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National and Ethnic Minorities in Poland—the Legal Problem of Definition

Abstract. The Polish Constitution adopted on 2 April 1997, for the first time after the war, contains a provision dedicated exclusively to protecting national and ethnic minorities, however without a definition of those two categories. The legislator extended the rights of national and ethnic minorities beyond those identified in the Article 35. The extension of such rights also results from international agreements. Thus far there is no statute regulating in a comprehensive and complete manner the situation of national and ethnic minorities (the Constitution does not make its adoption mandatory), the legal regulations concerning these issues are dispersed. The problem of legal definition of the national minority appeared in connection with the initiative of the formal recognition of the Union of People of Silesian Minority. Its application has been rejected by Polish courts for the reason of non-existence of such a minority and for the attempt of abuse of the electoral privilege granted to national minorities. The Supreme Court's position has been confirmed by the Chamber and then by the Grand Chamber of the European Court of Human Rights. However the 2002 national census revealed a new phenomenon of the Silesian minority: 3% of the inhabitants of the region declared their affinity to Silesian nationality.

Keywords: minority rights, Poland, constitutional law

I. Initial questions

Democratic political processes consequential on the fall of communism in Poland, just as in other countries of Central and Eastern Europe, initiated the appearance of postulates and requests of national minorities in the public debate. However, compared to other states where the previously dormant nationality issues erupted like a volcano (Czechoslovakia, Yugoslavia, the Soviet Union).

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Poland—a state without much national diversity¹—should be treated as a relatively non-conflictual one.

After many years during which there were no legal regulations concerning national minorities and the state implemented an assimilation policy, the establishment of the Sejm Committee for National Minorities was crucial for recognizing the existence and expectations of minorities (in August 1989), just like the declaration of the first non-communist Prime Minister Tadeusz Mazowiecki in September 1989, when he stated that Poland is also the homeland of national minorities.

Soon, the respect for such differences and application of international standards concerning such societies was manifested in bilateral international agreements (treaties),² regulating the issues of national minorities and containing clauses aimed at protecting them.

Despite various degrees of specificity of the matters regulated by treaties, their common feature is the reference to international standards and the so-called

¹ The number of members of national minorities, according to results of the National Census announced in June 2003 is: out of the total number of 38,2 million citizens of Poland—173.000 Silesians, 153.000 Germans, 48.700 Belorussians, 31.000 Ukrainians, 12.000 Roma people, 1.100 Jews, 1.100 Armenians, 8000 Czechs, 500 Tartars and 50 Karaims. In other words, 96,74% of respondents declared Polish nationality, 1,23%—a nationality other than Polish, while 2,03% did not make the relevant declaration.

These data differ considerably from the estimates made in 1992, when this number according to minority organizations approx. was 1,5 million; according to governmental estimates between 900.000 and 120.000; according to estimates of the Helsinki Committee in Poland—between 860.000 and 980.000. The percentage of national minorities in the total number of inhabitants of Poland (38,45 million) was between 1,9 and 3,8%. Figures quoted after: *Report for the Secretary General of the Council of Europe on implementation by the Republic of Poland of provisions of the Council of Europe's Framework Convention for the Protection of Minorities*, Warsaw 2002; Rzepliński, A.: *Położenie mniejszości narodowych w Polsce* [Situation of national minorities in Poland]. In: Kłoczowski, J. (ed.): *Ochrona praw mniejszości narodowych i religijnych* [Protection of Rights of National and Religious Minorities]. Lublin, 1993. 44.

² Such commitments are contained in agreements with: Germany of 17 June 1991; the Czech and Slovak Federal Republics of 6 October 1991; Hungary of 6 October 1991; Ukraine of 18 May 1992; Russia of 22 May 1992; Belarus Republic of 23 June 1992; Republic of Latvia of 1 July 1992; Republic of Estonia of 2 July 1992; Kingdom of Spain of 26 October 1992; Romania of 25 January 1993; Bulgaria of 25 February 1993; Republic of Lithuania of 26 April 1994; Moldavia/Moldova of 15 November 1994; Uzbekistan of 11 January 1995; Greece of 12 June 1996. Quoted after: Janusz, G.—Bajda, P.: *Prawa mniejszości narodowych. Standardy Europejskie* [National Minority Rights. European Standards]. Warsaw, 2000. 68–69.

minority clauses, covering a wider or greater catalogue of rights in the field of protection of persons belonging to minorities concerning: the right to learn the mother tongue and to education in the mother tongue and to use this language freely in private and public life, the right to form their own associations and organizations, the freedom of contacts between the members of a given minority in the country and abroad, the right to spell forenames and surnames in the mother tongue, the right to confess and practise their own religion.³ The persons protected by treaties may exercise these rights individually or collectively (together with other members of their group).

Until 1997 the constitutional provisions did not contain any regulations on national minorities. There were certain nationality-related criteria in Article 67 para. 2 and Article 81 of the provisions of the 1952 Constitution maintained in force by the so-called Little Constitution (constitutional act of 1992), which adopted the general principle of equality and non-discrimination.⁴

Only the Polish Constitution adopted on 2 April 1997, for the first time after the war, did contain a provision dedicated exclusively to protecting national minorities. This regulation is contained in Article 35, in the chapter concerning the freedoms, rights and obligations of a person and a citizen.

