EXPLORING THE CONCEPTS OF MINORITY AND MINORITY LANGUAGE IN INTERNATIONAL HUMAN RIGHTS LAW

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1. INTRODUCTION

International human rights law does not currently define a minority. For instance, the International Covenant on Civil and Political Rights protects minority rights in article 27 without defining the term minority. The Human Rights Committee did not define the term in the Diergaardt case. Nor did the African Commission define the term ‘minority’ in Malawi African Association and Others v Mauritania. The term minority was not even defined by the Kenyan High Court in IL Chamus v The Attorney General and Others. Yet various human rights instruments protect minorities.

Beyond definition, a number of groups have alleged that they are minorities and deserve protection under international human rights law. This article seeks to explore the concepts of minority and minority language in international law and unpack who can be protected under the banner ‘minority.’

2. THE CONCEPT OF MINORITY

At the international level, Francesco Capotorti - Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities - couched a widely used definition of a minority based on article

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1 LLBs (Hons), LLM and LLD. Dean, Faculty of Law, University of Zimbabwe.
4 MISC Civil Application N0. 305/ 2004.
27 of the International Covenant on Civil and Political Rights (CCPR) when he defines a minority as: ⁵

[a] group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members - being nationals of the state - poses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language.

According to Capotorti,⁶ a minority can be identified by five distinct characteristics. Four of the five characteristics fall under the following objective criteria namely; a) Numerical inferiority of the group; b) The ‘non-dominant position’ that it has in the society; c) The ‘ethnic, religious and linguistic characteristics’ distinguishing the group from those of the ‘rest of the population’ of the state; and d) Members of the minority group must be nationals of the State where they seek to assert protection.

The one remaining subjective criterion relates to solidarity or the collective will to preserve their ‘culture, traditions, religion or language’. Alfredsson describes the objective and subjective criteria as ‘two poles’ of minority identity.⁷

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⁵ F Capotorti ‘Study on the rights of persons belonging to ethnic, religious, and linguistic minorities’ (1979) UN Docs. E/CN.4/Sub.2/384/Rev.1, Sales No E78XIV1 5 96. In the same light Jules Deschenes modified this definition to read that a minority is ‘A group of citizens of a State, constituting a numerical minority and in a non dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.’ E/CN4/Sub2/1985/31, 14 May 1985 at 30.

⁶ Capotorti (n 5 above) 96.

The inevitable question that arises is ‘to what extent do these five characteristics define or describe minorities?’ An analysis of each of the five characteristics will help in answering this question.

2.1 **Objective criteria**

*a. Possession of distinct ethnic, religious and linguistic characteristics*

Capotorti observes that a ‘minority’ should be a distinct group within a state possessing stable ethnic, religious and linguistic characteristics that differ sharply from those of the rest of the population. Nowak holds that groups within a population may be considered minorities only when they differ from the rest of the population of the state in which they exist by reference to ethnicity, religion or language.\(^8\)

This characteristic is hardly criticized as key in defining and describing a ‘minority.’ This paper proceeds on the assumption that this characteristic is key in defining a ‘minority language’ as well.

*b. Numerical inferiority*

Capotorti argues that *minorities must be numerical inferior to the rest of the population.*\(^9\) Capotorti further avers that in countries where ethnic, religious and linguistic groups of roughly equal numerical size coexist, article 27 of the CCPR applies to them all. He further argues that a minority must constitute a sufficient number for the state to recognize it as a distinct part of the society and to justify the state making the effort to protect and promote it.

According to Caportorti, states should not grant special status to groups that are numerically small that it would be a disproportionate burden upon the resources of the state to

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9. I Andrysek states that ‘*[a]*ready looking at the term minority we feel an arithmetical connotation: a minority is a smaller part of a whole’. *Report on the definition of minorities* SIM Special No. 8 (1989).
grant them special status.\textsuperscript{10} States should not be required to adopt special measures of protection beyond a reasonable proportionality between the effort involved and the benefit to be derived from it.\textsuperscript{11} This approach is in line with the view of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1953 that provided that ‘minorities must include a sufficient number of persons to preserve by themselves their traditional characteristics.’\textsuperscript{12} However, sufficiency of the group is certainly a question of fact depending on the nature of the characteristics and the social environment of the group.\textsuperscript{13}

The main question that has been posed is whether or not a comparison to ‘the rest of the population’ relates to the population of the state in general or the population of other individual language groups individually.

