

**PROTECTION OF NATIONAL AND LINGUISTIC MINORITIES IN UNITARY
STATES: A COMPARATIVE ANALYSIS OF FRANCE AND POLAND IN LIGHT
OF THE COUNCIL OF EUROPE'S CONVENTIONS**

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Abstract

Although France and Poland are both unitary nation-states, they adopt quite contrasting approaches when it comes to the protection of national and linguistic minorities. This is best illustrated by the fact that Poland is a state party to the Framework Convention for the Protection of National Minorities and to the European Charter for Regional or Minority Languages, while France has not signed the former and refuses to ratify the latter. The purpose of this thesis is to discuss the reasons for such divergent approaches. To this end, it analyses the traditional underpinnings behind the concept of a unitary state in France and Poland. The thesis finds that the recognition of the existence of national and linguistic minorities is in principle incompatible with the traditional French republicanism, but, on the other hand, is consistent with the Polish constitutional tradition. Nevertheless, a comparative analysis of the systems of protection of chosen linguistic rights in light of the Council of Europe's conventions demonstrates that in practice the difference between both countries is not as significant as it would seem.

Introduction

A unitary system of government, in the traditional understanding of the concept, precludes granting special rights to specific groups or units. This understanding has, however, evolved and countries such as Spain, Italy or the United Kingdom have moved away from this classic concept by allowing for considerable regionalisation, while formally remaining unitary states. France, which is in some respects heavily decentralised, giving substantial autonomy to its overseas territories, appears to be joining these countries.¹ However, as in the case of Poland, complete regionalisation or federalism would be seen as incompatible with the constitutions of both countries because of their historical traditions and the classic understanding of the State.² France and Poland may be organised on a decentralised basis, but their central governments remain the only source of power.

Closely tied to the Polish and French understanding of a unitary system of government is the idea of nation-state, which implies a single nation inhabiting a single state.³ Nevertheless, this ideal of a single nation does not correspond to reality - in both countries it is impossible to turn a blind eye to the existence of national, ethnic or regional minorities. Although Poland is ethnically very homogenous (in the most recent population census only 3,8% of the total population declared that they did not have Polish national identity),⁴ it is still home to various historical minorities - there are as many as 15 recognised historical minority languages.⁵ France

¹ David Marrani, 'Principle of Indivisibility of the French Republic and the People's Right to Self-Determination: The New Caledonia Test' [2006] *Journal of Academic Legal Studies* 16, 86.

² Sophie Boyron, *The Constitution of France : A Contextual Analysis* (Oxford : Hart, 2013), 207; and Jennifer Yoder, 'Leading the Way to Regionalization in Post-Communist Europe: An Examination of the Process and Outcomes of Regional Reform in Poland' [2007], 21 *East European Politics and Societies* 3, 443.

³ Stephane Pierre-Caps, 'Constitutional non-recognition of minorities in the context of unitary states: an insurmountable obstacle?' in the Venice Commission, *The participation of minorities in public life (Science and Technique of Democracy, No. 45)*, (Council of Europe Publishing 2011), 11.

⁴ Central Statistical Office of Poland, *National Population and Housing 2011*, at < <http://stat.gov.pl/spisy-powszechnie/nsp-2011/nsp-2011-wyniki/> > accessed 6 April 2018.

⁵ The list is provided by the Ministry of the Interior and Administration: National and Ethnic Minorities, 'Characteristics of national and ethnic minorities in Poland': Belarusian, Czech, Karaim, Lithuanian, Lemko,

is linguistically extremely diverse, with a great number of regional languages spoken in metropolitan France as well as in its overseas territories.⁶ This reality of internal ethnic diversity naturally leads to the question of protection of national and linguistic minorities. It is a commonly shared view that the test for a democratic state is how it treats its minorities.⁷

Although both France and Poland are historically attached to the concept of a unitary state, when it comes to the protection of national and linguistic minorities, the two countries adopt quite a different position. Poland officially recognizes the existence of national, ethnic and regional minorities and the need for their protection as a state party to both the Framework Convention for the Protection of National Minorities (hereinafter: the Framework Convention or the FCNM) and the European Charter for Regional and Minority Languages (hereinafter: the European Charter or the ECRML). France, however, has not signed the Framework Convention and refuses to ratify the European Charter. Nevertheless, the constitutional shifts in 2008, the special status of Corsica and a considerable level of autonomy granted to some overseas territories show that France has in fact already started to move away from its traditional approach. But officially, as if trying to defy reality, it continues to endorse its historical idea of an indivisible Republic which is neutral to any differences among its citizens.

This thesis examines the reasons for having such divergent approaches when it comes to international obligations to protect national and linguistic minorities and attempts to clarify

German, Armenian, Roma, Russian, Slovakian, Tatar, Ukrainian, Hebrew, Yiddish and Kashubian, at < <http://mniejszosci.narodowe.mswia.gov.pl/mne/mniejszosci/charakterystyka-mniejs/6480,Charakterystyka-mniejszosci-narodowych-i-etnicznych-w-Polsce.html> > accessed 6 April 2018.

⁶ A report by Bernard Cerquiglini indicates 75 of them (Bernard Cerquiglini, *Les langues de France. Rapport au Ministre de l'Education Nationale, de la Recherche et de la Technologie, et à la Ministre de la Culture et de la Communication* (1999), Paris: La documentation française, < <http://www.ladocumentationfrancaise.fr/rapports-publics/994000719-les-langues-de-france-rapport-au-ministre-de-l-education-nationale-de-la-recherche-et> > accessed 6 February 2018.

⁷ See: Marek Safjan, *Pozycja mniejszości w Polsce w świetle orzecznictwa Trybunału Konstytucyjnego*, < https://trybunal.gov.pl/fileadmin/content/dokumenty/wystapienia/1998_2006/20031003.pdf >, accessed 26 March 2018, 1; Sławomir Łodziński, 'Between History and Europe Europeanization of Post-1989 National Minority Policy in Poland' [2009] *Polish Sociological Review* 555, 558; Barbara Mikołajczyk, *Mniejszości w prawie międzynarodowym* (Wyd. Uniwersytetu Śląskiego 1996), 63; Janusz Bugajski, *Ethnic Politics in Eastern Europe: A Guide to Nationality Policies, Organizations, and Parties* (ME Sharpe 1994), 44.

whether a recognition of such minorities is compatible with classical attributes of a unitary state. In particular, it investigates whether the Polish formal openness to pluralism has been exclusively a result of the external pressure in the context of its accession to the European Union, or if, rather, there exist some conceptual differences in the understanding of the concept of a unitary state that allow Poland to accede to the Council of Europe's conventions, but preclude France from doing so.

The thesis will focus on historical national and linguistic (ethnic and regional) minorities, since their protection can constitute the biggest challenge for unitary states. Guarantees of equal treatment seem to be well-suited for immigrant communities wishing to integrate into a new society and to enjoy the same rights as citizens of the host state. However, in the case of autochthonic groups who are dominated by the majority in the state and whose language and culture are threatened by extinction, the system of protection may require more advanced regulation.⁸ Such measures, often involving granting specific rights to members of minorities, can challenge the underpinnings of a unitary state and the principle of equality of all citizens.

Studies related to the situation of national and linguistic minorities in Poland usually situate this country in the context of Central, Eastern and South-eastern Europe, where linguistic rights have been granted "as a concession to international community rather than out of sincere commitment."⁹ It seems however, that the Polish initiative in its undertaking to protect its minorities cannot be completely ruled out. *This thesis analyses Poland outside of this usual context*, and puts it in comparison with France, as both countries demonstrate similar features of a unitary nation-state, but at the same time adopt very different approaches to protection of national and linguistic minorities.

⁸ See: Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014), 311-312.

⁹ Francesco Palermo, 'Judicial Adjudication of Language Rights'[2011] 02 EDAP, 5.

Despite obvious similarities between France and Poland, some scholars claim that French republicanism is unique and different from others, with the notion of universalism (and therefore of indivisibility of the Republic and equality of citizens) “at the heart of the French Republic.”¹⁰ This seems to suggest that France cannot be compared to other unitary states openly recognizing the existence of linguistic minorities and that no formal changes can occur when it comes to the question of protection of minorities. Nevertheless, a new generation of French political thinkers calls for the “French republicanism to be less sociologically naïve”,¹¹ attempting to reconcile the recognition of linguistic minorities with the traditional republican identity of France. A new understanding of classical attributes of a unitary state may place the protection of minorities in harmony with the unitary system of government and adapt the French Republican tradition to the new reality without changing its “heart”.

The analysis of the history of political thought and of the new constitutional developments in France and Poland suggests that it is predominantly historical and geopolitical factors that have caused the difference in understanding of a unitary nation-state in both countries. Accordingly, the thesis argues that a unitary structure of government is not conceptually incompatible with a recognition of national and linguistic minorities.

The thesis will examine the basic features behind the concept of a unitary state in France and Poland (Chapter 1), and explore the fact of a growing acceptance of the need to protect national minorities in both countries (Chapter 2). Chapter 3 will examine the legal framework of protection of minorities and its implementation in the two states, focusing on linguistic rights which pose the biggest challenges to the unity of the state, in order to see what are the practical effects of the formal difference of approaches. Finally, Chapter 4 will explore numerous challenges that stand in the way of ensuring full protection of national and linguistic minorities.

¹⁰ Leigh Oakes, ‘Normative Language Policy and Minority Language Rights: Rethinking the Case of Regional Languages in France’ [2017] 16 Language Policy 365, 370.

¹¹ Sophie Guerard de Latour, *Vers la République des différences* (Toulouse : Presses universitaires du Mirail 2009) in Oakes (n 10).

Chapter 1: The unity of the state and the existence of minorities

In order to understand whether the protection of minorities can be effectively ensured in a unitary state, it is necessary to understand what the traditional underpinnings are behind this system of government. Does the unity of the state imply a single and indivisible nation? Can a unitary state have more than one official language? Even though France and Poland are both unitary nation-states with one official language, the concept of the unity of the state is understood differently in their constitutional traditions, leading to differences in their approaches towards the protection of national and linguistic minorities.

1.1. The territorial indivisibility of the state

The French concept of unity of power emerged from royal power in the *Ancien Régime*.¹² However, the full manifestation of the concept of unity, as it is understood today, was realized during the Revolution, which abolished privileges granted to specific territories¹³ and divisions between certain social groups. This understanding of unity as resulting in equal treatment of all subjects and precluding all divisions within society is today enshrined in Article 1 of the Constitution, which states that France is an indivisible Republic ensuring “the equality of all citizens before the law.”¹⁴

Poland does not have an equally long tradition as a unitary state, but today the unity of government figures among its key constitutional principles. Article 3 of the Polish Constitution

¹² Michel Verpeaux, ‘L’unité et la diversité dans la République’ [2014] 42 *Nouveaux Cahiers du Conseil constitutionnel*.

¹³ Verpeaux (n 12), 1.

¹⁴ Republic of France, *Constitution of 4 October 1958*, French Text and English Translation, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf> accessed 28 March 2018, art 1.

explicitly states that Poland “shall be a unitary state.”¹⁵ This provision has been interpreted as instituting only one system of state organs and one government in the state.¹⁶ Consequently, all authority granted to public institutions emanates from regulations issued by the central government.¹⁷

Another important principle of the system of Polish government is that of decentralization of power. This is provided for in Article 15 of the Constitution, ensuring territorial decentralization of public power,¹⁸ and Article 16 creating an obligation to introduce local self-government.¹⁹ A provision ensuring a decentralised organisation of the state is also included in the French Constitution.²⁰ In both France and Poland it is accepted that this decentralization should not undermine the unitary character of the state. This means that territorial units can only act within the limits accorded to them by the central government. The countries, however, differ greatly as to the level of actual decentralization.