II. Constitutional regulation of national minority rights

The model of protection of national minority rights adopted in the 1997 Constitution is characterized by:

1. the general principle of equality and non-discrimination,
2. ensuring, apart from the general equality and non-discrimination, also separate protection of the rights of minority members,

³ Janusz, G.: Regulacje prawne dotyczące ochrony mniejszości narodowych w Polsce [Legal regulations concerning national minority protection in Poland]. In: *Status prawny mniejszości narodowych w Polsce w świetle Konwencji Ramowej o ochronie mniejszości narodowych* [Legal Status of National Minorities in Poland in the Light of the Framework Convention on the Protection of National Minorities]. Warsaw, 2001. 119.

⁴ The postulate of a separate regulation, one conforming to international standards, of the problems of national minorities in the Constitution was accepted almost from the very beginning of the constitutional debate. Cf. Rybczyńska, A.: Uwagi na temat statusu prawnego mniejszości narodowych w Polsce w świetle projektów konstytucyjnych lata 1989–1991 [Remarks about the legal status of national minorities in Poland in the light of constitutional drafts in the years 1989–1991]. In: *Ochrona... op. cit.* 83–89; Kallas, M.: Prace parlamentarne nad uregulowaniem statusu mniejszości w Polsce (1989–1995) [Parliamentary work on regulation of the status of minorities in Poland (1989–1995)], *Przegląd Sejmowy*, 1995, No. 3.

3. the adoption, to a certain extent, of protection of rights of communities of national and ethnic minorities.

Ad. 1. The constitutional prohibition of discrimination is formulated very widely. According to the provisions of the Constitution (Article 32 subpara. 2) no one may be discriminated against in the political, economic and social life “for any reason whatsoever”, while the state authorities are under a duty to treat all persons equally. In addition, the Constitution introduces a prohibition against political parties whose programmes or activities are based upon or sanction racial or national hatred (Article 13).

Ad. 2. The contents of Article 35 of the Constitution, which concerns “national and ethnic minorities”, must be analyzed in terms of: a) the notions contained in it and b) the persons enjoying protection and its scope.

The Constitution does not define the notion of minorities (national or ethnic ones).

Ad. 3. Since it is impossible to rely on a definition of “minorities” (national and ethnic ones) agreed in international law, the constitutional law doctrine⁵ identifies each minority using a combination of two criteria: the subjective one—signifying the willingness of each person to identify with such a minority—and the objective one—indicating the actual existence of a minority group, distinguished by some objective features. When determining the notion of a “national or ethnic minority” such features include a distinct culture, especially language, and a well-rooted awareness of such distinctness.

In other words, you may only belong to an actually existing minority if you have the features which characterize it, but always on condition of voluntary identification with that minority. As a consequence, the notion of minority is formulated in the doctrine as “a group of citizens of the state which are distinguished from the dominant part of the society by the awareness of their national (or ethnic) membership, which may be accompanied by differences in the language, religion, customs and culture in general.”⁶

⁵ Garlicki, L.: *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary]. Vol. III, Chapter II: Freedoms, rights and obligations of a person and citizen, Article 35, 4.

⁶ See Łoziński, S.: *Przekroczyć własny cień* [Cross Your Own Shadow]. In.: Berdychowska, B. (ed.): *Mniejszości narodowe w Polsce. Praktyka po 1989 roku* [National Minorities in Poland. Practice After 1989]. Warsaw, 1998. 15; Kwaśniewski, K.: *Socjologia mniejszości a definicja mniejszości narodowej* [Sociology of minorities and the definition of a national minority]. *Sprawy Narodowościowe*, vol. I, 1992, No. 1. 14. A similar definition of a minority as the entity that enjoys protection was adopted in Article 20, para. 1 of the 1991 Treaty with Germany.

The wording of this article, which mentions “national and ethnic minorities”, proves that these are two different notions, thus each of them may be defined separately.

Here, we should mention that:

1. this distinction is not universally adopted in international law, where often only one of these terms is used, both these terms being treated as interchangeable.⁷

2. The fact that these terms are treated as interchangeable in international law does not mean that they are synonymous in Polish law. The fact that the constitution uses both of them implies that they have different meanings. Their non-synonymous nature is expressed in the Polish legislative solutions where e.g. only national (and not ethnic) minorities enjoy the privilege of relief from the consequences of electoral threshold.

3. The fact that the legislator uses both these terms requires establishing a criterion to distinguish them. Such a criterion proposed by the legal doctrine⁸ to distinguish “national” from “ethnic” minorities is the criterion of “statehood”, according to which a national minority is a group which forms part of a nation whose main seat is in another state, while an ethnic minority is a group distinguished from the given nation by the possession of certain specific cultural features (e.g. distinct language, dialects, customs).

Despite certain deficiencies of the above differentiation (history knows many nations deprived of their statehood), it seems that this criterion was adopted also by the Supreme Court when it ruled on the inadmissibility of registration of the Union of People of Silesian Nationality, which will be discussed in detail later on.

The persons who enjoy individual protection include only “Polish citizens” who belong to minorities, excluding foreign and stateless persons even if they stay in Poland.⁹

⁷ Cf. Article 27 ICCPR and Article 30 of the Convention on the Rights of a Child, which concern ethnic minorities, and Article 5, para. 1 of the Convention against Discrimination in the Field of Education and Article 14 ECHR, which concern “national minorities”.

