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MINORITY PROTECTION IN GERMAN-POLISH RELATIONS – HISTORICAL INFLUENCE AND CURRENT RELEVANCE

Abstract: *The anniversaries of the 1970 Warsaw and the 1990 2+4 Treaties give occasion to revisit the matter of minority protection in German-Polish relations. The interwar system established a problematic unevenness that tainted its acceptance, particularly from the Polish perspective. After 1990 the minority issues achieved an increased, albeit moderate, relevance in German-Polish relations. To some extent the 1991 Polish-German Treaty on Good Neighbourly Relations and Friendly Co-operation retains the unevenness of the inter-war period, as Art. 20(1) recognizes a German minority in Poland, but refuses to acknowledge a Polish minority in Germany. However, currently the thorniest issues concern various situations related to the "Silesians" in Poland, which the Polish government does not recognize as a protected minority under the European Council Framework Convention for the Protection of National Minorities.*

Keywords: minorities, inter-war period, 1991 Polish-German Treaty, Framework Convention for the Protection of National Minorities

INTRODUCTION

Minority protection – a topic that was front and centre in German-Polish relations in the inter-war period – has received much less attention since the end of the Second World War. However, the anniversaries of the 1970 Warsaw[1] and the 1990

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[1] Treaty between the Federal Republic of Germany and the People's Republic of Poland Concerning the Basis for Normalizing Their Mutual Relations (signed on 7 December 1970) 830 UNTS 327.

2+4 Treaties,[2] milestones in the improvement of a historically strained relationship, offer the occasion for an inquiry into the current relevance of minority protection in the relations between both countries.

In the following, I first explain the challenges of defining "minority" in international law (Section 1). Thereafter, the historical development of minority protection, with a particular focus on Germany and Poland, will be traced from the inter-war period (Section 2) to the end of the Cold War (Section 3.1) and until today (Section 3.2). In Section 4, I discuss current challenges in German-Polish relations pertaining to minority issues, focusing on the (non-)recognition of the Polish minority in Germany (4.1); the special situations of Silesians in Poland (4.2); as well as an ongoing dispute over a territorial and administrative reform affecting the rights of the German minority in the Opole (Oppeln) region (4.3). Section 5 concludes this contribution.

1. (NOT) DEFINING "MINORITY" IN INTERNATIONAL LAW

The search for a definition of what constitutes a "minority" for the purposes of the present discussion – usually the starting point of a doctrinal inquiry into any legal matter – already gives us pause. No definition of the term has been universally accepted.[3] Neither the heyday of minority protection in the inter-war period;[4] nor the negotiation, adoption and discussion of the central post-1945 instruments on minority protection; nor Art. 27 of the International Covenant on Civil and Political Rights (ICCPR);[5] nor the European Council Framework Convention for the Protection of National Minorities (FCNM)[6] have filled this void. However, since the 1920s, it has been established that minority protection is built on two central

[2] Treaty on the Final Settlement with Respect to Germany (signed on 12 September 1990), 1696 UNTS 115.

[3] *See e.g.* R. Hofmann, *Menschenrechte und der Schutz nationaler Minderheiten*, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 587 (2005), p. 599; R. Hofmann, *Minderheitenschutz in Europa – Überblick über die völkerrechtliche Lage*, 52 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 (1992), p. 2; C. Henard, *Minorities, International Protection*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), para. 1.

[4] *Cf.* A. Meijknecht, *Minority Protection System between World War I and World War II*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022); G. Dahm, *Völkerrecht* (1st ed.), W. Kohlhammer, Stuttgart: 1958, Vol. I, pp. 393 et seq.; H. Lauterpacht, *Guggenheim's International Law* (8th ed.), Longmans, Green & Co., London: 1955, Vol. I – Peace, pp. 711 et seq. *See also infra* Section 2.

[5] International Covenant on Civil and Political Rights (signed on 16 December 1966), 999 UNTS 171 and 1057 UNTS 407. *See also infra* Section 3.1.

[6] European Council Framework Convention for the Protection of National Minorities, 1 February 1995, ETS No. 157. *See also infra* Section 3.2.

pillars, as famously summarized by the Permanent Court of International Justice (PCIJ) in 1935 in the *Minority Schools in Albania* Advisory Opinion:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The *first* is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect *equality* with the other nationals of the State.
>
> The *second* is to ensure for the minority elements suitable means for the *preservation of their racial peculiarities, their traditions and their national characteristics*.
>
> These two requirements are indeed *closely interlocked*, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[7]

Thus, equality and identity form the core principles of minority protection.[8] The equality principle means substantive equality, i.e. not the obligation to treat everybody exactly the same but rather to take into account the relevant and often differing circumstances, which might even necessitate differential treatment.[9] The identity principle requires respect for a minority's specific and separate identity – in religious, cultural, linguistic or other forms.[10] These two principles, as the PCIJ noted in the above-cited *Albanian Minority Schools* case, are interlinked, since denying the minority's identity automatically amounts to discrimination, and unequal treatment affects minority identity.