In attempting to answer this key question, the first school of thought argues that the rest of the population refers to the population of other language groups individually. The main challenge with this approach lies with the group distribution in each country. One group may be a majority in one region and a minority (compared to other groupings) in another region. For instance, the Shona group is a majority in the Mashonaland region and the whole of Zimbabwe. They constitute more than 50 per cent of the total population of Zimbabwe. However, the Shona group is a minority in the Matabeleland region. This scenario creates an absurd situation where a majority group within a state can also be a minority within the same state if members of this group are few in another region or province of the same state.

\textsuperscript{10} The test used is one of reasonable proportionality. See F Capotorti (n 5 above) 96.

\textsuperscript{11} See also G Gilbert “The Legal Protection Accorded to Minority Groups in Europe” (1992) 23 Netherlands Year Book of International Law 72-73.


\textsuperscript{13} PV Ramaga ‘The group concept in minority protection” (1993) 15 Human Rights Quarterly 577.
The question of whether members of the majority community
in a state can be considered minority if they are numerically
inferior in a province or region arose in Ballantyne, Davidson
and McIntyre v Canada.\textsuperscript{14} The UN Human Rights Committee
(UNHRC), by a majority opinion, decided that members of
such a community cannot be considered as a minority for the
purpose of Article 27 of the CCPR. The UNHRC buttressed the
notion that ‘the minorities referred to in Article 27 are
minorities within such a state (party to the CCPR), and not
minorities within any province’.\textsuperscript{15}

The second school of thought argues that ‘the rest of the
population’ refers to the population of the state in general.
For instance, Jelena Pejic argues that numerical inferiority
should be established by comparison to the entire population
of a state.\textsuperscript{16}

Some scholars argue that if a group constitutes less than 50
per cent of the population of the state in general, that group
qualifies as a minority.\textsuperscript{17} They further argue that in a situation
where there is no clear majority, the expression ‘the rest of
the population’ is interpreted to refer to the aggregate of all
groups of the population of the state concerned.\textsuperscript{18}

A number of problems arise from this approach. First, the
comparison is between a culturally homogenous group and an
amorphous one (the aggregate of all the rest). Second, this

\textsuperscript{14} Communication Nos 359/1989 & 385/1989, Ballantyne, Davidson and
McIntyre v Canada, UNHR Committee (31 March 1993), UN Doc CCPR/

\textsuperscript{15} Ballantyne case (n 14 above) para 11(2).

\textsuperscript{16} J Pejic ‘Minority rights in international law’ (1997) 19(3) Human Rights
Quarterly 666-685.

\textsuperscript{17} For example A Eide in Working definition on minorities, Possible ways
and means of facilitating the peaceful and constructive solution of
problems involving minorities, E/CN4/Sub2/1993/34, 10 August 1993,
SCPDPM (45th Session), para 29 says 'A minority is any group of
persons resident within a sovereign State which constitutes less than
half of the population of the national society and whose members
share common characteristics of an ethnic, religious or linguistic
nature that distinguish them from the rest of the population.'

\textsuperscript{18} Shaw ‘The definition of minorities in international law’ in Dinstein &
Tabory (n 12 above) 25.
approach defines minority status mainly in terms of inter-group relations rather than in terms of power relations.

Third, it does not necessarily follow that the size of a group determines its dominant or subordinated position in a society. For instance, pre-colonial Africa saw numerically inferior groups wielding political, economic and social power. This was the case in South Africa during the apartheid era and Zimbabwe during the colonial era. In terms of language, a numerically inferior group of language speakers can be in a position of domination and their language can indeed be the dominant language. This was the case in apartheid South Africa where the Afrikaans and English were the dominant languages in the public sector and English was dominant in the economic sector. Again, pre-colonial Zimbabwe saw numerically inferior English speakers dominant politically, socially and economically.

Fourth, Capotorti’s argument that ‘the rest of the population’ refers to the population of the state in general does not take into considerations situations where there is a federal government and power is constitutionally vested in a provincial or regional government. In such states, minority issues arise at provincial and regional levels. De Varennes asserts the following: 19

> It could be validly maintained that the drafters of Article 27 simply overlooked that in a federal state, even a national majority may find itself subjected to serious mistreatment if it is a numerical minority in one of the federal units and outside the reach of federal (national) protection.