⁸ Winczorek, P.: *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 roku* [Commentary to the Constitution of the Republic of Poland of 2 April 1997]. Warsaw, 2000. 54–55; Łoboziński: *op. cit.*, 35. The same criterion is used in the justification for the draft Act on National and Ethnic Minorities in the Republic of Poland, *Druk Sejmowy*, No. 223.

⁹ The range of persons who enjoy protection as national minorities is differently regulated in the International Covenant of Civil and Political Rights, to which Poland is a party. According to the interpretation of its provisions made by the Commission on Human Rights, members of minorities do not have to be citizens and do not even have to be permanent residents. Migrant workers or even visitors in a State-Party, including those that

The constitutionally guaranteed freedom is the possibility to maintain and develop the particular national or ethnic identity, which is expressed as the freedom to maintain and develop the particular language, maintain customs and traditions, as well as to develop the particular culture.

Apart from Article 35, also Article 27 of the Constitution concerns the language-related rights of minorities. Pursuant to this provision, “Polish shall be the official language of the Republic of Poland. This provision shall not infringe upon the national minority rights resulting from ratified international agreements”.¹⁰

Therefore, it follows from the contents of Article 27 of the Constitution that the scope of respect for language-related rights of minorities is determined, in the event of national minorities, by international agreements. This applies especially to such an important right as the right to use one’s mother tongue as an auxiliary language¹¹ in contacts with public authorities.

The constitutional freedom of maintaining customs and traditions and developing culture is connected with the constitutional safeguards of freedom of confession, ensuring religious education and upbringing to children.

In conclusion, we may state that Article 35 in combination with the remaining principles and provisions that form the system of freedoms and rights of a person allows us to formulate three general rules: the prohibition of assimilation (understood as measures taken by public authorities in order to eliminate national and ethnic diversities); the principle of equal treatment; the prohibition of discrimination.

constitute a minority, are entitled not to be refused the enjoyment of the rights granted to minority members. Cf. Komentarz Komitetu Praw Człowieka dotyczący praw osób należących do mniejszości chronionych [Commentary of the Human Rights Committee on rights of members of protected minorities]. In: *Toruński Rocznik Praw Człowieka i Pokoju, 1994–1995*. vol. 3, Toruń, 1996. 119.

¹⁰ Regardless of this provision, Article 87 of the Constitution contains a general provision recognizing ratified international agreements as a source of law in Poland, which gives Article 22 the character of *lex specialis*.

¹¹ Such a possibility is envisaged in the contacts between persons that belong to minorities and administrative authorities by Article 10, para. 2 of the European Framework Convention for the Protection of National Minorities ratified by Poland. There are direct references to the issues of using a minority language as an auxiliary language in the agreements with the Czech and Slovak Republics (Article 8, para. 2) and Belarus. Bilateral agreements with Germany and Lithuania use the expression “free use of the mother tongue in the private life and publicly”. For more information see Janusz: *op. cit.*, 118–122. In the current legal status, Poland has not ratified the European Charter for Regional Languages, signed on 12 May 2003.

Respect for these freedoms is guaranteed by various administrative and judicial procedures—including the right to trial, the constitutional complaint, the right to apply to the Ombudsman.

The Constitution formulates also the right of groups of national and ethnic minorities to the protection of their identity, indicating their institutional rights (establishing their own educational and cultural institutions and institutions designed to protect religious identity) and procedural rights (the right to participate in the resolution of “matters concerning their cultural identity”).

III. Statutory regulations of minority rights

Provisions of the Constitution do not pose any obstacles for the ordinary legislator to extend the rights of national and ethnic minorities beyond those identified in Article 35, unless this infringes upon other constitutional principles and norms. The extension of such rights may also partly result from international agreements.

In the current legal status, as there is no statute regulating in a comprehensive manner the situation of national and ethnic minorities (the Constitution does not make its adoption mandatory), the legal regulations concerning these issues are dispersed.

Despite the lack of a statute which would provide for the possibility of using in public life, apart from the official (Polish) language, minority languages as auxiliary ones, the binding Codes of Administrative, Civil and Criminal Procedure permit the use of other languages than Polish in official relationships to a limited extent (by conducting proceedings with the participation of a translator/interpreter). The Law on the System of Common Courts¹² gives a person who does not have sufficient command of Polish the right to appear before a court and speak a language known to him/her, receiving gratuitously the assistance of an interpreter.

The Polish Language Act,¹³ while stating that Polish is the official language, emphasises at the same time that it “shall not infringe the rights of national and ethnic minorities” (Article 2 subpara. 2). Executing the statutory delegation, the Minister of Interior and Administration¹⁴ established the possibility of

¹² Act of 22 July 2001, *Journal of Laws* (Dziennik Ustaw), No. 98, item 1070.

¹³ Of 7 October 1999, *Journal of Laws*, No. 90, item 999.

¹⁴ Regulation of 18 March 2002, *Journal of Laws*, No. 37, item 349 on the events when names and texts in Polish may be accompanied by versions in translation into a foreign language.

providing the names and texts in localities that have large communities of national minorities or ethnic groups with translations into a foreign language, in particular the language of the national or ethnic minorities living in the given area. Providing translations concerns the names and texts designated to be read by the public, placed on: plaques of a public utility authority or institution, in other noticeable place designated for information, in means of public transport.¹⁵

Currently, there are also no problems concerning the right to spell and pronounce the forenames and surnames of members of minorities in the mother tongue, even though the provision of Article 2 para. 2 subpara. 2 of the Act of 1956 on Changing Forenames and Surnames still considers non-Polish pronunciation of a surname as a valid reason for changing it.