France has been traditionally considered as a model, or an archetype of a unitary state,²¹ but this unity is today sometimes questioned, at least in its classical form, in three ways. First of all, the explicit reference to unity is no longer mentioned in the Constitution, as opposed to the Polish Constitution and its above mentioned Article 3. In France, this notion, present in 19th century constitutions, has been abandoned and now it is only “indivisibility” that remains.²² A question therefore arises whether this formulation constitutes a softening of the principle of the

¹⁵ Republic of Poland, *Constitution of 2 April 1997*, Polish Text and English Translation, available at: <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> accessed 28 March 2018, art 3.

¹⁶ Paweł Sarnecki (ed), *Prawo konstytucyjne RP* (C.H. Beck 2008), 77.

¹⁷ Andrzej Jackiewicz, ‘Unitarism and Decentralisation as Constitutional Principles of the Republic of Poland’ [2012] in Dmitrijs Olehnovics (ed) *Daugavpils Universitātes 53. Starptautiskās Zinātsiskās Konferences Materiāli* (Daugavpils Universitāte 2012), at <https://www.dukonference.lv/files/proceedings_of_conf/53konf/tiesibas/Jackiewicz.pdf> accessed 28 March 2018, 2.

¹⁸ Republic of Poland, *Constitution of 2 April 1997*, art 15

¹⁹ Republic of Poland, *Constitution of 2 April 1997*, art 16

²⁰ Republic of France, *Constitution of 4 October 1958*, art 1

²¹ Marrani (n 1), 16; and Boris Barraud, ‘Constitution, décentralisation et unité de l’État - Quelques propositions audacieuses’ 11, at <<https://hal-amu.archives-ouvertes.fr/hal-01367524/document>> accessed 28 March 2018, 3.

²² Republic of France, *Constitution of 4 October 1958*, art 1.

unitary character of government.²³ Indeed, one of the possible reasons for this omission has been the need to account for the distinctiveness of the overseas territories.²⁴

Secondly, the Constitution itself states that France is organised on a decentralised basis in the very provision providing for its indivisibility.²⁵ It seems therefore that there are some nuances to the unity of the state. The process of decentralization of the French state will be discussed in more detail in Section 2.2, but here it is important to mention that it has been considerably more advanced than in Poland, and France is now sometimes described as being “between a unitary and a federal state”.²⁶ On the other hand, in the case of Poland it is hard to speak even of regionalisation, as competences of local self-governments are too limited.²⁷ In Poland, decentralisation implies mainly a delegation of administrative tasks to lower-level territorial units. A creation of units with a special status, unlike in the case of France,²⁸ would be seen as incompatible with the unitary system of government.²⁹

The last aspect which could possibly be incompatible with the Polish understanding of a unitary state would be the creation of citizenship only for a specific section of society. According to Sarnecki, one of the key characteristics of a unitary state is the fact of having one citizenship in the state.³⁰ This is certainly the case of Poland, but it stands in sharp contrast with France, where the Nouméa Accord resulted in the creation of citizenship of New Caledonia, specific only to this territory.³¹ Citizenship confers specific rights to a specific group within the French nation - most importantly, the right to vote in a referendum on the independence of New Caledonia. This is the case even though Article 3 of the Constitution states that no section

²³ Barraud (n 21), 3.

²⁴ Félicien Lemaire, ‘L’outre-mer, l’unité et l’indivisibilité de la République’ [2012] 35 Les Nouveaux Cahiers du Conseil constitutionnel, 2.

²⁵ Republic of France, *Constitution of 4 October 1958*, art. 1.

²⁶ Marrani (n 1), 16.

²⁷ Sarnecki (n 16), 78.

²⁸ See: Republic of France, *Constitution of 4 October 1958*, art 72.

²⁹ Jackiewicz (n 17), 4.

³⁰ Paweł Sarnecki, ‘Uwagi do art. 164 Konstytucji RP’ in Leszek Garlicki (ed), *Komentarz do Konstytucji Rzeczypospolitej Polskiej* (Wyd. Sejmowe 2007).

³¹ Verpeaux (n 12), 7.

of the people may exercise national sovereignty, which belongs to the people as a whole.³² All this illustrates that France has moved away from a classic model of a unitary state, as now certain territories within France enjoy a specific status, contrary to the logic of the French Revolution.

Despite considerable autonomy granted to its overseas territories, it is considered that federalism, at least in the case of metropolitan France, would be unthinkable.³³ Indeed, taken alone, metropolitan France is much closer to the idea of a classic unitary state. The famous decision of the French Constitutional Council on the statute of Corsica reminds that regulatory power of territorial communities is confined to limits prescribed by law, and the legislator cannot authorise local governments to adopt measures in the domain reserved to statutes, if it is not mandated by the Constitution.³⁴ Therefore, even though decentralisation is much more advanced in France than in Poland, both countries remain unitary states. Nevertheless, the differences between France and Poland show that the family of unitary states is far from being homogenous and the traditional underpinnings of this system of government can be challenged.

1.2. The nationhood: indivisible or internally diverse?

As shown in the previous section, the unity of the French state has been challenged by granting specific status to certain territories and their inhabitants. However, these developments have not been followed by a recognition of linguistic rights of members of national and linguistic minority groups, even those inhabiting overseas territorial communities. The question of whether a unitary state is ready to grant specific rights to members of ethnic minorities very much depends on the understanding of the concept of a nation.

³² Republic of France, *Constitution of 4 October 1958*, art 3

³³ Giovanni Poggeschi, 'Language Rights and Duties in Domestic and European Courts' [2003] 25 *Journal of European Integration* 207, 218.

³⁴ CC Decision no. 91-290 DC, 9 May 1991.

Academics usually distinguish two main models of nationhood which developed in Europe – the French one, born during the French Revolution, based on citizenship, and the German approach where nation is a pre-existing political community with membership defined by ethnic criteria.³⁵ It is accepted that traditionally the German model has been more influential in Central and Eastern Europe, where nation is usually understood in ethnic terms.³⁶

Even though both models exclude internal ethnic distinctions, they are based on radically opposed underpinnings.³⁷ In the German model, the nation is assumed to be culturally homogenous,³⁸ and the nation-state is organised around this ethnic group. In France, however, the nation is a political community, not based on a particular ethnicity.³⁹ This means that it is citizenship that determines whether one belongs to the nation exercising sovereignty in the State. Using Sieyès' words, nation is a "body of associates living under a common law and represented by the same legislature."⁴⁰

One would imagine that the French approach, neutral towards ethnicity, would be welcoming for national and linguistic minorities. After all, it does not precondition the membership of a particular nation on the basis of ethnic links. Nevertheless, in the case of autochthonic minorities, this approach turned out to be assimilative in practice.⁴¹ Formal neutrality towards minorities actually means that the State does not confer to them any specific rights in order to account for their difference. In practice, as demonstrated by Jennings, this

³⁵ See: Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (1992); Joseph Marko, 'Constitutional Recognition of Ethnic Difference – Towards and Emerging European Minimum Standard?' in A Verstichel and others, *The Framework Convention for the Protection of National Minorities : A Useful Pan-European Instrument?* (Antwerp : Intersentia, 2008), 20; Joseph Marko, 'Minority Protection through Jurisprudence in Comparative Perspective: An Introduction' [2003] 25 *Journal of European Integration* 175, 176.

³⁶ Julie Ringhelheim, 'Minority Protection and Constitutional Recognition of Difference: Reflections on the Diversity of European Approaches' in Verstichel (n 35), 45.

³⁷ Brubaker (n 35), 1.

³⁸ Joseph Marko, 'Constitutional Recognition of Ethnic Difference – Towards and Emerging European Minimum Standard?' in Verstichel (n 35), 21.

³⁹ *ibid*, 21.

⁴⁰ Cited in Brubaker (n 35).

⁴¹ Marko (n 38), 21 and Brubaker (n 35), 1.

results rather in the primacy of national values than in a universal protection of all citizens,⁴² as it is usually the language and culture of the dominant majority which is endorsed by the State.

One of the characteristics of the French constitutional order is the indivisibility of the French nation, which is an expansion of the principle of territorial indivisibility and integrity.⁴³ Its expression can be seen in the already mentioned Corsica decision (see Section 1.1). The French Constitutional Council held that a reference to “the Corsican people, a component of the French people” was incompatible with the Constitution, as it “recognizes only the French people, made up of all French citizens regardless of origin.”⁴⁴ The invalidation of this reference in the Act on the statute on the territorial unit of Corsica reduced much of its symbolic meaning.

The principle of indivisibility of the French nation seems to be untouched even by the introduction of Article 72-3 to the Constitution in 2003, stating that “the Republic shall recognize the overseas populations within the French people.”⁴⁵ As argued by Verpeaux, the unity of the French people is still preserved: the article refers to internal “populations”, and not “people” - an expression which was problematic in the Corsica decision.⁴⁶ And it is worth pointing out that since Article 72-3 refers only to overseas populations, minorities in mainland France and Corsica do not get that kind of recognition.

In contrast, Article 35 of the Polish Constitution acknowledges the existence of national and ethnic minorities and grants their members the freedom to develop their language, traditions, and culture.⁴⁷ In this respect it is similar to the constitutions of other countries of Central and Eastern Europe, which usually include provisions recognizing national or ethnic

⁴² Jeremy Jennings, ‘Citizenship, Republicanism and Multiculturalism in Contemporary France’ [2000] *British Journal of Political Science* 575, in Oakes (n 10), 377.

⁴³ Marko (n 38), 12 and 21.

⁴⁴ CC Decision (n 34), para 13.

⁴⁵ Republic of France, *Constitution of 4 October 1958*, art 72-3.

⁴⁶ Verpeaux (n 12), 7.

⁴⁷ Republic of Poland, *Constitution of 2 April 1997*, art 35.

minorities,⁴⁸ often as a result of European pressure. However, the Polish Constitution goes further than many constitutions of the region, which define nation on the basis of ethnic criteria.⁴⁹ The Polish nation is defined in the Preamble as “all citizens of the Republic”.⁵⁰ It seems therefore that the Polish Constitution endorses a citizen-state approach and rejects the ethnic definition of the nation. but, unlike France, it does recognize the existence of minorities at the same time.

Nevertheless, it is argued that national homogeneity is very much present in the Polish consciousness,⁵¹ as national and ethnic minorities have been a marginal part of society since the end of the Second World War. Some members of minorities feel that although today the Polish notion of “nation” is inclusive of minorities, the “ethnolinguistic nationalism” continues to be a de facto basic principle of the Polish state.⁵² This may weaken the state’s policy towards the protection of minorities and the practical execution of the legal framework granting specific rights to national and linguistic minorities.

These contrasting understandings of nation can be a result of two factors: a long evolution of the concept and differing state policies over the years. As to the first one, Poland had a long tradition of multiculturalism as a confederate state of the Polish-Lithuanian Commonwealth, home to many ethnic groups. Even in the interwar period around 30% of the total population belonged to other nationalities.⁵³ Before gaining independence in 1918, the

⁴⁸ Ringhelheim (n 36), 36.

⁴⁹ For example, see: the Preamble of the Slovakian Constitution (“we, the Slovak people together with members of national minorities and ethnic groups living in the Slovak Republic”); the Preamble of the Hungarian Constitution (where members of the Hungarian nation proclaim that nationalities living with them “form part of the Hungarian political community”; Part I of the Croatian Constitution (Republic of Croatia is a “nation state of the Croatian nation and the state of the members of its national minorities); art 1 of the Serbian Constitution (Republic of Serbia is the state of the Serbian people and all citizens who live in it), English translations available at < <https://www.constituteproject.org/>> accessed 6 April 2018.