For example, in the Indian case of *D.A.V. College, Jullunder v Punjab*, A.I.R, the Indian Supreme Court held that minority status can be determined not only nationally but also within the units of the federation, depending on the matter in question. 20 Also, Recommendation 1201 of the Parliamentary

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Assembly of the Council of Europe defines minority in a way that includes minorities at a regional level of a given federal state.\textsuperscript{21}

It is clear from the above that the numerical inferiority characteristic of a minority is very difficult to sustain as criterion to be used to define or describe a minority. This assertion is fortified by reference to the African context that is different from the European context where numerical inferiority plays a major role. Dersso\textsuperscript{22} makes an interesting distinction between the European and African contexts when it comes to numerical inferiority. He argues that the European state emerged through a long history and organic process of state building by historically dominant groups. There is therefore a clear distinction between majority groups and minority groups in Europe. Again, minority rights issues become issues of number and cultural issues. On the other hand, the state in Africa was created as a result of colonialism and after independence, colonial boarders were maintained. There are some states in Africa where it will be difficult to identify a majority group with more than 50 per cent of the total population.


\textsuperscript{22} Unpublished: SA Dersso 'Taking ethno-cultural diversity seriously in constitutional design: Towards an adequate framework for addressing the issue of minorities in Africa' Unpublished PhD thesis, University of the Witwatersrand, 2010 8-9. In his words: 'This difference means that in the context of Europe and similarly situated countries elsewhere in the world, the issue of minorities is about how to protect numerically smaller and ethno-culturally distinct groups from assimilation into and domination by the majority. Although it involves power relations, it has basically been seen as a statistical and cultural issue. The numerical factor has accordingly assumed particular importance in the definition of a minority in the European experience. In Africa, by contrast, the issue of minorities is not a statistical problem involving counter-balancing of the numerical strength of a majority. It is more about the accommodation of population diversity. The central thrust of minority issues in Africa is how to recognise and accommodate in the processes of the state the diverse identities and interests of members of the various ethno-cultural groups constituting the post-colonial African state in a way that provides sufficient structures and processes for the expression and accommodation of those identities and interests.'
population. Minority rights issues in Africa therefore mainly focus on power relations and accommodation of population diversity.

The numerical inferiority characteristic, though not essential to defining a minority, can be used to assess the degree of vulnerability of a group and to help state parties ascertain the minimum numerical threshold required for a group to qualify for recognition as a minority and for the state to introduce special measures of protection. It can therefore be argued that if the numerical inferiority characteristic has been disqualified as essential to defining a minority.

c. Non-dominance

Capotorti argues that the minority group must be non-dominant in relation to the rest of the population. This characteristic relates to political, economic and social non-dominance. Non-dominance brings out the fact that ‘minority’ is a political, economic and social reality. Put differently, a minority is identified based on the degree of political and economic participation as well as social inclusion rather than on the number of members of a specific group. In fact, minorities are possibly undermined not so much by their weaknesses in numbers, but by their exclusion from power. A minority is therefore generally regarded as lacking the political, economic and social clout to influence decision-making processes of a state. It is therefore justifiable to protect minorities based on their position of general vulnerability and weakness.

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23 Ramaga (n 13 above) 113 argues that ‘In modern times, political power is the major instrument of dominance. It may negate the possible influence of the majority by precluding the effect of all other elements of dominance.’ C Palley Constitutional law and minorities (1978) 3 contends that ‘minority’ means ‘É any racial, tribal, linguistic, religious, caste or nationality groups within a nation state and which is not in control of the political machinery of the state.’


25 M Nowak UN Covenant on Civil and Political Rights: CCPR commentary (1993) 188.

26 J Rehman The weaknesses in the international protection of minority rights (2000) 16.
It is clear from the above that a minority is non-dominant politically, economically and socially. This is a key characteristic in defining a ‘minority.’

d. Nationality

Capotorti highlights that members of the minority group must be nationals or citizens of the state. It is argued below that this characteristic is no longer applicable in international law. Jules Deschenes defines minorities as ‘... a group of citizens of a state...’ Stanislav Chernichenko also extends the definition to permanent residents.