The possibility of returning to the surnames and forenames compulsorily polonized in Poland after 1952¹⁶ is fully recognized in judgments of the Supreme Administrative Court issued on the basis of regulations of bilateral treaties.

Similarly, there are no issues connected with the legal regulation of educational rights of national minorities.

The Act on the Educational System of 1991 obliges public schools to enable their pupils and students to maintain the sense of their national, ethnic, linguistic and cultural identity, and in particular to learn their own language, history and culture. Such education may be conducted upon the parents' application in various forms: in separate groups, branches or schools – with additional lessons of language, history and culture; in inter-school teaching teams of schools or their branches where the language of tuition is the language of the national or ethnic minority.

Detailed principles of education are now contained in the Regulation of the Minister of National Education and Sport of 3 December 2002 on the conditions and manner of performance by public schools and establishments of tasks allowing the maintenance of the sense of national, ethnic, linguistic and religious identity. Pursuant to another Regulation of the Minister of National Education, pupils or students who belong to national minorities and ethnic groups may take final secondary school examinations in Polish or in the

¹⁵ The first event of application of the provision of the Regulation was placing the plaques of the Office and Council of Lasowice Wielkie Gmina [Municipality] (Opolskie voivodeship) in German, with the official name of the locality.

¹⁶ Pursuant to an unpublished order of the Prime Minister of 7 September 1952.

language of the given national minority (except for examinations in the Polish language, geography and history).¹⁷

Even though neither the Constitution nor ratified international agreements concern the political rights of national minorities, linking them with civil rights, the Law on Elections to the Sejm and the Senate of the Republic of Poland contains a provision (introduced in 1993) that relieves national minorities from the duty to exceed the 5% electoral threshold.¹⁸ In 2002, a provision was introduced into the Law on Elections to Municipal Councils stating that, when dividing *voivodeships* [provinces] into constituencies, grouping together *poviates* [counties] may not be grouping together in a way which violates the social links between electors belonging to national or ethnic minorities who live in the territories of these *poviates*.¹⁹

Minorities were granted access to mass media by a provision (Article 21 para. 1 subpara. 9) of the Radio and Television Broadcasting Act of 1992, which obliges the public radio and television stations to take into account the needs of national and ethnic minorities.²⁰

Protection of minority rights in the structures of the executive power²¹ was entrusted to the relevant organizational units of the Ministry of Culture (Department of Culture of National Minorities), Ministry of National Education (Department of Education and Upbringing) and Ministry of Interior and Administration (Department of Citizenship).

The Minister of Interior and Administration is responsible for the government's policy concerning national minorities. This policy is co-ordinated by the Interministerial Team for National Minorities,²² headed by a Secretary of State delegated by the Minister. Representatives of each ministry dealing with various aspects of national minority policy participate in the Team's work.

¹⁷ Regulation of the Minister of National Education of 21 March 2001 on the conditions and manner of evaluating, classifying and promoting pupils, students and listeners and conducting examinations and tests in public schools. *Journal of Laws*, No. 29, item 323.

¹⁸ Act of 12 April 2001 Law on Elections to the Sejm and the Senate of the Republic of Poland, *Journal of Laws* of 16 May 2001, No. 46 item 499.

¹⁹ *Journal of Laws*, No. 127, item 1089.

²⁰ Of 15 October 1992.

²¹ Sora, M.: *Ochrona mniejszości narodowych z perspektywy administracji rządowej* [Protection of national minorities from the perspective of government administration]. In: *Status prawny... op. cit.*, 135 and foll.

²² The Team, appointed on 6 February 2002, continues the activities of the Inter-Ministry Team for National Minorities, which existed in the years 1997–2001.

The Team is one of the opinion-giving and advisory bodies of the Prime Minister as regards developing and co-ordinating the Government's policy on minorities. The Team is serviced by the National Minorities Division, which has functioned since 2000 within the structure of the Department of Citizenship of the Ministry of Interior and Administration. The head of the Division is also the secretary of the Team for National Minorities.

Since 2000, at *voivodeship* level there are plenipotentiaries (or advisors) of *voivodes* [province governors] for national minorities.

Regardless of the legal regulations discussed above, the Parliament is working on a draft of Act on National and Ethnic Minorities in the Republic of Poland. The current²³ version of the draft, apart from a definition of national minorities, attempts to regulate in a comprehensive manner their social, educational and cultural rights.

The definition of minority proposed in the draft is similar to the definition adopted in the Central European Initiative Instrument for the Protection of Minority Rights of 1994, which means that the draft does not take into account the constitutional distinction between national and ethnic minorities.

The draft makes references to almost all principles of the Council of Europe's Framework Convention for the Protection of National Minorities, including a catalogue of rights enjoyed by national minorities, the prohibition of discrimination on national or ethnic grounds and the prohibition of assimilation. While recognizing the principle of equality of citizens, it does not exclude the possibility of conducting a policy of preference for national minorities in order to even out the chances.