⁵⁰ Republic of Poland, *Constitution of 2 April 1997*, Preamble

⁵¹ Sławomir Łodziński, *Równość i różnica: mniejszości narodowe w porządku demokratycznym w Polsce po 1989 roku* (Scholar 2005), 97.

⁵² Tomasz Kamusella and Motoki Nomachi, ‘The Long Shadow of Borders : The Cases of Kashubian and Silesian in Poland’ (University of St. Andrews Publications 2014),44.

⁵³ Jerzy Tomaszewski, *Ojczyzna nie tylko Polaków: mniejszości narodowe w Polsce w latach 1918-1939* (Młodzieżowa Agencja Wydawnicza 1985) 50.

question of what constitutes the Polish nation was a subject of ideological debates.⁵⁴ Kamusella and Nomachi argue that a nation-state concentrated around a single ethnic community was seen as the only idea capable of legitimizing the state at the time.⁵⁵ The situation however was much more nuanced, and even the nationalistic movement seemed to understand the Polish nation as a community joined together by common history, culture and interests, and not necessarily language or ethnicity.⁵⁶

As to the second factor, Polish communist authorities were determined to follow a policy of homogenization and assimilation.⁵⁷ This was facilitated by ethnic purges, reshaping of borders and forced relocations, and, as a result, Poland has become a very homogenous state.⁵⁸ As noted by a leading Polish sociologist in the field, today this ethnic conception of the nation remains influential – a mono-ethnic society is sometimes seen as desirable, and the state is considered to be an important institution in creating Polish national identity.⁵⁹

The nation based on citizenship is therefore understood differently in Poland and France. In Poland, even though there are some tendencies to understand nation in ethnic terms, the concept of nationhood is inclusive of minorities and openly recognizes their existence. In France however, the citizen-state approach is neutral to ethnicity, which then, as will be seen in Section 1.3, leads to a denial of some linguistic rights to national and ethnic minorities.

⁵⁴ See : Brian A. Porter, 'Who Is a Pole and Where Is Poland? Territory and Nation in the Rhetoric of Polish National Democracy before 1905' [1992] *Slavic Review* 639.

⁵⁵ Kamusella and Nomachi (n 52), 37.

⁵⁶ Porter (n 54).

⁵⁷ Łodziński (n 7), 560; and Kamusella and Nomachi (n 52).

⁵⁸ Sławomir Łodziński, 'Towards the Polish Nation-State. National Minorities in Poland Between 1945 and 1989' (2012) 3 *History of Communism in Europe* 59.

⁵⁹ Łodziński (n 51).

1.3. The unity of language

Language is an important symbol of the nation,⁶⁰ which explains its significance for nation-states. Both France and Poland have only one recognized official language, which emphasizes the unity of the nation. But, again, the notion of the official language does not mean the same in both countries, with Poland being more open to introduce minority languages into the public sphere.

The provision establishing the official status of French in Article 2 of the Constitution was introduced in 1992 as a reaction against the threat of domination of the English language,⁶¹ rather than in the context of assuring its primacy over regional languages. As a result, French is the only language whose use can produce legal effects.⁶² Following the decision of the Constitutional Council on the Finance Act 2002, French has to be used by legal persons of public law, as well as by bodies with a public-service mission.⁶³ This applies even to overseas territories, which enjoy a considerable amount of autonomy and a special status acknowledged in the Constitution. The *Conseil d'Etat*, France's Supreme Administrative Court, held that French is the official language of French Polynesia, and invalidated two laws adopted by the Polynesian Assembly, as its members used Tahitian in deliberations.⁶⁴

Nevertheless, regional languages have been acknowledged in the French Constitution. In 2008, it was amended to include Article 75-1 recognizing that regional languages form “part of France's heritage.”⁶⁵ This, however, turned out to be a rather symbolic change and has not affected the position of French – the Constitutional Council specified that this provision does

⁶⁰ Simo Määttä, ‘The European Charter for Regional or Minority Languages, French Language Laws, and National Identity’ [2005] 4 Language Policy 167, 180.

⁶¹ Verpeaux (n 12), 4.

⁶² Doris Farget, ‘La Constitutionnalisation Des Langues Regionales Francaises - Entre Reconnaissance et Effectivité Symbolique’ [2011] 26 Canadian Journal of Law & Society 133, 147; and Marc Frangi, ‘Les collectivités locales face aux langues régionales’ (AJDA 2000) 300.

⁶³ CC Decision no. 2001-456 DC, 27 December 2001.

⁶⁴ CE Decision no. 361767, 13 June 2013.

⁶⁵ Republic of France, *Constitution of 4 October 1958*, art 75-1.

not constitute a right or freedom guaranteed by the Constitution, and therefore cannot be invoked by individuals to challenge a constitutionality of laws.⁶⁶ Article 75-1 seems therefore to be only an affirmation of the diversity of the French culture. In comparison with the French provision, Article 35 of the Polish Constitution provides for a much more advanced protection, as it stipulates that the state ensures that citizens belonging to national and ethnic minorities can preserve and develop their language.⁶⁷ It therefore grants an actual right to members of these minorities. The French position, however, constitutes a significant obstacle to France's accession to the ECRML, as it provides the right to use regional or minority languages in private and public life as an inalienable right. While Article 2 is not an obstacle for the use of minority languages in private life, there seems to be no possibility of introducing a "co-officiality" for them, even if they were to be mentioned and recognized in the Constitution.⁶⁸ French continues to be the only language which can be used in relations with public administration.

Even though Poland has also only one official language, it has been more open to the use of minority languages in public life. Article 27 of the Polish Constitution which establishes the official status of Polish, at the same time specifies that it does not infringe the rights of national minorities resulting from ratified international conventions.⁶⁹ It would seem that this provision, as a guarantee of linguistic rights for minorities, stands in big contrast to the French one. However, there have been many disputes as to its interpretation.⁷⁰ According to some Polish constitutionalists, including Trzeciński, this provision does not introduce any effective

⁶⁶ CC Decision no. 2011-130-QPC, 20 May 2011.

⁶⁷ Republic of Poland, *Constitution of 2 April 1997*, art 35.

⁶⁸ The recent statement of Emmanuel Macron on the possibility of mentioning Corsican language in the Constitution makes it clear that it is not possible to recognize any kind of "co-officiality" for the Corsican language. See: L'Express, 'Macron favorable à ce que la Corse soit mentionnée dans la Constitution', 8 February 2018, <https://www.lexpress.fr/actualite/politique/macron-favorable-a-ce-que-la-corse-soit-mentionnee-dans-la-constitution_1983028.html> accessed 9 February 2018.

⁶⁹ Republic of Poland, *Constitution of 2 April 1997*, art 27.

⁷⁰ Łodziński (n 51), 143-144.

right to derogate from the first sentence establishing the official status of the Polish language.⁷¹

Sadurski goes even further and describes the provision as “rigid” and “homogenising”, leaving no possibility for adding any minority languages to the official one.⁷²

This negative assessment of Article 27 seems however not to be entirely justified. The recognition of linguistic rights of minorities does not mean that the state cannot establish an official language, the adoption of which is a result of balancing of interests between the state and minorities.⁷³ The fact that Poland has only one official language does not go against its international obligations – for example, it is accepted that Article 10(2) of the Framework Convention (granting the right to use minority languages before administrative authorities) cannot undermine the status of an official language.⁷⁴ In fact, Poland has introduced numerous measures granting the right to use minority languages in public life, and therefore Article 27 has proved not to be an obstacle for introducing other languages into the public sphere. Indeed, it is now confirmed that Article 27 involves the right to the use of minority languages both in private and public life.⁷⁵

The very definition of an “official language” in the Polish constitutional doctrine seems to leave room for introducing minority languages in public life. The Constitutional Tribunal, after having examined the history of Polish language regulations, held in a judgment from 14th May 1997 that an “official language” is not the same as a “state language”. The state language is a much broader notion and is a basic means of social communication on the territory of the state, which, in the case of unitary states, is the national language. Although usually the state language is the same as the official language, in cases where there are ethnic minorities in the

⁷¹ Janusz Trzeciński, ‘Remarks about Article 27’, in Leszek Garlicki (ed), *Konstytucja Rzeczypospolitej Polskiej: Komentarz* (Warszawa: Wydawnictwo Sejmowe, 1999), as cited in Wojciech Sadurski (n 8), 318.

⁷² Sadurski (n 8), 318.

⁷³ Fernand De Varennes, ‘Equality and Non-Discrimination: Fundamental Principles of Minority Language Rights [Article]’ [1998] *International Journal on Minority and Group Rights* 307, 310.

⁷⁴ Fernand de Varennes, ‘Article 10’ in Marc Weller (ed), *The Rights of Minorities in Europe : A Commentary on the European Framework Convention for the Protection of National Minorities* (New York : Oxford University Press, 2005), 303.

⁷⁵ Safjan (n 7), 3.

state, a distinction between the two can be made and special legal regulations can derogate from the use of the state language in official relations.⁷⁶ The judgement of the Constitutional Tribunal shows therefore that there is a possibility of introducing exceptions to the use of a single language in public life even in the case of a unitary state.

Nowadays there is no differentiation in the Constitution nor in the Law on Polish Language⁷⁷ between the two notions of language, as both instruments use the term of an official language. But, even though the decree which was subject to interpretation in the above mentioned judgment is no longer in force, the Constitutional Tribunal confirmed that when it comes to the understanding of different notions of language, the interpretation from the 14th May 1997 judgement is still valid.⁷⁸ Another important statement from this judgement was that the obligation to use the official language is limited by constitutional freedoms and rights – where a citizen wants to realise his fundamental freedoms and rights, he does not have to use the official language.⁷⁹ The obligation to use Polish in public life is therefore not absolute, as in the case of France, and it does not result solely from the fact of Poland's international obligations, but from its own understanding of an official language.

The analysis of the traditional underpinnings of a unitary state, such as the territorial indivisibility, the concept of the nation, and the unity of language shows that there are important differences between Poland and France in these respects. Despite the fact that when it comes to territorial organisation, France considerably has moved away from the model of the unitary state, in other aspects it has shown a stronger attachment to the principle of unity and indivisibility than Poland. Nevertheless, it is Poland that is more open to the recognition of

⁷⁶ Resolution of 14 May 1997, Polish Constitutional Tribunal, W 7/96, Journal of Laws no. 53 item 346.

⁷⁷ Act of 7 October 1999 on the Polish Language, Journal of Laws 1999, vol. 90, item 999.

⁷⁸ Judgment of 13 September 2005, Polish Constitutional Tribunal, K 38/04, Journal of Laws 2005, no. 186, item 1567.

⁷⁹ Resolution (n 76).

national and linguistic minorities within the nation due to its understanding of the nationhood and an official language.

Chapter 2: Towards a more comprehensive system of protection of national and linguistic minorities

Even though the principle of the unity of the state lies at the heart of the French Republicanism, the movement of decentralisation which came to prominence since the 1980s has significantly challenged it. This has been also followed by some shift in the way of thinking about the rights of linguistic minorities, questioning the traditional cultural neutrality of France. In Poland, the movement towards a greater protection of national and linguistic minorities started after its political transformation in 1989.