However, paragraphs 5.1 and 5.2 of the UNHRC General Comment 23 extend the application of Article 27 of the CCPR to non-citizens. The Kenyan High Court buttressed the position that minorities include non-citizens in IL Chamus v Attorney General of Kenya and Others. Even Capotorti himself, in an article published 6 years after production of his 1979 special report, dropped the requirement that members of the minority need to be nationals of the state.

It is therefore clear from the above that the nationality characteristic is no longer a key characteristic in defining a ‘minority.’ Put differently, one does not need to be a citizen, national, or permanent resident for them to be regarded as a

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27 E/CN4.Sub2/1985/31, 14 May 1985 at 30. Pejic (n 16 above) questions whether citizenship is a precondition for invoking article 27 and whether indigenous groups are entitled to the rights for which it provides. The issue of citizenship is dealt with below. As regard indigenous peoples, it is argued that indigenous peoples that have distinct ethnic, religious and linguistic characteristics and satisfy other criteria for minorities are covered by article 27. See clause 3.2 of the UNHRC General Comment 23.


29 It says ‘...migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights.’


minority. Considerations of proportionality can be used to determine the extent of protection of minority rights of nationals and non-nationals within a state.

2.2 Subjective criterion

e. Solidarity or Collective will

Finally, Capotorti observes that members of the minority group must have the collective will to preserve their own characteristics. Pejic\textsuperscript{32} explains the meaning of solidarity as follows:

The sense of solidarity referred to in Capotorti’s definition implies an awareness by persons belonging to a minority group of the ethnic, religious, or linguistic characteristics that set them apart from the majority, and a desire to preserve those characteristics as central to the common identity.

The solidarity\textsuperscript{33} or collective will in question can be ascertained from the fact that the group in question has kept its distinctive characteristics over a period of time. In Capotorti’s words:\textsuperscript{34}

Once the existence of a group or particular community having its own identity (ethnic, religious or linguistic) in relation to the population as a whole is established, this identity implies solidarity between members of the group and consequently a common will on their part to contribute to the preservation of their distinct characteristics. Bearing these observations in mind, it can be said that the subjective factor is implicit in the basic objective element, or at all events in the behavior of the members of the group.


\textsuperscript{33} JA Sigler Minority rights: A comparative analysis (1983) 5 defines minority as ‘In its simplest form we can regard as a minority group any category of people who can be identified by a sizable segment of the population as objects for prejudice or discrimination or who, for reasons of deprivation, require the positive assistance of the state. A persistent non-dominant position of the group in political, social, and cultural matters is the common feature of the minority’.

\textsuperscript{34} Capotorti (n 5 above) 96.
Solidarity can also be gleaned from the group’s refusal to assimilate. According to Shaw\textsuperscript{35} ‘\textit{[i]t is axiomatic that a group that has survived historically as a community with a distinct identity could hardly have done so unless it had positively so wished.’\textsuperscript{36} Deschenes defines solidarity as ‘\textit{a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.’}\textsuperscript{36} Solidarity is therefore an essential characteristic in defining a ‘minority’ and ‘minority language.’

It is apparent from the above analysis that only three characteristics are indisputably key in defining or describing a minority. These are a) Possession of stable ethnic, religious and linguistic characteristics that differ sharply from those of the rest of the population; b) Political, economic and social non-dominance and c) Collective will to survive and maintain these distinct characteristics.

\subsection*{2.3. Definition of minority}

A minority is therefore ‘\textit{a politically, economically and socially non-dominant population group within a nation that is distinguished by reference to its stable ethnicity, religion and or language and has a collective will to survive and maintain its ethnicity, practice its religion and use its language.’}\textsuperscript{37}

\section*{3. The concept of minority language}

The concept of minority language is best understood in the light of concept of minority discussed above and how minority language has been defined in international and regional treaties. One treaty that was bold enough to define a minority

\begin{thebibliography}{9}
\bibitem{Shaw} MN Shaw ‘The definition of minorities in international law’ (1991) 20 \textit{Israel Yearbook on Human Rights} 13-42 40.
\bibitem{Henrard} K Henrard ‘The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities’ (2001) 1 \textit{The Global Review of Ethnopolitics} 41-61 43 argues that ‘\textit{[a] minority is a population group with ethnic, religious and linguistic characteristics differing from the rest of the population, which is non-dominant, numerically smaller than the rest of the population and has the wish to hold on to its separate identity.’}
\end{thebibliography}
language is the European Charter for Regional or Minority Languages (European Languages Charter). Article 1 defines minority or regional languages as:

Languages different from the official language(s) of that State traditionally used by part of the population of a state that are not dialects of official languages of the state, languages of migrants or artificially created languages.