In the areas inhabited traditionally or in considerable numbers by members of national minorities, the draft envisages the possibility of minority languages being treated as auxiliary languages, taking into account the possibility of spelling names of localities, authorities and streets in minority languages. A special chapter devoted to education and culture of national minorities contains regulations connected with teaching the mother tongue and education in that language, the principles concerning financing cultural events, national minorities and the tasks of radio and television broadcasts. The draft envisages also the

²³ The work on the previous draft was delayed, among other things, because of delayed ratification by Poland of the Framework Convention of the Council of Europe for the Protection of National Minorities. After ratification of the Convention in April 2000 and the Committee taking into account its provisions, the draft was again submitted by the Sejm Committee for National and Ethnic Minorities on 11 January 2002.

establishment of the Office for National Minorities headed by the Chairman, who would be responsible for implementation of the state policy on minorities.

Critics of the draft (including the government), while accepting the need to adopt the statute and the majority of solutions proposed in it, point out some deficiencies of the draft and proposals of controversial solutions.

In the government's opinion, the draft submitted for the first reading displays major content-related and legislative defects. The most important objections concern:

- lack of differentiation in the text of the draft between the notions of “national minority” and “ethnic minority” and lack of indication of the categories for membership of such minorities,

- lack of precise regulation of the principles of using minority languages as auxiliary languages in the public life. According to the government, a statutory regulation of this issue, due to both its importance for the status of minorities and novelty of the regulation, should be a comprehensive one. The statute should indicate the conditions (prerequisites) which have to be met in order for the minority language to be introduced as an auxiliary language in the given *gmina*,

- the government objected also decisively to the proposal of establishing a new central authority of government administration for minority issues—the Chairman of the Minorities Office. According to the government there are no actual grounds for such a major change of the system of protecting minority rights in the structure of the executive power and it would be sufficient to strengthen the position of the Team for National Minorities and increase the powers of the Minister of Interior and Administration.

IV. Protection of minority rights in international law

The policy of the Republic of Poland on national minorities is implemented on the basis of the internal legal order and instruments of international law, signed and ratified by Poland, which instruments set standards of protection of rights of members of national minorities. It is international law regulations that determined those standards of protection of rights of national and ethnic minorities that were the point of reference for Poland on its way back to the family of democratic states.

The Constitution of 2 April 1997 defined for the first time in an unequivocal and undisputed manner the place of international law instruments in the domestic legal order, which makes real the protection of minority rights on the

basis of international agreements. Article 87 para. 1 mentions ratified international agreements among the legal instruments binding in the Republic of Poland. This means that provisions of ratified international agreements may bind all entities in the state—they may affect the legal status of individuals, similar entities (e.g. private-law legal persons), political parties, NGOs and each segment of public authorities at central and local level. At the same time, by the introduction of the category of sources of universally binding law, the Constitution defined in an exhaustive and enumerative manner the categories of instruments on whose basis the rights, freedoms and obligations of all these entities may be regulated.²⁴

According to the Constitution, a ratified international agreement, after promulgation in the Journal of Laws of the Republic of Poland, becomes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute (Article 91 para. 1). Here, we are concerned with international agreements relating to freedoms, rights and obligations of members of national minorities, which agreements belong to the constitutional category of international agreements whose ratification requires prior consent granted in a statute (Article 89 para. 1). The Constitution defines the special place of such agreements in the domestic legal order: they take precedence over statutes if the statute cannot be reconciled with the agreement (Article 91 para. 2). The constitutional watchdog of coherence of the system of source of law is the Constitutional Tribunal, which decides *inter alia* on the conformity with the Constitution of statutes—including the statutes authorizing the President to ratify a specific category of international agreements—and international agreements, and on the conformity of statutes to ratified international agreements whose ratification required prior consent granted in a statute (Article 188).

Due to the fact that previously the issue of validity of international agreements in the domestic legal order was not regulated in the fundamental law and Poland acceded, in the pre-constitutional period, to many important international agreements, relevant provisions were included in the transitional provisions of the Constitution. A principle was introduced that international agreements ratified by the Republic of Poland before the entry into force of the Constitution pursuant to the constitutional provisions in force at the time of their ratification and promulgated in the Journal of Laws are considered as ratified with prior consent granted in a statute and the provisions of Article 91 of the Constitution, quoted above, apply to them if it follows from the contents

²⁴ Garlicki, L.: *Polskie prawo konstytucyjne. Zarys wykładu* [Polish Constitutional Law. Reading Outline]. ed. VII, Warsaw, 2003. 126.

of the international agreement that they concern the category of matters listed in Article 89 para. 1.

After the end of WW II and the establishment of UN system of human rights protection, Poland became a party to numerous UN documents which regulate the status of minority members, including: Universal Declaration of Human Rights, UNESCO Convention against Discrimination in Education, International Convention on Liquidation of All Forms of Racial Discrimination, Convention on the Prevention and Punishment of the Crime of Genocide, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, as well as the Convention on the Rights of the Child, ILO Convention on Discrimination in Respect of Employment and Occupation. Poland opted also for the resolution of the Commission on Human Rights concerning the rights of members of national, ethnic, religious and linguistic minorities, adopted at 57th session of the Commission in Geneva.

Within the framework of the Organization for Security and Co-operation in Europe, Poland signed the following instruments concerning, *inter alia*, the protection of national minorities: Final Act of the Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of CSCE and “Challenges of Change”—the Helsinki Document. It participates—as the host of the Office for Democratic Institutions and Human Rights of OSCE—in annual meetings of member States, aimed at reviewing the commitments in the field of human rights and developing new strategies, including the preparation of effective aid for Roma people.