2.1. Constitutional and ideological shifts in France

The principle of indivisibility of the French nation may give an initial impression that France adopts a very rigid understanding of a unitary state, refusing to acknowledge differences within society on the legal level. However, as already mentioned in Section 1.1, France is far more decentralised than Poland, and its current administrative organisation, being quite flexible, considerably challenges its territorial unity.⁸⁰ Indeed, many academics argue that the movement of decentralisation which started in the 1980s has brought about a change in the French constitutional structure,⁸¹ introducing what Barraud calls a *semi-federalisme de fait*.⁸² What is more, there are also signs that the traditional formalistic approach towards linguistic diversity may also be undergoing some changes, moving away from the classic concept of unity.

⁸⁰ Boyron (n 2), 209; Marrani (n 1), 87.

⁸¹ See for example: Barraud (n 21); Boyron (n 2), 209; Lemaire (n 24), 4.

⁸² “de facto semi-federalism”, Barraud (n 21).

First of all, Article 75-1 of the Constitution, despite having no real judicial effects, is nevertheless a sign of change in the way the French state perceives its cultural diversity.⁸³ As Farget notes, this constitutional recognition may enable minority languages to leave their marginalised position.⁸⁴ The history of the adoption of the constitutional law introducing this Article shows that there were voices in the debate calling for a stronger recognition of regional languages in France, even though the final result has not been very impressive. Members of the left-wing faction even proposed to include a sentence in Article 2 stating that regional languages are equally recognized by the Republic, therefore granting them a co-official status.⁸⁵ Other propositions granted primacy to the French language, but nevertheless considered including the statement granting recognition to regional languages either in Article 2 or 1, putting them in a central place of the Constitution.⁸⁶ Although eventually these ambitious projects were abandoned, it can be seen that the dominant position of French can be questioned.

Secondly, although at the constitutional level minority languages do not enjoy a strong protection, there have been many important legislative advancements when it comes to linguistic rights.⁸⁷ Even before the decentralisation process started in the 1980s, the 1951 Law Deixonne recognised the right to study regional languages,⁸⁸ granting protection to Occitan, Basque, Breton, Catalan and Alsatian,⁸⁹ and Law Haby stated that teaching of regional languages can be provided throughout the education system.⁹⁰ Furthermore, the 1984 Law on Higher Education established that the service of higher education should promote and help to

⁸³ Farget (n 62), 149; Bruno de Witte, 'Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change : Legal Mobilisation in the Multi-Level European System* (Oxford : Hart Publishing, 2014), 31.

⁸⁴ Farget (n 62), 142.

⁸⁵ *ibid*, 137.

⁸⁶ *ibid*, 138.

⁸⁷ de Witte (n 83), 31.

⁸⁸ Law no. 51-46 of 11 January 1951 on teaching of local languages and dialects.

⁸⁹ Douglas Kibbee, 'Minority Language Rights: Historical and Comparative Perspectives' [2008] 3 *Intercultural Human Rights Law Review* 79, 123

⁹⁰ Law no. 75-620 of 11 July 1975 on Education, art 12

enhance regional languages and cultures.⁹¹ Even the Toubon Law relative to the use of French provides that its dispositions do not affect the legislation on regional languages and do not oppose to their use.⁹² And since this Law was passed as a concretisation of the amendment inscribing the official status of French into the Constitution, it seems that Article 75-1 was not meant to affect the existing position of regional languages in France.

Minority languages were also given recognition in specific laws relative to the status of territorial collectivities. The Organic Law relative to New Caledonia not only provides that kanak languages are recognized as languages of instruction,⁹³ but it explicitly affirms a separate kanak identity,⁹⁴ showing that there can be different identities within the French nation. The Law relative to the status of Corsica provided for the possibility of teaching of Corsican at nursery and elementary schools.⁹⁵ Finally, the 2004 Law on the autonomous status of French Polynesia provides an important protection for local languages. Even though French remains the official language of the collectivity,⁹⁶ Article 57, paragraph 3 states that natural and legal persons governed by private law may use languages of Polynesia in their acts and agreements without risking that they would become void.⁹⁷ The Law also provides for teaching of Tahitian and other Polynesian languages not only in elementary or primary schools, but also in higher education institutions.⁹⁸

It is clear that regional languages are given some form of attention when it comes to domains of culture and education. To say that France is absolutely inattentive to the need to promote their development would be therefore an overstatement. The movement of territorial decentralisation has been in some way followed by the reinforcement of the protection of

⁹¹ Law no. 84-52 of 26 January 1984 on Higher Education, art. 3.

⁹² Law no. 94-665 of 4 August 1994 on the use of French language, art 21.

⁹³ Organic Law no. 99-209 of 19 March 1999 on New Caledonia, art 215.

⁹⁴ See: *ibid*, articles 143 and 145.

⁹⁵ Law no. 2002-92 of 23 January 2002 on Corsica, art 7.

⁹⁶ Organic Law no. 2004-192 of 27 February 2004 on the autonomous status of French Polynesia, art. 57 para 1. al. 1.

⁹⁷ *ibid*, art. 57 al. 3

⁹⁸ *ibid*, art. 57 al. 4 and 5

regional languages. But these developments have not come so far as to grant an official status to local languages. They are present in public life – for example, in public education – but they still cannot be used before public authorities, in order to uphold the unity of language and indivisibility of the Republic.

Yet, when it comes to the territorial organisation of France, it is evident that cultural and geographic diversity of France is recognized at the constitutional level. Article 72 of the Constitution lists five different types of communities,⁹⁹ demonstrating a commitment to take account of local specificities. Article 73 and 74 establish a special regime for overseas territories, and New Caledonia has been even given its own Title XIII with transitional provisions reflecting their right to self-determination. Even in the metropolitan France there is room for flexibility – a special status is now enjoyed not only by Corsica,¹⁰⁰ but also by Paris, Marseille and Lyon.¹⁰¹ If the French unity is understood as abolishing territorial privileges, like it was during the French Revolution,¹⁰² then the practice of creating special units would only be compatible with it if they were not considered as privileges, but as a way of accounting for distinctness of these territories. The question therefore arises why the same logic is not applied for regional languages.

It may be argued that there is no real need for granting extensive linguistic rights to minorities as the French population is largely bilingual.¹⁰³ However, language is an important part of human identity,¹⁰⁴ and as such deserves to be promoted and protected if its speakers so wish. Taking this into account, many political academics, including those of French origin,

⁹⁹ Communes, Departments, Regions, Special-Status communities and Overseas Territorial Communities; in Republic of France, *Constitution of 4 October 1958*, art 72.

¹⁰⁰ Created by Law no. 82-214 of 2 March 1982 on the special status of the region of Corsica.

¹⁰¹ Established by Law no. 82-1169 of 13 December 1982 on administrative organisation of Paris, Marseille, Lyon and public establishments for cooperation between local authorities.

¹⁰² Verpeaux (n 12), 1.

¹⁰³ Frangi (n 62), 8.

¹⁰⁴ See: Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report*, February 1995, available at <<https://rm.coe.int/16800c10cf>> accessed 4 April 2018, para 64; Sławomir Łodziński, 'Etniczne Flagowania Rzeczywistości. Problemy Wprowadzania Dodatkowych Nazw Miejscowości w Językach Mniejszości Narodowych w Polsce' [2016] in 26 *Pogranicze. Studia Społeczne*, 230.

started calling for the French Republicanism to adapt to reality of ethnic diversity,¹⁰⁵ challenging the French vision of liberalism and reinterpreting basic notions behind it.

French Republicanism can be described as a traditional liberalism, which attaches a considerable importance to individual rights and equal treatment of citizens regardless of considerations such as language.¹⁰⁶ However, this approach, which is apparently neutral to ethnicity, is not well adapted to the French reality. Oakes therefore proposes that some theoretical advancements be made to remedy this situation.¹⁰⁷ The traditional universalist approach may seem to be essential for the French republicanism, but nothing is set in stone, as perfectly demonstrated by the shift away from territorial unity in France. Indeed, Poggeschi even suggests that an evolution which will bring about a semi-official status for regional languages is foreseeable.¹⁰⁸

The new understanding of liberal theory does not shift the focus away from individuals. Traditional liberalism allows for members of minorities to use language of their choice in their private life, but in the public sphere the state is neutral towards linguistic differences.¹⁰⁹ The new approach, however, focuses on disadvantages experienced by individual members of linguistic minorities if there is no accommodation for their special needs.¹¹⁰ The abandon of the politics of neutrality is therefore justified by the obligation to satisfy the rights of individual citizens.

¹⁰⁵ Cécile Laborde, *Critical Republicanism : The Hijab Controversy and Political Philosophy* (Oxford : Oxford University Press, 2008) in Oakes (n 10), 370.

¹⁰⁶ Susanna Mancini and Bruno de Witte 'Language Rights as Cultural Rights: A European Perspective' in Norman Dorsen and others, *Comparative Constitutionalism : Cases and Materials* (St Paul, MN : West Academic Publishing, 2016), 973.

¹⁰⁷ Oakes (n 10), 370.

¹⁰⁸ Poggeschi (n 33), 211.

¹⁰⁹ *ibid*, 366-367.

¹¹⁰ *ibid*, 370 and 377.

This new approach, called a critical or neo-republicanism, is based on the premise that members of national and linguistic minorities are dominated by the majority in the state.¹¹¹ Even if formally all individuals have equal rights, members of minorities can still be in an inferior position,¹¹² which can lead to their exclusion from public life.¹¹³ Therefore granting some specific rights to members of national and linguistic minorities aims to re-establish the equality between citizens coming from different groups of society. Consequently, this approach does not break with republicanism,¹¹⁴ as republicanism is exactly about granting equal rights to all citizens.

It can be seen therefore that the movement of decentralisation, which brought France somewhere between unitary and federal states, has been followed by the increased recognition of the role of minority languages in education and has provoked changes in the way the traditional French Republicanism is perceived.

2.2. The external pressure and the internal commitment to protect linguistic minorities in Poland

Chapter 1 demonstrated that in the modern Polish understanding of a unitary state it is possible to recognize the existence of minorities within the nation. However, it is a commonly shared view that in countries of Central and Eastern Europe, the recognition of minorities has been largely caused by the Western pressure – by an aspiration to accede to the European Union or to join the Western “family” of democratic states.¹¹⁵ In the case of Poland, it is certainly true

¹¹¹ See : Sophie Guérard de Latour, ‘Le Multiculturalisme, Un Projet Républicain?’ [2009] 4 Les Ateliers de l’Ethique 43; and Cécile Laborde, ‘Républicanisme critique et multiculturalisme libéral’ in Sophie Guérard de Latour (ed), *Le multiculturalisme a-t-il un avenir?* (Paris : Hermann 2013), 214.

¹¹² De Latour (n 111), 44.

¹¹³ Oakes (n 10), 377.

¹¹⁴ Cécile Laborde (n 112), 230-231, in Oakes (n 10), 377-378.

¹¹⁵ Palermo (n 9).

that these motives have played an important role.¹¹⁶ Nevertheless, it seems that apart from the external pressure, there was a genuine commitment in Poland to provide protection for national and linguistic minorities after years of neglect in the communist Poland.

The concept of granting linguistic rights for national minorities was not a complete novelty to the Polish constitutional tradition. In the interwar period, the 1924 Act on state language allowed for an exception from the use of Polish in relations with public authorities in certain voivodships for Ruthenian, Belarusian and Lithuanian.¹¹⁷ It was only after the Second World War that the communist authorities turned to a homogenising policy of a single state language.¹¹⁸

The democratic transition in Poland marked an important step in ensuring protection for national and linguistic minorities. The need for providing rights to minority groups was recognized by politicians of the anti-communist opposition such as Lech Wałęsa and Tadeusz Mazowiecki, who expressed the view that the state should support the development of their languages.¹¹⁹

There are three major factors which could have influenced the Polish movement towards a stronger protection of national and linguistic minorities. In the first place, the democratic transition brought about civil liberties, such as freedom of expression and association, which facilitated and encouraged the political mobilisation of minorities.¹²⁰ This emergence of minorities in the public sphere entailed the development of studies related to the subject,¹²¹ which furthermore increased the awareness of the presence of linguistic minorities

¹¹⁶ Bruno de Witte (n 83), 40.