An analysis of the above definition reveals two glaring weaknesses. The first weakness is that the definition excludes the languages of migrants. It seems to follow Capotorti’s view that minority languages are limited to nationals or citizens. Such an approach is inconsistent with article 27 of the CCPR as read with the UNHRC General Comment 23.

The second weakness is that the definition seems to presuppose that once a language is accorded official language status by the state, it (together with its dialects) ceases to become a ‘minority language.’ Put differently, the European Language Charter presupposes that a language is a ‘minority language’ if it is not recognized and accorded official language status by the state.

This approach is not supported by international jurisprudence and creates four problems. The first problem is that there is nothing in International law that suggests that once a language has been accorded official language status it ceases to be a minority. Clause 5.2 of UNHRC General Comment 23 makes it clear that the existence of minorities (in this case linguistic minorities) is not subject to the recognition by the state involved. This essentially means that the granting of official language status to a minority language does not eliminate or invalidate its real minority condition or its minority language status. The definition of a minority in article 1 of the European Language Charter is in direct conflict with article 27 of the CCPR as interpreted by clause 5.2 of General Comment 23 of the UN Human Rights Committee.

The second problem is that there is no clearly defined meaning of an official language. No international legal document contains any definition of official language. De Varennes defines an official language as 'a form of legal recognition of an elevated status for a language in a state or other jurisdiction.' A UNESCO report defined an official language as 'a language used in the business or government - legislative, executive and judicial.'

What is clear though from International law is that the declaration of official language status is a political process left to the discretion and prerogative of each state. For instance, in Podkolzina v Latvia, the European Court of Human Rights held that

... [s]imilarly, regard being had to the principle of respect for national characteristics enunciated above, the Court is not required to adopt a position on the choice of a national parliament’s working language. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make.

International law does not quite clearly define the factors that need to be taken into consideration when a state is considering affording official status to a language. For instance, in Diergaardt v Namibia, the UNHRC did not spell out the criteria used to afford official status to a language.

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39 F de Varennes 'Draft report on international and comparative perspectives in the use of official languages: models and approaches for South Africa' (October 2012) 4. In the same vein, a decision of the Spanish Constitutional Court 82/1986 of 26 June, which decided on the unconstitutionality appeal against the Basic Law on the Normalisation of Basque Language Use, second legal fundament stated that 'É a language is official when it is recognised by public authorities as the normal means of communication within and between themselves and in their relations with private individuals, with full validity and legal effects.'


41 Podkolzina v Latvia 2002 ECHR 34.

42 See Birk-Levy v France, application no. 39426/06, published on 6 October 2010.

43 ‘n 2 above.’ See also the Ballantyne case (n 14 above).
Instead, the Committee took the view that whatever official languages a state freely chooses, it cannot use such a choice in a way which would violate international human rights law such as freedom of expression.

However, reference to other sources help reveal some of the criteria a state can use in considering to grant a language official status. For example, *Podkolzina v Latvia et al* establishes that the sovereign state can take into account historical and political considerations. The UN also took the view that the determination of an official language or languages is a historical, social and political process. Capotorti contends that these factors include the numerical importance of a linguistic community, their political and economic position within the state and the stage of development of a language. Vieytez summarises these social, historical and political considerations as a) the sociolinguistic situation of the country; b) the linguistic dynamics of the country and its context; c) the pre-existing legal situation and d) the political organisation of the state.

The third problem is that there is no clarity in international law of what the content of official language status entails. Does it imply a more or less uniform legal status or else a

44 Study of the problem of discrimination against indigenous peoples, UN Doc. E/CN.4/Sub.2/476/Add.6 states that ‘During the process of nation building, a language, usually that of the segment of the population which gains supremacy and imposes itself socially, politically and militarily on other segments in various regions and whose language dominates the other languages or dialects in the country, becomes, because of these extra-linguistic factors, the language of highest standing and, ultimately, the official language. Official recognition is of great importance to this and the other languages spoken in the country because, whether or not it is provided for in the Constitution or other basic law, such a selection means that this privileged linguistic instrument will be used in the various activities of the State. At the end of the colonial dependence the people of many countries faced the problem of having to decide which language would henceforth be the official language of their new State. During this process, what became the official language - either the single official or one of them - was often the language introduced by the colonizers; in a few cases, a national language was chosen.’