National minorities issues are one of the topics discussed at all meetings of the Wyszehrad Group (including in Bratislava in 1999, in Budapest in 2000, in Prague in 2000 and in Warsaw in 2001). Discussions concern legal solutions devised to protect minorities and, in particular, experiences of implementation of minority programmes in each state. Within the framework of another regional group, the Central European Initiative, in 1995 Poland became a signatory of a now, within the framework of the CEI Working Group on Minorities, its document entitled “CEI Instrument for the Protection of Minority Rights”, and participates in cooperation and exchange of experiences with partners from the region.

Since 1989, the strategic objective of Poland’s foreign policy has been membership of the European Union. These efforts have been crowned with the signature of the Accession Treaty on 16 April 2003. Before this took place, Poland, like other candidate states, was obliged to meet specified requirements, including political ones, determined in the conclusions of the European Council in Copenhagen in June 1993. One of the important conditions was observance of national minority rights. In the course of harmonization activities,

Poland was evaluated by the European Commission from the point of view of its preparedness for accession. It should be stressed that only two states, Poland and Cyprus, were considered as states conducting proper policies on national and ethnic minorities (mainly Roma people). The European Commission considered that Polish legislative and executive powers function properly from the point of view of national minority protection.

The Republic of Poland has been a party to the Framework Convention for the Protection of National Minorities since 1 April 2001. Ratification documents were submitted to the Secretary General of the Council of Europe together with the interpretation declaration adopted by the Council of Ministers of Poland. The declaration states, *inter alia*, that in view of lack of a definition of national minority in the Framework Convention, the Republic of Poland interprets this term to denote national minorities inhabiting the territory of Poland, whose members are Polish citizens. This understanding of national minorities corresponds to the wording of Article 35 of the Constitution.

The principle of reciprocity is the basis for international law commitments concerning the rights and freedoms of national minorities resulting from bilateral agreements between Poland and other states, particularly neighbouring states (cf. footnote 2). The fact that legal regulations concerning the status of each minority are dispersed in bilateral agreements results in their differentiation, despite their basic conformity to European standards. Naturally, minorities without a “mother state”—Roma people or Karaims—are deprived of protection in such agreements.

V. Problem of the Silesian minority in case law of domestic courts and ECHR

The initiative of recognition of a distinct Silesian nationality emerged in 1995, at the meeting of an association called the Movement for the Autonomy of Silesia. The pioneer of separation of the Silesian nationality was also priest Arkadiusz Wuwer from Tychy, who in 1996 sent an inquiry to the Ministry of Interior whether Silesian nationality existed. The answer was that, due to lack of a precise definition of a nation in Polish law, everyone had the right to feel who they wished. Priest Wuwer sent the letter from the ministry together with a declaration on membership of the Silesian nationality to his mother *gmina* requesting that it be included in his personal files.

In 1996 the *Voivodeship Court* in Katowice received an application for registration of the Union of People of Silesian Nationality pursuant to the Act—

Law on Associations.²⁵ According to the submitted memorandum of association of the Union, its objectives included the protection of ethnic rights of persons of Silesian nationality (Para. 7), and there was a provision that each person of Silesian nationality was eligible to become an ordinary member of the Union (Para. 10). Paragraph 30 stated that the Union was an organization of the Silesian national minority.

In June 1997, the District Court of Katowice registered it in spite of the negative opinion of the *voivode*. The *voivode* questioned the provision of the memorandum of association that the Union is an organization of the Silesian national minority, while such a nationality does not exist (only an ethnic group, if anything), therefore the court registered something that did not exist. In addition, the *voivode* pointed out that the memorandum of association did not contain a definition of a “person of Silesian nationality”, as a result of which the membership of this nationality was left to an arbitrary decision of the Union’s authorities, which was inconsistent with the Law on Associations.

The Appeal Court of Katowice supported the *voivode*’s opinion, holding that Silesians could not be treated as a national minority, but only an ethnic group. It ruled that a national minority to which one wishes to belong and with which the given person identifies himself/herself must objectively exist. One cannot determine one’s national identity without reference to the basic precondition which is the existence of the nation. And the nation exists when the general public has no doubts as to its existence.²⁶

The Supreme Court dismissed the cassation appeal filed by the would-be Union of People of Silesian Nationality and upheld the decision of the Appeal Court. It found that registration of the Silesian nationality would infringe the law, because “non-existent minority” would enjoy the privileges of national minorities, adding that Silesians were not a national minority, but an ethnic one. As we have already mentioned, both these definitions are still missing in Polish law. Even though, on the day of issue of the judgment, Poland was not yet bound by the Framework Convention on National Minorities, the Supreme Court referred to an explanatory report to this Convention of 1995, which provides that the individual’s subjective choice of the nation is inseparably linked to objective criteria relevant to the person’s national identity. This means that a subjective declaration of membership of a specific nationality groups implies prior social acceptance of the existence of such a nationality group. Therefore even though an individual has the right of subjective choice

²⁵ Act of 7 April 1989—Law on Associations, *Journal of Laws*, 1989, No. 20, item 104.

²⁶ Judgment of the Appeal Court of Katowice of 24 September 1997, I ACa 493/97.

of nationality, this does not directly lead to the emergence of a new, distinct nationality or national minority.