¹¹⁷ Law of 31 July 1924 on state language and the official language of state and local administrative authorities, available at <<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19240730724/O/D19240724.pdf>> accessed 6 April 2018.

¹¹⁸ For a comprehensive summary of these policies, see: Łodziński (n 58).

¹¹⁹ Peter Vermeersch, 'EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland' [2015] *Journal on Ethnopolitics and Minority Issues in Europe* 114, 131.

¹²⁰ Łodziński (n 51), 15; Vermeersch (n 120), 131.

¹²¹ Łodziński (n 51), 62.

in Poland and the need for their protection. Therefore the 1989 political transformation also generated a transformation in the way of thinking about ethnic minorities in Poland.

The second important factor were the geopolitical changes at the beginning of the 1990s which occurred in Poland's neighbouring countries. The Polish state wanted to ensure the protection of Poles living in the newly emerged surrounding countries and to regulate the situation of a strong German minority.¹²² This resulted in a number of bilateral treaties signed by Poland with its neighbours, starting with the 1991 Treaty of Good Neighbourship and Friendly Cooperation concluded with Germany.¹²³ These treaties were the first step towards a comprehensive system of protection of minorities.

Finally, the last factor would be the willingness to join the "family" of Western democracies. The Copenhagen Document from 1990 was arguably an important guideline for Poland as to how to achieve this aim.¹²⁴ While it is probable that even without the European pressure Poland would break with the previous policies of the communist authorities and would provide some form of minority protection, Tesser argues that the international community had a considerable impact on the way in which Poland decided to deal with the question, especially by adopting a subjective notion of national identity, allowing each individual to decide whether he or she identifies with a given nationality.¹²⁵ Indeed, despite the fact that the protection of national and linguistic minorities always had an important place on the political agenda in the post-communist Poland,¹²⁶ it was not until 2005 that Poland, after long debates, finally adopted a general law on the protection of linguistic minorities.¹²⁷ This occurred after the Advisory

¹²² *ibid*, 130.

¹²³ Polish-German Treaty of Good Neighbourship and Friendly Cooperation of 17 June 1991.

¹²⁴ Łodziński (n 51), 130.

¹²⁵ Lynn M Tesser, 'The Geopolitics of Tolerance: Minority Rights under EU Expansion in East-Central Europe' [2003] 17 *East European Politics & Societies* 483, 505.

¹²⁶ Łodziński (n 51), 126-127 and 139.

¹²⁷ Act of 6 January 2005 on national and ethnic minorities and on the regional language, *Journal of Laws* 2005, no. 17, item 141.

Committee on the Framework Convention in its opinion on Poland recommended the adoption of a comprehensive law on this issue.¹²⁸

It is clear that, as in many other countries of Central and Eastern Europe, the European community had a considerable impact on the policy of Poland towards national and linguistic minorities after the political transformation in 1989. Nevertheless, the process of recognition of minorities in Poland started well before. Already in 1981 – therefore at times where there was no real prospect of joining the EU – the First National Delegates Summit of the Solidarity Trade Union adopted a resolution committing the movement to ensuring means for national and ethnic minorities to develop their culture. The motive for this statement was, apparently, “the fidelity to the tradition of the Republic of many nations”,¹²⁹ showing therefore that the legacy of the multicultural First Polish Republic was still strong. Moreover, In 1988 the Commission for National Minorities operating as part of the National Citizen’s Committee (an advisory body of the Solidarity Chairman) started to prepare a law guaranteeing the protection of national minorities.¹³⁰

It seems therefore that in the case of Poland, the recognition of minorities within the nation was a result of geopolitical changes and the democratic transformation, and not only due to the European pressure. This further indicates that granting rights to minority groups was not seen as incompatible with the Polish constitutional structure.

¹²⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Poland*, 27 November 2003, at < <https://rm.coe.int/168008bd20>> accessed 1st April 2018, 3 and 5.

¹²⁹ NSZZ Solidarność Komisja Krajowa, ‘Uchwała I KZD ws. mniejszości narodowych (69/81)’ (7 October 1981) at < <http://www.solidarnosc.org.pl/1-kzd-1981/item/6182-uchwala-i-kzd-ws-mniejszosci-narodowych-69-81>> accessed 1st April 2018.

¹³⁰ Sławomir Łodziński, *Struktura narodowościowa Polski i polityka wobec mniejszości w latach 1989-1992* (KS Biuro Studiów i Ekspertyz 1992).

Chapter 3: Linguistic rights of minorities in practice

The previous chapters have demonstrated the difference between the ethnically neutral approach of France towards national and linguistic minorities and the formal acknowledgment of their existence in Poland. The purpose of this chapter however is to examine to what extent this formal difference results in disparities in the protection of minorities in practice in light of the principles set out by the Framework Convention and the European Charter. To this end, the chapter will discuss three linguistic rights which are of great importance for minorities¹³¹ and are instrumental to their accommodation in society,¹³² but on the other hand, continue to be controversial as visibly challenging the supposed unity of the state.¹³³

3.1 The use of minority languages before administrative authorities

The right to use language before administrative authorities possibly constitutes the biggest challenge to the concept of a unitary state, as it implies a form of “quasi-officiality” of minority languages. The concern that this right would undermine the position of the official language is however addressed in Explanatory Reports to both the Framework Convention and the European Charter, which explain that these instruments are not meant to affect the status of the official state language.¹³⁴ The Explanatory Reports also stress the importance of the right,

¹³¹ According to Poggeschi, linguistic rights are important in order to fight social exclusion of minorities and to appreciate their culture. See: Poggeschi (n 33), 208.

¹³² Sadurski (n 71), 315.

¹³³ Łodziński (n 51), 53 and 198; and Safjan (n 7).

¹³⁴ Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (n 104), para 66, and Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages*, 5 November 1992, at < <https://rm.coe.int/16800cb5e5> > accessed 6 April 2018, para 29.

as it is crucial for preserving the identity of speakers of minority languages,¹³⁵ as well as for their exercise of rights as citizens.¹³⁶

The right is enshrined in paragraph 2 of Article 10 of the Framework Convention and in Article 10 of the European Charter. The FCNM sets out a basic principle obliging states to ensure the possibility to use minority languages before administrative authorities, in areas which are “traditionally or in substantial numbers” inhabited by members of minorities.¹³⁷ Using formulations such as “as far as possible”, the provision provides the contracting states with a substantial flexibility in fulfilling of this obligation. In contrast, the European Charter contains much more detailed provisions, laying out specific obligations to be ensured by the state. However, as the Charter adopts a “menu approach”, leaving to states the decision which obligations to subscribe to,¹³⁸ it gives the contracting states a considerable choice regarding the rights it is ready to provide to its minorities.

Even though France has not ratified the European Charter following the decision of the Constitutional Council on its incompatibility with the Constitution,¹³⁹ certain aspects of the right to use minority languages before administrative authorities can still be consistent with the Constitution. Indeed, in its decision the Council objected to the provisions of Part I and Part II of the ECRML, at the same time recognizing that the obligations subscribed to by France from Part III are not incompatible with the Constitution.¹⁴⁰ The Council explains that Article 2 of the Constitution precludes the recognition of any right of members of minorities to use regional

¹³⁵ Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (n 104), para 63

¹³⁶ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (n 135), para 100.

¹³⁷ Council of Europe, , *Framework Convention for the Protection of National Minorities*, 1 February 1995, art. 10.

¹³⁸ See: Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, art 2 para 2: Contracting states must apply at least thirty-five paragraphs or subparagraphs from Part III of the Charter, with a minimum of three from both articles 8 and 12, and one from each articles 9, 10, 11 and 13.

¹³⁹ CC Decision no. 99-412 DC, 15 June 1999.

¹⁴⁰ *ibid*, para 13.

languages before government departments or public authorities, but it does not prohibit the use of translations.¹⁴¹

Accordingly, it would be possible for France to implement only the obligations of the European Charter it subscribed to without having to revise the Constitution.¹⁴² This would include the publication by regional and local authorities of official documents in regional languages.¹⁴³ Interestingly, this obligation of providing translation of documents has not been subscribed to by Poland and is not provided for in the Polish Act of 2005 on national minorities and the regional language.¹⁴⁴ The French legislation does not explicitly provide for this right, and, as already mentioned, the official use of regional languages in public administration is effectively prohibited by Article 2 of the Constitution.¹⁴⁵ However, according to Report of the Advisory Committee for the promotion of regional languages and internal linguistic plurality, in administrative practice the use of languages other than French cannot be precluded in particular circumstances.¹⁴⁶ Nevertheless, there is no legally recognized right to use regional languages in official relations with public administration.

In contrast, in Poland the right is regulated in article 9 of the Polish Act on national minorities and the regional language. However, the regulation does not provide this right in a very comprehensive way at least in three aspects. First of all, Poland did not subscribe to paragraph 1 of Article 10 of the ECRML, which guarantees the right to use minority languages before administrative authorities of the state.¹⁴⁷ Under the European Charter, Poland is obliged to provide for the possibility to submit oral or written applications in minority languages only

¹⁴¹ *ibid*, para 8.

¹⁴² Frangi (n 62).

¹⁴³ See: Council of Europe, *European Charter for Regional or Minority Languages* (n 139), art 10, paras 2 c and d.

¹⁴⁴ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128).

¹⁴⁵ Poggeschi (n 33), 210.

¹⁴⁶ Comité Consultatif pour la promotion des langues régionales et de la pluralité linguistique interne, *Rédefinir une politique publique en faveur des langues régionales et de la pluralité linguistique interne*, (July 2013) at <file:///C:/Users/weron/Downloads/RAPPORT_politique%20publique%20en%20faveur%20des%20langues%20régionales_final.pdf> accessed 5th April 2018, 42.

¹⁴⁷ Council of Europe, *European Charter for Regional or Minority Languages* (n 139), art 10, para 1.

before sub-territorial authorities.¹⁴⁸ Even this obligation is not completely fulfilled by Poland - under Article 9 of the 2005 Act, a minority language can be used as an auxiliary language only in relations with the municipal authorities.¹⁴⁹ This problem has been addressed by the Committee of Experts on the Charter, stating that it would be desirable to provide for the possibility of using minority languages also in relations with districts and voivodships.¹⁵⁰

Secondly, according to the provisions of Article 9 of the 2005 Act, minority languages play only a limited role in relations between members of minorities and the regional authorities. Admittedly, members of minorities have a right to receive an answer in the minority language to their applications.¹⁵¹ However, the appeal procedure can take place only in the official language.¹⁵² Article 9 paragraph 7 confirms the official status of Polish, as any doubts are resolved on the basis of a document written in the official language,¹⁵³ bringing the Polish position close to the French one, where French is the only language which can produce legal effects.¹⁵⁴

Finally, minority languages can be used as auxiliary ones only in municipalities where members of linguistic minorities constitute at least 20% of the total population. Here, the Advisory Committee on the Framework Convention and the Committee of Experts on the Charter differ in their evaluation of this provision. The Advisory Committee draws attention to practical problems with the execution of the right resulting from lack of financial incentives and practical barriers deterring the municipalities to introduce an auxiliary language.¹⁵⁵ In contrast, the Committee of Experts on the Charter finds the threshold of 20% itself problematic.