45 F Capotorti (n 5 above) 75-76.

46 EJR Vieytez (n 38 above) 15.
status that can be compared between different countries? Is it legally binding or symbolic? What rights does official language status bring to a language?

There is also no clarity regarding the levels of official language status. In a study of constitutions throughout Europe, Vieytez\(^\text{47}\) came up with four levels of official languages status that he calls officialities. The first level is what he calls ‘full officiality and dominant language.’ In this case, official language status shows all the possible effects and the language involved is considered an element of the state’s linguistic identity. The official language is fully used in government business. Examples of full officiality and dominant language include French in France or Monaco, Swedish in Sweden or Russian in the Russian Federation.

The second level of official language status is what Vieytez calls ‘full officiality and non-dominant language.’ In this case, a language is afforded full official language status but it is not dominant because of social limitations. The language is still an identity element of the state although it evokes a colonial past (Malta) and it is an element of a more symbolic nature generally based on historical or geographical explanations. Examples include Irish Gaelic in Ireland, Swedish in Finland, English in Malta, Russian in Belarus or French in Luxembourg.

The third level of official language status is what Vieytez calls ‘Partial or limited officiality and dominant language.’ This level comes with two variations. The first variation is called ‘exclusive officiality’ where the territorial principle is strictly adopted and different languages are given official language status in the areas where they are dominantly spoken. This is the case of French or German in Switzerland or Belgium and the Swedish of the Aaland Islands. The second variation is called ‘shared officiality’ where official language status is shared by two or more languages within a territory, municipality, province or region. These are the cases of Feroese in the Feroe Islands, Greenlandish in Greenland, German in the South Tyrol, Russian in Transnistria or Crimea, Albanian in Kosovo or Catalan in Catalonia or the Balearic Islands.

\(^\text{47}\) EJR Vieytez (n 38 above) 24-25.
The fourth and final level of official language status is what Vieytez calls ‘partial or limited officiality and non-dominant language.’ Again, this has two variations. The first is called ‘officiality in the institutional sphere of political autonomy.’ This refers to cases where a language, although giving way socially to the state language with which it shares officiality, benefits from some symbolic institutional presence in a substate organised sphere. The second variation is called ‘officiality in the local institutional sphere without its own political power.’ In this case, official language status is largely limited in the institutional, geographical or population spheres. Language barely fulfils symbolic functions regarding the outside sphere although it may logically operate as an element of cohesion of the group and presents a certain tolerance of the state towards plurality. Examples include Slovenian in Italy, Sorbian languages in Germany, Hungarian in Slovenia or Sami in Norway.

Vieytez’s observations and classification of official language status therefore reveals a need to clarify the content of official language status at international law.

The final problem is that the granting of official language status is in some cases only symbolic and does not guarantee the use of the language by authorities. Put differently, the use of a language by state authorities does not necessarily correspond to its official status. The use of official languages in administration, public education, public health, media, courts, business and other government activities depends on the provisions of the individual country’s constitution, legislation, policies and jurisprudence. This ranges from the language being symbolic, to defined limited use of language, to undefined use of language to unlimited use of an official language. The bottom line though is that declaring a language official does not guarantee its use unless there is national legislation defining the extent of use.

For example, in Société des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education,\textsuperscript{48} the Supreme Court of Canada held that the recognition of the

\begin{footnote}{48}Soci_t_ des Acadiens du Nouveau-Brunswick v Association of Parents for Fairness in Education (1986) 1 S.C.R. 549 (Canada) para 59.\end{footnote}
status of official languages for French and English at the federal level under Article 16 of the Canadian Constitution did not guarantee as such a right to any type of service or use in either official language.\textsuperscript{49} De Varennes comments on this decision as follows:\textsuperscript{50}

Official language status in Canada was merely a political or symbolic gesture which had to be further developed in other constitutional or legal provisions. It was the latter which ultimately determine the degree and use of that country’s official languages - or specific constitutional provisions on the actual use of these languages.