The Supreme Court confirmed also that, contrary to appellants' statements, refusal to register the Union did not infringe Poland's international commitments, because neither the International Covenant on Civil and Political Rights nor the European Convention on the Protection of Human Rights and Fundamental Freedoms provides for unlimited freedom of association.²⁷

Having exhausted the domestic instance procedure, in 1999 the would-be members of the Union of People of Silesian Nationality filed a complaint to the European Commission on Human Rights in Strasbourg that the Republic of Poland violated Article 11 of the European Convention on Human Rights—freedom of association. They considered that Polish courts abused the right to assess whether a given—Silesian in this case—nationality exists. After entry into force of Protocol 11 to the Convention, the application was referred to the Court for examination.

In the judgment of 20 December 2001, ECHR supported the arguments of the Polish government. It pointed out that the applicants' real motive for registration was to benefit from electoral preferences. It declared that "rights and freedoms of individuals or groups may be limited so as to ensure greater stability of the country as a whole, including its democratic electoral system." However, it stressed, referring to the existing case law, that the restrictions on freedom of association admissible under Article 11 should be interpreted narrowly.

ECHR did not express its opinion whether Polish courts had the right to examine the existence of Silesian nationality. It found, however, that as Polish law did not provide for any procedure whereby a national minority could seek recognition, for groups not recognized as minorities by bilateral treaties the only way was the procedure of registration of the relevant association. Consequently, it criticized the Polish state for the lacuna in the law as regards registration of membership of a minority, which left a sense of uncertainty for individuals and forced them to make use of a procedure designed for a different purpose.²⁸

The Silesian unionists appealed against the judgment. The case was referred to the Grand Chamber of ECHR on 2 July 2003 and examined as the first case against Poland according to the appeal procedure. The Silesians pointed out that refusal to register their union was justified by mere suspicions and suppositions as to the future, that is uncertain, activities of the union including the use thereof to abuse electoral privileges. The appellants put forward an opinion that registration of an union or association is not the same as the registration of an

²⁷ Judgment of the Supreme Court of 18 April 1998, I PKN 4/98.

²⁸ *Case of Gorzelik and Others v. Poland*. Application No. 44158/98.

electoral committee. The committees are registered by the State Electoral College. If it refuses registration, the case may—upon application of the persons concerned—be decided upon by the Supreme Court according to the procedure determined in the electoral law. Should it turn out that the Silesians' Union abuses the law, its activities may be suspended by the *voivode* and even the association may be dissolved by the court. So if the Court in the previous judgment found that the institution of elections should be protected against abuse, the procedures that exist in Polish law are sufficient for that purpose.

The Polish government put forward a counter-argument that registration of the union would signify legal recognition of the existence of this nationality. In turn, recognition of the existence of this nationality would have important political consequences in the light of the Law on Elections to the *Sejm* and Senate of the Republic of Poland, as its Article 134 provides for exemption from the 5% electoral threshold for committees of “registered organizations of national minorities”. In its opinion, the government suggested that main objective behind the establishment of the union was to circumvent the above provisions of the Law on Elections.

Decisions on referring an appeal to the Grand Chamber of ECHR are rare. When commenting on this fact, Chairman of the Helsinki Foundation for Human Rights, Marek Nowicki, said that this meant that the previous judgment raised serious objections of the Court.²⁹ Marek Nowicki supported the opinion of the Union of Silesians that the sole criterion relevant for assessing whether a national minority exists should be the subjective conviction of the persons concerned that they belong to it. Therefore the state has no right to assess such membership based on objective preconditions. If fifteen persons wishes to establish the association of the minority of dwarves, the state has no right to investigate if they really are dwarves. They have the right to associate under any banner, provided they do not violate the law. And if the state wants to protect its electoral law, it should formulate it differently.

The National Census, whose results were published in June 2003, showed that the Silesian nationality is not only an artificial construction, adopted by its advocates in order to take advantage of electoral privileges.³⁰

The census confirmed that Poland is a nationally homogeneous state, since 96,7% respondents declared Polish nationality. As many as 173.000 of

²⁹ Cf. the words quoted in the article entitled *Narodowość dozwolona* [Permissible nationality]. *Gazeta Wyborcza* of 30 June 2003. 9.

³⁰ It is symptomatic that the Chief Statistical Office, the body responsible for conducting the National Census, when publishing its results on its website uses the term “Silesian community” and not “Silesian minority”.

respondents declared—for the first time in the history of censuses in Poland—they belonged to Silesian nationality. So, out of approx. 5 million inhabitants of the region, about 3% submitted declarations of membership of Silesian nationality. We know, however, that this number would be greater if there were broader awareness of the possibility of choosing this option. What came as a surprise was the number of persons declaring German nationality—153.000 in the whole country—that is, considerably smaller than estimated (including estimates of the government and the Helsinki Committee in Poland that defined their number at around 300.000).³¹

The census was preceded by a wide-ranging awareness-raising action organized by the Movement for the Autonomy of Silesia, that there was a possibility of declaring Silesian nationality in the census. In a kind of reaction to it, the German minority organization conducted a leaflet campaign in which it denied the existence of the Silesian minority.

In the National Census, respondents were asked: “What nationality do you belong to?” and the census takers were obliged to use the following definition of nationality: “Nationality is a declarative individual feature (based on a subjective feeling) of each person, expressing his/her emotional, cultural or genealogical (due to parents’ origin) links with a certain nation”. The nationality question was an open one, no possible categories of answers were suggested, unlike in the census conducted in Czechoslovakia standing on the verge of disintegration in 1991, when the category “Silesian nationality” was used for the first time. The definition used in the census question gives right to theoretical doubts and allows almost all ethnonyms to be accepted as answers (quite frequently the answer “European nationality” was given—sic!). These statements indicating “Silesian nationality” should be understood as a declaration of a sense of link with this ethnic group, closer than that the link with the Polish or German nations.