¹⁴⁸ *ibid*, art. 10, para 2b.

¹⁴⁹ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128), art. 9.

¹⁵⁰ Council of Europe, *European Charter for Regional or Minority Languages: Application of the Charter in Poland. 2nd monitoring cycle* (1 December 2015) at <<https://rm.coe.int/16806dc5fc>> accessed 6 April 2018, para 91 and 93.

¹⁵¹ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128), art. 9 para 3.2.

¹⁵² *ibid*, art 9, para 5

¹⁵³ *ibid*, art 9 para 7

¹⁵⁴ Farget (n 62), 147.

¹⁵⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities, *Third Opinion on Poland*, (28 November 2013), at <<https://rm.coe.int/168008c6a1>> accessed 6 April 2018, paras 109-116.

Because of the Polish demographic structure, a great number of minority language speakers do not reach the required threshold and are therefore deprived of protection.¹⁵⁶ According to the Committee of Experts, even lowering the threshold to 10% would not be effective given the dispersion of national and linguistic minorities in Poland.¹⁵⁷

It can clearly be seen that despite the apparent difference between French and Polish approach to recognize the right to use minority languages before public authorities, it can be argued that in practice Poland does not afford much more protection to this right than France. Nevertheless, the legal recognition of this right, even in a limited way, can constitute an important first step towards a more comprehensive protection.

3.2. The display of place names and public signs in minority languages

The display of traditional place names in a minority language is an important act of acknowledging the distinct historical and cultural character of a given place, which at the same time visibly challenges the linguistic unity of the state.¹⁵⁸ The obligation of the state to provide for such a possibility is contained in Article 11, paragraph 3 of the FCNM, as well as in Article 10, paragraph 2, point g of the ECRML.

Article 10, paragraph 2, point g of the European Charter has been subscribed to by Poland,¹⁵⁹ but is also one of the obligations that France would have undertaken had their ratified the ECRML,¹⁶⁰ which means that in principle the public display of place names in minority

¹⁵⁶ Council of Europe, *European Charter for Regional or Minority Languages: Application of the Charter in Poland. 2nd monitoring cycle* (n 151), para 8.

¹⁵⁷ *ibid*, para 96

¹⁵⁸ Łodziński (n 51), 230.

¹⁵⁹ See: Poland, *Declaration contained in the instrument of ratification deposited on 12 February 2009*, at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/declarations?p_auth=adpW1NPI> accessed 6 April 2018.

¹⁶⁰ See: France, *Declaration contained in the full powers handed to the Secretary General at the time of signature of the instrument, on 7 May 1999*, at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/declarations?p_auth=pEaYirtU&_coconventions_WAR_coeconventionsportlet_enVigueur=false&_coconventions_WAR_coeconventionsportlet_searchBy=state&_coconventions_WAR_coeconventionsportlet_codePays=FRA&_coconventions_WAR_coeconventionsportlet_codeNature=10> accessed 6 April 2018.

languages is not incompatible with the French Constitution. Indeed, although there is no explicit provision in the French legislation authorising such display, it is a common practice in a number of regions to provide names of places, streets, municipalities or districts in local minority languages.¹⁶¹ This practice would also seem to be compatible with Article 11 paragraph 3 of the FCNM (which has not even been signed by France), as the Explanatory Report states that this provision does not provide for the official recognition of such names in minority languages.¹⁶²

In Poland the public display of place names in minority languages is regulated by Article 12 of the 2005 Act on national minorities and the regional language. The Act was revolutionary in this context, as up until 2005 there has never been a possibility of introducing additional place names.¹⁶³ The Act provides for the possibility of using additional traditional names for place names and physiographical objects,¹⁶⁴ as well as for the names of streets.¹⁶⁵ Such names cannot be used independently, and shall figure after the respective Polish name.¹⁶⁶ This can arguably emphasize the majority – minority relation, which can be felt by members of minorities,¹⁶⁷ even in municipalities where the members of linguistic minorities actually constitute the majority of the population. Nevertheless, it is a way of emphasizing the official status of Polish.

The additional names are established according to the rules of the minority language.¹⁶⁸ There are two conditions which have to be fulfilled in order to introduce additional place names: one referring to the name itself, and the other relating to the percentage of inhabitants

¹⁶¹ Frangi (n 62), 7. For the use of names in minority language in Alsace, see for example: <<https://plaquesbilingues.fr/>> accessed 5 April 2018

¹⁶² Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report*, (n 104), para 70

¹⁶³ Łodziński (n 51), 231.

¹⁶⁴ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128), art. 12, para 1, point 1)

¹⁶⁵ *ibid*, art. 12 para 1, point 2)

¹⁶⁶ *ibid*, art 12, para 5

¹⁶⁷ Łodziński (n 51), 241.

¹⁶⁸ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128), art 12, para 6.

of a municipality belonging to a linguistic minority. The first condition is that the additional names should not refer to the names used between 1933 – 1945 given by the authorities of the Third Reich or the Soviet Union.¹⁶⁹

The second one, as in the case of the use of minority languages before administrative authorities, is that the public display of place names in local languages is possible only in the municipalities where the number of speakers of minority languages exceeds 20% of the total population.¹⁷⁰ Such municipalities have to be firstly registered in the Official Registry of Municipalities, which is done on the request of the municipal council.¹⁷¹ Alternatively, additional names can be introduced if more than 50% of the population has supported their introduction in public consultations.¹⁷²

Here again, the Committee of Experts on the Charter noted that the 20% threshold may be too high and deprive members of minorities of the possibility to introduce additional names in a local language in a considerable number of areas.¹⁷³ Moreover, the Committee observed that apart from place names, no street or other names have been introduced. The reason for this, as explained by the Polish authorities, is that it is the state that bears the costs of introducing additional place name signs, but the costs of street names signs have to be covered by the municipal authorities.¹⁷⁴

Both in the case of France and Poland, the question of introducing additional place names in local minority languages lies therefore in the hands of local authorities. Nevertheless, while in France the practice flourishes because of no express prohibition, in Poland there is a legally recognized right to the public display of place names in minority languages under

¹⁶⁹ *ibid*, art 21, para 3.

¹⁷⁰ *ibid*, art 12, para 7, point 1)

¹⁷¹ *ibid*, art 12, para 2.

¹⁷² *ibid*, art. 12, para 7, point 1)

¹⁷³ Council of Europe, *European Charter for Regional or Minority Languages: Application of the Charter in Poland. 2nd monitoring cycle* (n 151), para 8.

¹⁷⁴ *ibid*, para 97.

certain conditions. The devil, however, lies in details and exactly these conditions can hamper the effective exercise of this right.

3.3. Minority languages in education

The right to learn minority languages at school is essential for their development and preservation. It also plays an important role in the demarginalization of minorities: it can contribute to the provision of a high-level of education and thus to the fight against unemployment and poverty of some minorities,¹⁷⁵ and consequently can serve to create a real equality of opportunity for them.¹⁷⁶ The importance of providing classes of or in minority languages can be well illustrated by the example of the Roma minority. In Poland, the lack of the common language for all Roma makes it difficult to develop a relevant education plan specific to their needs, and, in contrast to other national or ethnic minorities, many Roma children do not speak Polish well. This contributes to their exclusion at school, problems with gaining education, and furthermore deteriorates their social position, leading to continuing poverty and economic discrimination.¹⁷⁷

The right to learn the minority language or to have it as a language of instruction is enshrined in Article 14 of the Framework Convention and Article 8 of the European Charter. Article 14 of the FCNM again adopts quite a “soft” language: the obligation of the contracting parties to provide for education of minority language goes only “as far as possible”, and it refers to areas inhabited traditionally or in substantial numbers by members of minorities.

¹⁷⁵ Kinga Gal, ‘The Council of Europe Framework Convention for the Protection of National Minorities and Its Impact on Central and Eastern Europe’ [2000] 2000 Journal on Ethnopolitics and Minority Issues in Europe 17; Paul Bruthiaux, ‘Language Rights in Historical and Contemporary Perspective’ [2009] 30 Journal of Multilingual and Multicultural Development 73.

¹⁷⁶ Kibbee (n 89), 79.

¹⁷⁷ Canada: Immigration and Refugee Board of Canada, *Poland: Situation of Roma: Communities and language, public attitudes and treatment of Roma, including recent reports of violent incidents, presence of extremist organizations and groups, state protection, economic and social conditions, and state programs*, 25 January 2000, at <<http://refworld.org/docid/3ae6ad4212.html>> accessed 20 January 2018.

Moreover, it clarifies that this obligation shall be executed without prejudice to the official language.¹⁷⁸

Teaching of minority languages or bilingual education is relatively well developed in France. Had France ratified the European Charter, it would have proscribed to the obligation of making available all levels of education in minority languages. In the case of pre-school, primary, secondary and technical and vocational education, France would have chosen to provide education in minority languages if there was a request from families of pupils or pupils themselves (depending on their maturity) and provided that the number of pupils would be sufficient.¹⁷⁹ In contrast, Poland chose to be obliged to make the education of minority languages available at the above mentioned levels of education, without the precondition of a request or a substantial number of interested pupils.¹⁸⁰ In the case of higher education, while Poland undertook just to provide facilities for the study of minority languages at universities,¹⁸¹ France would have committed itself to provide facilities and to make education available. France, unlike Poland, also would have been obliged to provide education of minority languages in the case of adult and continuing education courses. Both countries tuned out to have the same approach when it comes to the teaching of history and culture related to minority languages, the training of teachers of minority languages, setting up a supervisory body to monitor the system of education in minority languages, and providing teaching of non-territorial languages if it is justified by the number of speakers of these languages.¹⁸²

France has been criticized in the Report of the European Bureau for Lesser Used Languages in France, that teaching of minority languages is not considered to be a right for

¹⁷⁸ Council of Europe, *Framework Convention for the Protection of National Minorities* (n 138), art 14.

¹⁷⁹ France, *Declaration...* (n 161).

¹⁸⁰ Poland, *Declaration...* (n 160).

¹⁸¹ *ibid.*

¹⁸² See and compare: France, *Declaration...* (n 161) and Poland, *Declaration...* (n 160).

children and parents, but as a possibility of an educational institution to provide it.¹⁸³ While this may be true, the legal framework enabling the teaching of minority languages and bilingual education is considerably developed, which incidentally may create favourable conditions for members of linguistic minorities to exercise their right to education in their language. The system of education provides for different modalities of teaching: apart from a classic bilingual education, there is also a possibility to opt for the bilingual education through immersion, “extensive teaching” of minority languages, or classes with reinforced language teaching.¹⁸⁴

Article L 123-3 II 1° of the French Code of Education stipulates that French being the language of teaching, exceptions can be made by the necessity to teach regional and foreign languages.¹⁸⁵ Interestingly, putting regional and foreign languages in the same provision may imply that teaching of regional languages is valuable primarily for educational benefits which are always brought by learning other languages, rather than to enable members of minorities to develop their identity and culture. The unique value of regional languages is however emphasized in Article 312-10 of the Code, which reiterates the constitutional provision that regional languages form part of France’s heritage. It also adds that teaching of regional languages can be provided throughout the whole education system.¹⁸⁶

One problem with the education in minority languages in France is its uneven provision when it comes to different languages. While teaching of regional languages has been rather successful in Corsica or the Basque Country, it is not the case for languages with a smaller number of users, such as Flamand or Gallo.¹⁸⁷ This problem is however not specific to France. In the case of non-territorial languages, which users are spread across the country and therefore

¹⁸³ EBLUL-France, *Written Contribution of EBLUL-France (Committee on Economic, Social and Cultural Rights United Nations, 55th session)*, (19 February 2016), at <https://elen.ngo/wp-content/uploads/2016/05/INT_CCPR_CSS_FRA_20888_E.pdf> accessed 6 April 2018, 7.