This decision clearly highlights that official language status does not guarantee use of that language. It would be wrong

\textsuperscript{49} A contrary view is expressed in Mentzen alias Mencina v Latvia, [Application no. 71074/01, admissibility decision of 7 December 2004] where the European Court on Human Rights held that "Éthe Court acknowledges that the official language is [É] one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag. A language is not in any sense an abstract value. It cannot be divorced from the way it is actually used by its speakers. Consequently, by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with the public authorities. In the Court’s view, it is first and foremost from this perspective that measures intended to protect a given language must be considered. In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language. "Suffice to mention is that this decision does not accurately reflect the international law position as argued above. Varennes [on page 10 of the report cited above] tries to justify this decision when he argues that"É there is therefore, in the absence of legislation to the contrary, at least a very strong implication that a government has an obligation to use such a language, and a corresponding individual right for citizens to use that official language." The flipside of this argument is that through legislation, a government can limit or totally eliminate the use of a language that has been declared official. Varennes is indirectly acknowledging the dominant international law position that official language status does not guarantee use. National legislation defines the extent of use of a language.

\textsuperscript{50} F de Varennes (n 39 above) 4.
then to assume that a minority language that is afforded official language status ceases to be a minority merely by the granting of the official language status. This is especially so if the official language status is merely symbolic or political and the language is not used in government spheres. The use of a language (and not official language status) therefore becomes fundamental in determining whether it is minority or majority. This is especially supported by the fact that even though English is not the official language of United Kingdom, United States of America, New Zealand and Australia, English has been the language predominantly used in these countries. English is not a minority language in these countries.

Accordingly, official language status cannot therefore be used to define a ‘minority language’ or to distinguish it from a majority language. So, a language can be official but if it is not used in spheres of government, its speakers remain discriminated against and the language is considered minority. The extent of use of a language in the public or government domain is therefore an essential criterion that can be used to define a minority language. This approach finds support in the last part of the definition of a minority language given by Batibo that states as follows:51

Sociolinguistically, a minority language is defined not only by its relative demographic inferiority but also, and more so, by its limited public functions. Thus, a minority language can be identified horizontally by looking at its weak or non-dominant position in relation to other languages in the region or nation, and vertically on the basis of its low status and absence of use in public or official areas.

This argument fits perfectly well with the ‘functional load’ concept developed by Pandharipande which states as follows:52

[t]he concept of “functional load” in this context refers to the ability of languages to successfully function in one or more social domain. The load is considered to

51 HM Batibo Language decline and death in Africa: Causes, consequences and challenges (2005) 51.
be higher or lower on the basis of the number of domains it covers. The higher the number of domains, the higher the load... The higher the functional load, the more powerful the language is perceived to be. Thus, *minority languages are those that carry a lower functional load and thereby hold a lower position in the power (political, economic and social) hierarchy.*

It is clear from the above then that the use of a language in the public government domain is a determinant factor in establishing whether a language is a ‘minority’ or ‘majority’ language. This ties perfectly well with the non-dominance criterion of a minority. Therefore, a language is a ‘minority language’ if it is politically, economically and socially non-dominant in terms of use in the public or government domain.

In summary, the following characteristics are essential in defining a minority language a) its speakers must have a stable linguistic characteristic that differ sharply from those of the rest of the population; b) its speakers must be politically, economically and socially non-dominant; c) its speakers must have a collective will to survive and maintain these distinct linguistic characteristics and d) the language must have limited use in the public or government domain.

Taking these criteria into consideration, a minority language can be defined as ‘a language (including sign language) that has limited or no use in the public or official or government domain. Its speakers are a politically, economically and socially non-dominant distinct linguistic population group within a nation and they show a collective will and mutual solidarity focused on preserving their language.’

4. Conclusion

The concepts of minority and minority language are evolving concepts in international human rights law. Even though there is no agreed definition for the two concepts, the analysis above has ably demonstrated the existence of three agreed characteristics of minorities. These are a) Possession of stable ethnic, religious and linguistic characteristics that differ sharply from those of the rest of the population; b) Political, economic and social non-dominance. For a minority language, this is further shown by the fact that the language must have
limited use in the public or government domain. and c) Collective will to survive and maintain these distinct ethnicity, religion and language.