The declaration of national identity in the census is, by definition, unfairly simplifying: those having complex or multiple identities have to choose only one. The picture becomes simplified and deceptive, but clearer. In sociological research of a more nuanced nature than the census, over 50% of respondents in

³¹ The census revealed also that in Poland there are approx. 280.000 of persons with double—Polish and German—citizenship, which constitutes slightly more than half of the number of persons declaring German nationality. The falling number of members of German nationality is connected with the gradually shrinking in each subsequent election to the Sejm support for the Social and Cultural Society of Germans in Śląsk Opolski, which enjoys the statutory exemption from electoral thresholds (from about 74.000 in 1993 to 42.000 in 2001).

the area of Śląsk Opolski [part of Silesia] declared mixed identity: Silesian and German or Silesian and Polish.³²

If the census confirmed the new phenomenon of the Silesian minority, it should be linked with both positive and negative factors. The first category should include the fact that now, just before accession to the European Union, regional identity is becoming increasingly attractive (and it may be possible to acquire certain status and obtain economic support from the Communities), and the real attitudes of inhabitants of the region, especially the identification with their specific work ethos and the strong sense of family links. The second group includes political contestation of pauperization and economic degradation of the region (shutting down unprofitable hard coal mines, which were the main employers in Silesia), which—in Silesians' opinion—the Polish government does not try to prevent.³³

Using sociological criteria one could hardly agree that a Silesian nation or even nationality exists. We are rather dealing with a strong ethnic group and not a fully-developed nation or even nationality, as nations usually strive for an independent state or political independence, use their own languages, have their own national territories. In the case of Silesia nobody requests separation, regional autonomy at most, there is no Silesian language but rather a groups of various dialects of the Polish language,³⁴ and the ethnic territory is currently divided between two states—Poland and the Czech Republic.³⁵

According to European standards, a national state has full sovereignty to grant the status of a national or ethnic minority to ethnic groups that inhabit its territory. From this point of view the census results would have little significance—Polish authorities would not have to consider Silesians as a nationality. But we have to remember that another standard is the so-called self-categorization of citizens, i.e. recognition that—in accordance with Article 3 para. 1 of

³² Cf. research by dr Danuta Berlińska quoted by Marek Świercz in the article *Ślązak brzmi dumniej* [Silesian sounds more proudly]. *Śląsk*, 2003, No. 8 (94), 6–7.

³³ Dziadul, J.: *Narodziny narodu* [*The birth of a nation*], *Polityka*, 2003, No. 28 (2409) 20–22.

³⁴ Silesian dialects, unlike the language of Kashubians, a Pomeranian ethnic group that forms part of the Polish nation, were not considered as the so-called regional language within the meaning of the Council of Europe Charter of Regional or Minority Languages. However, some linguists recognize the existence of regional varieties of Polish: the above-mentioned Kashubian and Silesian. Cf. Dunn, J. A.: *The Slavonic Languages in the Post-Modern Era*. www.arts.gla.ac.uk, quoted in the judgment of the Grand Chamber of the European Court of Human Rights of 17 February 2004 in the case of *Gorzelik and Others*.

³⁵ Szczepański, M. S.: *Narody, narodowości i spisowe deklaracje* [Nations, nationalities and census declarations]. *Śląsk*, 2003, No. 8 (94) 8.

the Framework Convention for the Protection of National Minorities—“every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”.

In the second-instance proceedings, ECHR regarded the census results from Silesia as one of the facts of the case worth consideration and quoted them in its judgment of 17 February 2004. The judgment of the Grand Chamber was consistent with that issued in the first instance. ECHR declared that the Republic of Poland did not restrict the applicants’ freedom of association as such. State authorities did not prevent the concerned parties from associating or promoting the particular minority issues, but from creating a legal person which—thanks to its memorandum of association and pursuant to the electoral law—would obtain special status and electoral preferences. The Court also pointed out that Polish courts questioned only those provisions of the articles which would grant the Union the right to electoral privileges, approving all the remaining ones. The applicants’ refusal to make the necessary amendments to the memorandum of association shows, according to the Court, a clear intention to use the association for political purposes. Summarizing, the Court considered that the steps taken by the Polish State in this case were legitimized by a “pressing social need” and did not infringe the principle of proportionality, therefore refusal to register the association was within the permitted scope of restrictions on the right “necessary in a democratic society”, as provided for in Article 11 para. 2 of the Convention.

Despite the clear standpoint taken by the Grand Chamber of the Strasbourg court, the case of union of people of Silesian nationality is not over. Members of the Movement for Autonomy of Silesia (whose current number is around 5.000) filed a new application to the court for registration of the Union of People of Silesian Nationality. There has been one major amendment to the memorandum of association presented to the court. Before it was to be an organization of “the Silesian national minority”, while now—an association of “persons declaring they belong to the Silesian nationality”, the official name remaining unchanged yet. Initiators of registration stress that they do not attempt to acquire the rights enjoyed by national minorities and that the union will not enter the political scene, but is to cultivate the culture, language and history.³⁶

³⁶ Cf. the words of Andrzej Roczniok, who initiated the efforts to register the association, in *Mniej niż mniejszość* [Less than a minority], *Polityka*, No. 24 [2456] of 12 June 2004.