¹⁸⁴ Comité Consultatif pour la promotion des langues régionales et de la pluralité linguistique interne, *Rédefinir une politique publique en faveur des langues régionales et de la pluralité linguistique interne* (n 147), 26-33.

¹⁸⁵ French Code of Education, art L 123-3 II 1°.

¹⁸⁶ *ibid*, art 312-10. The possibility to provide teaching of regional languages at all levels of education is also enshrined in art L 121-1.

¹⁸⁷ *ibid*, 28.

do not constitute a significant majority in any area, Article 8 of the Charter conditions the obligation to provide their teaching to cases where the number of users justify it.¹⁸⁸ The FCNM, as already seen, limits the obligation of the state to the cases in which areas are inhabited in substantial numbers by members of national minorities.¹⁸⁹ In the case of Poland, this is particularly problematic for non-territorial languages such as Yiddish.¹⁹⁰

An important feature of the teaching of regional languages in France is that, following the decisions of the Constitutional Council, it cannot be mandatory. In the Corsica decision, which has already been mentioned a few times, the Constitutional Council held that including the teaching of Corsican in the school curriculum is not contrary to the principle of equality as long as it is not mandatory.¹⁹¹ A similar conclusion was reached in a later case also concerning Corsica,¹⁹² as well as in the Decision concerning the Organic Law on the autonomous status of French Polynesia.¹⁹³ The reasoning of the Council suggests that making the teaching of a particular language mandatory only in a specific territory of France puts the inhabitants of this territory in a different position from the inhabitants of other French territories, thus violating the principle of equality. This specific understanding of the constitutional principle of equality will be discussed in more detail in Section 4.1.

In Poland, the teaching of minority languages is also provided on a voluntary basis,¹⁹⁴ but this practice is not however based on the principle of equality. The right to learn the minority language and to learn in this language is provided by Article 8, point 4) of the 2005 Act on national minorities and the regional language. It is further regulated in the Law on the

¹⁸⁸ Council of Europe, *European Charter for Regional or Minority Languages* (n 139), art 8, para 2.

¹⁸⁹ Council of Europe, *Framework Convention for the Protection of National Minorities* (n 138), art 14, para 2

¹⁹⁰ With respect to Yiddish, the problem exists also in France. See: Kartik Tripashi, 'Ma Patrie, C'Est La Langue Francaise'- Linguistic Imperialism and Minority Language Rights in International Law' [2014] NUJS Law Review 293, 309.

¹⁹¹ CC Decision (n 34), para 37.

¹⁹² CC Decision no. 2001-454 DC, 17 January 2002, paras 24-25.

¹⁹³ CC Decision no. 96-373, DC 9 April 1996, para 92.

¹⁹⁴ Łodziński (n 51), 189.

Education System.¹⁹⁵ According to the Resolution of the Advisory Committee on the Framework Convention, the system of minority language education is well developed.¹⁹⁶

Nevertheless, there is still a serious problem with the fact that the Roma children have no opportunity to learn their language.¹⁹⁷ Moreover, the Committee of Expert on the European Charter notes that there is no training for teachers of minority languages provided, and there is also a problem with the provision of adequate textbooks.¹⁹⁸ Furthermore, Poland adopts a threshold of seven and fourteen pupils in order to set up a minority language class at primary and secondary level of education respectively.¹⁹⁹ This is despite the fact that it has subscribed to the obligation to provide the teaching of minority languages in the school system irrespective of the number of pupils willing to undertake it. This practice puts Poland closer to the French approach, as France would have subscribed to the obligation to provide minority languages education only if the number of pupils was significant.²⁰⁰

All in all, even though France and Poland adopt different approaches when it comes to recognizing the existence of linguistic minorities within the state, it seems that in practice the level of protection afforded to these minorities is often not that different. Indeed, in some aspects it can be even more developed in France, as is arguable the case of education. The crucial difference therefore lies in the right to use minority languages before administrative authorities. This right, despite several drawbacks in its application, is recognized in Poland. In France it is however precluded, even though some accommodation, such as the translation of

¹⁹⁵ Law of 7 September 1991 on the Education System, Journal of Laws 1991, no. 95, item 425.

¹⁹⁶ Committee of Ministers, *Resolution CM/ResCMN(2015)3 on the implementation of the Framework Convention for the Protection of National Minorities* by Poland, (4 March 2015), at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c3cfd> accessed 6th April 2018.

¹⁹⁷ Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Poland* (n 129), para 19.

¹⁹⁸ Council of Europe, *European Charter for Regional or Minority Languages: Application of the Charter in Poland. 2nd monitoring cycle* (n 151), para 76.

¹⁹⁹ *ibid*, para 86

²⁰⁰ France, *Declaration...* (n 161).

the official documents into minority languages could be introduced without the need for a constitutional revision.

Chapter 4: Challenges facing the protection of national and linguistic minorities

As seen in previous chapters, in both France and Poland there have been movements towards a greater protection of the rights of national and linguistic minorities. Moreover, even though France continues to refuse to recognize the existence of linguistic minorities in the state, Chapter 3 has illustrated that in practice members of these minorities can exercise some linguistic rights, even though they are not formally provided for in the legislation, and arguably are not meant to be considered as rights as such. This Chapter, however, discusses the main remaining obstacles which still preclude the full protection of minorities both in France and Poland.

4.1. The principle of equality before the law and the French refusal to recognize the existence of minorities

One of the main obstacles which stand in the way of the recognition of national and linguistic minorities in France is its formalistic interpretation of the constitutional principle of equality before the law. As seen in section 3.3., this principle precludes the introduction of mandatory teaching of minority languages. Moreover, this principle, together with the principle of indivisibility of the Republic, has been the reason for the consequent refusal by France to ratify and sign the Council of Europe's conventions. The Constitutional Council has interpreted the provisions of the European Charter as conferring specific rights on groups of speakers.²⁰¹ According to this understanding, granting specific rights to linguistic minorities puts them in a privileged position, and this goes not only against the principle of equality, but also against the

²⁰¹ CC Decision (n 140), para 10.

unity of the nation, which, since the French Revolution, was supposed to abolish all distinctions within society.

As argued by de Witte, the principle of equality is a disputable basis for arriving at a conclusion that mandatory teaching of Corsican would be unconstitutional.²⁰² After all, each legal system is necessarily based on making certain classifications and treating distinct situations in a different way, as treating them equally would exactly be a violation of the principle of equality. This substantive vision is adopted by Poland,²⁰³ where the principle of equality serves as a basis for providing linguistic rights to minorities, so that they have a right to use their own language in the same way as other citizens. Even though the protection of minorities can breach the universality of legal protection, this is accepted in order to compensate for the weaker position of minorities.²⁰⁴

Admittedly, when the question of the protection of national and linguistic minorities first came to be discussed in Poland after the political transformation in 1989, there were doubts whether granting rights to national minorities is compatible with the principle of equality.²⁰⁵ In the end, the debate was resolved in favour of the protection of minorities. Article 35 of the Constitution grants protection to members of national and ethnic minorities, but this is understood to be a realization of the principle of equality.²⁰⁶

The decision of the Constitutional Council on the incompatibility of the European Charter with the Constitution seems to suggest that the ECRML confers collective rights to speakers of regional languages.²⁰⁷ However, the European Charter has been intended rather to

²⁰² De Witte (n 83), 41.

²⁰³ Sarnecki (n 16), 200.

²⁰⁴ Safjan (n 7), 2.

²⁰⁵ Łodziński (n 51), 15.

²⁰⁶ Wiesław Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Zakamycze 1998), 37 in Łodziński (n 51), 143.

²⁰⁷ See: CC Decision (n 202), para 6.

promote language as a European heritage rather than to protect the rights of minorities.²⁰⁸ Although arguably the protection of languages as a European heritage has also the effect of producing rights for their speakers, the Explanatory Report to the ECRML states clearly that it does not confer any collective rights for the minorities.²⁰⁹

It seems that it is mainly the position of the Constitutional Council, as well as of the Conseil d'Etat, which constitutes the biggest obstacle to France's recognition of national and linguistic minorities. Their rulings have been even described as a "counter-mobilisation."²¹⁰ Indeed, the existence of a political mobilisation to increase the protection of minorities in France cannot be denied. For example, the French government of Lionel Jospin signed the European Charter, stating in the Declaration accompanying the signature that it interprets the ECRML as ensuring the equality of all citizens before the law.²¹¹ Furthermore, the amendment of the Constitution in order to ratify the European Charter was one of the commitments of François Hollande during his presidential campaign.

The proposition to amend the Constitution, adopted by the National Assembly on 28th January 2014,²¹² included a new article 53-3.²¹³ This article would have authorised France to ratify the European Charter. It was accompanied by an interpretative declaration, stating that the use of the word "group" in the European Charter does not confer collective rights to users of minority languages, allowing the interpretation of the Charter which could be compatible

²⁰⁸ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (n 135), para 26. See also: Fernand de Varennes and Patrick Thornberry, 'Article 14' in Weller (n 74); and Oakes (n 10), 370.

²⁰⁹ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (n 135), para 11.

²¹⁰ De Witte (n 83), 40.

²¹¹ France, *Declaration...* (n 161), para 1.

²¹² See further for the description of the legislative process: <http://www.assemblee-nationale.fr/14/dossiers/ratifier_charte_langues_regionales_minoritaires.asp>, accessed 9th February 2018.

²¹³ French National Assembly, *Proposition of a constitutional law authorising the ratification of the European Charter of Regional and Minority Languages*, (28 January 2014), at <<http://www.assemblee-nationale.fr/14/ta/ta0283.asp>>, accessed 9th February 2018.

with the principle of equality. Admittedly, this seemed to be only reinstating what had been already noted in the Explanatory Report to the Charter.²¹⁴

The interpretative declaration also emphasized the official status of French. It explained that Article 7,²¹⁵ Article 9,²¹⁶ and Article 10²¹⁷ of the European Charter should be interpreted only as general principles, which would not be prejudicial to Article 2 of the Constitution. The use of French would still be obligatory for legal persons of public law and private bodies with a public-service mission, as well as in relations with the administration and public services.²¹⁸ Here again, the interpretative declaration basically repeats what has been already agreed upon with respect to the interpretation of the ECRML. As made clear by the Explanatory Report on the European Charter, states dispose of a large discretion in deciding how to implement Article 10, and no specific action is required to be taken – contracting parties can decide which provisions they wish to subscribe to. Granting a co-official or “quasi-official” status to minority languages is not required – the Report states that only in some cases “the characteristics of the regional or minority language may allow it.”²¹⁹

The proposed constitutional amendment seems therefore to propose a less rigid approach to the principle of equality before the law. This approach has nevertheless been once again rejected, this time by the Conseil d’Etat, which, acting in its capacity of a legal advisor

²¹⁴ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (n 135), para 11.

²¹⁵ The facilitation and encouragement of the use of regional and minority languages in public and private life.

²¹⁶ The Use of minority languages in judicial proceedings.

²¹⁷ The Use of minority languages before administrative authorities and public services.

²¹⁸ French National Assembly, *Proposition of a constitutional law...* (n 214).

²¹⁹ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (n 135), para 103.

to the French government, stated that the adoption of the law would be contrary to the Constitution.²²⁰ At the end, the bill has been rejected by the Senate.²²¹

The adoption of a more substantive understanding of equality when it comes to recognizing distinct rights of national and linguistic rights of minorities could bring France more in line with other European countries. France may be treating all its citizens in a formally neutral way, but in practice it puts certain groups at a considerable disadvantage.²²² By endorsing substantive equality, as in the case of Poland, France would be bringing different groups of citizens in a de facto position of equality. As argued by Oakes, the fact that France rejects granting specific rights to minority groups, claiming that collective rights violate the principle of equality, has led it to neglect the individual rights of members of these minorities.²²³ The French approach is often criticized for the fact that in practice it imposes the language and culture of the majority on its minorities.²²⁴

The well-known argument brought forward by Kymlicka is that the state is never culturally neutral.²²⁵ It may be even argued that by adopting one official language, the state is granting a collective right to the majority of the population that uses it.²²⁶ Arguably, in France the today's official position of French has been created by a policy of homogenisation, imposed by the central authority on outermost regions. It has to be remembered that still in the middle of the 19th century only 25% of the French population could use French proficiently.²²⁷

²²⁰ Le Conseil d'Etat et la juridiction administrative, *Ratification de la Charte européenne des langues régionales ou minoritaires* (31 July 2015), at < <http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Ratification-de-la-Charte-europeenne-des-langues-regionales-ou-minoritaires> > accessed 6th April 2018.

²²¹ See the website of the French Senate at <<http://www.senat.fr/dossier-legislatif/ppl13-320.html#timeline-5>> accessed 6th April 2018.

²²² Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (Oxford : Clarendon Press, c1995).

²²³ Oakes (n 10), 371.

²²⁴ See: Kymlicka (n 222); Jeremy Jennings (n 42).

²²⁵ Will Kymlicka, 'Western Political Theory and Ethnic Relations in Eastern Europe', in Will Kymlicka and Magdalena Opalski (eds), *Can Liberal Pluralism Be Exported? : Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford : Oxford University Press, 2001).

²²⁶ Gyorgy A, 'National or Ethnic Minorities and Individual Language Rights' [1996] *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 35, 37-38.

²²⁷ Tripashi (n 194), 297.

Granting specific rights to members of linguistic minorities can therefore protect them as a group which is usually dominated by the majority.

In Poland, even though it endorses a substantive vision of equality, the principle is also sometimes used as an argument against the recognition of rights for specific minorities. This is the case of the Silesians. This minority is refused the official status of a national, ethnic, or regional minority, and this is often explained by the fact that doing so would violate the principle of equality with regards to others groups which have a distinct cultural or ethnic identity, such as the Mazurians or the Gorals.²²⁸

4.2. Non-recognition of minorities: the state's discretion to exclude minorities from international protection

The Framework Convention and the European Charter, despite being the most comprehensive instruments for the protection of linguistic minorities in Europe, have several weaknesses. The most important in the present context is the fact states have a relative discretion in choosing which minorities they wish to protect. The FCNM does not provide a clear definition of a national minority – contracting parties are therefore free to adopt their own. Moreover, the ECRML gives freedom to contracting states to indicate which regional and minority languages they want to protect. As a result, states can exclude some minorities of the protection afforded to others.

The situation is not helped by the fact that minorities excluded from the protection do not have effective judicial ways of challenging the state's decision and have to resort to political mobilisation. The European Convention on Human Rights does not cover a “linguistic freedom”, as stated by the Strasbourg Court in *Birk-Levy v. France*.²²⁹ Moreover, as illustrated

²²⁸ Łodziński (n 51).

²²⁹ *Birk-Levy v France* App no 39426/06 (ECHR, 21 September 2010).

by the case *Gorzelik and others v. Poland*, the European Court of Human Rights leaves a margin of appreciation to member states when it comes to defining what constitutes a national minority deserving of protection in the context of the freedom of assembly of minority organisations.²³⁰

Gorzelik and others v Poland concerned the refusal of the Polish courts to register the “Union of People of Silesian Nationality”. Silesians constitute the largest Polish linguistic minority,²³¹ inhabiting the historical region of Silesia in south-west Poland. Despite the political mobilisation of some regional organisations, the most known of which is the Silesian Autonomy Movement, the Polish state refuses to recognize Silesians as a national or ethnic minority, and does not accept Silesian as a regional language, claiming that it is only one of the numerous dialects of Polish. The only regional language recognized by Poland and protected under the 2005 Act on national minorities and the regional language is Kashubian.

The question whether something constitutes a dialect or a regional, separate language, is one of the most difficult considerations for linguists.²³² Accordingly, it is hard to evaluate whether the Polish refusal to recognize Silesian as a separate language is justifiable or not. Admittedly, Silesian and Lower Silesian are given ISO language codes,²³³ which is not the case of Upper Silesian. It is certainly hard to conclusively determine whether Silesian can be considered as a separate language.

It seems, however, that apart from linguistic considerations, the Polish state may be reluctant to recognize the Silesian minority for other, political reasons. One of the conditions in the Polish definition of a national minority is that it must identify itself with a nation

²³⁰ *Gorzelik and others v Poland* App no 44158/98 (ECHR, 20 December 2001).

²³¹ Central Statistical Office of Poland, *National Population and Housing 2011* (n 4).

²³² Tripashi (n 190) 307.

²³³ 639-3 szl and 639-3 sli for Silesian and Lower Silesian respectively. See: SIL International, <<http://www-01.sil.org/>> accessed 6 April 2018.

organized in its own state.²³⁴ This requirement cannot be fulfilled by the Silesian minority, therefore their recognition as a national minority would require an important change in the law. Granting the status of a national minority would have important electoral consequences – national minority parties are not required to fulfil the 5% threshold to enter the Sejm (the lower house of Parliament).²³⁵ This may constitute a deterrent factor for the State to include the Silesians in the protection granted to national minorities. Recognizing Silesian as a regional or ethnic language would not have such vast consequences, but would still impose important obligations on the state under the European Charter and the Polish Act of 2005 on national minorities and the regional language, especially considering the high number of members of the Silesian minority.

Another important factor which may be influencing Poland's refusal to recognize the Silesian minority is the fact that claims to recognize the Silesian language are often associated with separatist tendencies of the Silesian Autonomy Movement, which cannot be accepted according to the Polish concept of a unitary state.

Here it is important to note that Kashubian, the only regional language recognized by Poland, used to be in the same position as Silesian is nowadays.²³⁶ The question of the nature of Silesian is still open to debate and there has been some signs of a changing approach – as remarked by Kamusella and Nomachi, the successful registration in 2011 of the Society of the People of the Silesian Nationality provides a positive example.²³⁷

The question of the lack of protection for Silesian has been addressed by the Advisory Committee on the FCNM. The Committee considered that even though the Silesian language is considered to be a variety of Polish, Poland should consider different options which would

²³⁴ Act of 6 January 2005 on national and ethnic minorities and on the regional language (n 128), art 2, para 1, point 6).

²³⁵ Law of 5 January 2011, Electoral Code, Journal of Laws 2011, no. 21, item 112, art 197, para 1.

²³⁶ See: Kamusella and Nomachi (n 52) 41.

²³⁷ *ibid.*

afford protection for the Silesian minority, and particularly it should engage in the process of standardisation given the fact of significant disparities between different varieties of Silesian.²³⁸ Moreover, the Committee made an interesting remark that the application of the FCNM does not necessarily require a formal recognition of a groups as a national minority, or the existence of a specific legal status of a group.²³⁹ It seems therefore that the scope of protection of the FCNM can include the Silesian minority.

It is evident that as long France endorses the formalistic approach to the principle of equality, the formal recognition of national and linguistic minorities will not be possible. The adoption of a more substantive interpretation of equality would therefore be a positive development. In the case of Poland, even though the question of differentiating between dialects and regional languages is extremely difficult, Poland could follow the suggestion of the Advisory Committee to the FCNM and try to ensure some level of protection of the Silesian minority even without formally recognizing its status.

²³⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities, *Third Opinion on Poland* (n 156), paras 24-25.

²³⁹ *ibid*, para 26

Conclusion

The “family” of unitary states is very diverse and includes numerous models of government. A comparative analysis of France and Poland reveals that even in states which have been traditionally considered as unitary, there can be some accommodations to the territorial unity, the unity of nation or the unity of language. The differences between the traditional understandings of these three principles in France and Poland lead to a different position with regard to the protection of national and linguistic minorities. This is why France refuses to subscribe to relative international obligations, while Poland is a party to both the FCNM and the ECRML.

The main reason for such divergent approaches is the different understanding of nationhood in France and Poland. While in both countries nation is based on the idea of citizenship, in France this approach has led to a refusal to recognize the possibility of granting specific rights to linguistic minorities. The state is supposed to be neutral to ethnic differences between citizens and treat them equally without considering their distinct characteristics. This is in sharp contrast to Poland, where the existence of national and ethnic minorities is recognized at the constitutional level.

Even though both countries have only one official language, the Polish notion of the official language does not preclude the introduction of other languages spoken by national and linguistic minorities into the public sphere. In France, however, regional languages are recognized in the Constitution only as a part of the French cultural heritage, and there is no possibility of introducing a co-officiality, or even a “quasi-officiality” for minority languages, even in autonomous overseas territories.

This disparity between the French and Polish approaches is therefore caused by their different constitutional traditions which influence their current understanding of a unitary state.

The Polish recognition of the rights of national and linguistic minorities has not been caused exclusively by its willingness to accede the European Union. Although the geopolitical considerations were certainly important after the political transformation of Poland in 1989, the internal commitment to provide protection for minorities cannot be ruled out. The thesis argues that the Polish interpretation of the concept of nation and of the official language allows for the recognition of the existence of minorities and their linguistic rights, contrary to the case of France.

It is important to note however that this difference between formal approaches of France and Poland does not necessarily entail an equally significant difference when it comes to the provision of the protection of national and linguistic minorities in practice. What constitutes the biggest divergence between the two countries is the right to use minority languages before administrative authorities. According to the French position, such right would undermine the status of French as an official language. Poland provides such a possibility, but the right is however severely limited by the fact that it only applies to municipal authorities and in municipalities where members of minorities constitute at least 20% of the population.

When it comes to the public display of place names in minority languages, in France, unlike in Poland, it is not provided by law, but neither is it prohibited and in practice takes places spontaneously in numerous regions. The teaching of regional languages and bilingual education is, in turn, relatively well adopted and subject to elaborate legislation. This practice is considered however to be rather a development of the French cultural heritage, rather than a conferral of rights to minorities, in contrast to Poland, where this right is provided in the Act on national minorities and the regional language. Moreover, in France, mandatory teaching of languages is considered to be incompatible with the principle of equality before the law.

This understanding of the principle of equality in France constitutes a major obstacle to the recognition of the existence of minorities. The thesis therefore argues that it would be

advantageous to adopt a more substantive vision of equality, as it is in the case of Poland. While the traditional French approach results in putting certain citizens at disadvantage, a revised one could re-establish the equality between them.

Finally, the situation of Silesians in Poland is a problem that deserves a particular attention, as it illustrates the weakness of both the FCNM and the ECRML, which leave the contracting states freedom to determine which minorities they want to protect. This results in exclusion of some minorities from the protection afforded to others. Following the suggestion of the Advisory Committee on the FCNM, Poland could become more engaged in protection of the Silesian minority even without legally recognizing its distinct ethnic status.

It results from the above considerations that the French constitutional tradition of a unitary state is in principle much more hostile to the recognition of national and linguistic minorities than the Polish one. In practice however, the protection of linguistic minorities in Poland requires some further improvements in order to fully reflect the state's constitutional openness to the existence of minorities within the nation.

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