However, the quote above indicates further central characteristics of minority protection, which pertain to its relationship to human rights protection. International and regional human rights instruments focus on the individual. Human beings enjoy

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[7] PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, PCIJ Series A/B No. 64, p. 17 (emphases added).

[8] *See also* Henard, *supra* note 3, para. 21.

[9] *Ibidem*.

[10] *Cf. e.g.* R. Hofmann, *Minorities, European Protection*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), paras. 21 et seq.

human rights for the mere sake of their individual existence.[11] By contrast, minority rights, through their element of minority identity, require group membership and thus have a collective side to them.[12] Therefore, minority rights may display both individual and collective aspects: the rights of the individual to identify as part of a minority and be treated equally, as expressed for example in Art. 27 ICCPR;[13] and the right of the minority as a collective to respect for their identity and equality.[14] In addition to, and as a consequence of the aforesaid, minority protection inheres a rationale beyond that of international human rights protection. Minorities are protected not merely for the sake of their existence, but furthermore because their protection is pivotal for the maintenance of international peace and security.[15] Hence besides serving individual and group interests, minority rights also serve the general interest of states in ensuring that their populations, both majority and minority, "liv[e] peaceably alongside" each other and "co-operat[e] amicably",[16] as clashes between ethnic, religious or other minorities have historically been an important root cause for war and other armed conflicts.[17]

While a universally accepted definition of "minority" is still lacking, and the most important international and regional instruments, such as Art. 27 ICCPR and the FCNM, merely employ the term without undertaking to define it, two points deserve emphasis. First, an attempt to provide a definition by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the (then) UN Human Rights Commission,[18] has received the most widespread recognition in practice and scholarship.[19] According to the criteria he laid out, a "minority" has both objective and subjective characteristics.[20] Objectively, a minority denotes a group that is numerically inferior to the rest of the population, with ethnic, religious, or linguistic features different from the rest of the population and with a non-dominant position within the state, but whose members are citizens of that state. Subjectively, there needs to exist "a will on the part of the members of the

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[11] For a *locus classicus see* H. Lauterpacht, *An International Bill of the Rights of Man*, Oxford University Press, Oxford: 2013 (reprint of the 1945 edition); H. Lauterpacht, *International Law and Human Rights*, Stevens & Sons, London: 1950.

[12] *Cf.* D. Kugelmann, *Minderheitenschutz als Menschenrechtsschutz – Die Zuordnung kollektiver und individueller Gehalte des Minderheitenschutzes*, 39 Archiv des Völkerrechts 233 (2001), p. 234.

[13] *Ibidem*, pp. 240 et seq.

[14] *See* with respect to the international system for minority protection of the inter-war period, Meijknecht, *supra* note 4, paras. 6 et seq.

[15] Hofmann, *supra* note 3, p. 588.

[16] *Minority Schools in Albania*, p. 17.

[17] Hofmann, *supra* note 3, p. 588.

[18] *See* F. Capotorti, S*tudy on the rights of persons belonging to ethnic, religious and linguistic minorities*, United Nations, 1979, E/CN.4/Sub.2/384/Rev.1, in particular p. 96.

[19] *Cf. e.g.* Hofmann, *supra* note 10, para. 4; *see also* A. v. Arnauld, *Völkerrecht* (4th ed.), C.F. Müller, Heidelberg: 2019, pp. 350 et seq.

[20] *See* Capotorti, *supra* note 18, p. 96; *see also* Henard, *supra* note 3, paras. 4 et seq.

group to preserve their own characteristics",[21] in other words a feeling of identity and solidarity.[22] Second, inasmuch as there is no universally accepted definition thereof, and since international instruments (speaking here within the European context) use the term "minority" but do not attempt to provide a definition for the purposes of a given agreement,[23] it has been widely accepted that while self-identification should be taken into account, in the end what constitutes a "minority", and who belongs to such a group, remains within the appreciation of the member states to these instruments, notably as regards the FCNM.[24]

2. THE HISTORICAL BAGGAGE OF MINORITY PROTECTION FROM THE INTER-WAR PERIOD

Minority protection, particularly in the Polish-German context, has a complicated history. While the historical precursors of minority protection, then mainly concerned with religious minorities, date back to the Edict of Nantes (1598), the Peace Treaty of Westphalia (1648) and the Treaties of Vienna (1615) and Karlowitz (1699) between the German and Ottoman Empires,[25] the first system of international protection of the rights of *national* minorities was created in the aftermath of the First World War. The post-1919 order, built around the Versailles Treaties and the League of Nations, re-adjusted large parts of territories – located mainly in Eastern Europe – as a consequence of the fall and/or disintegration of the German, Austrian and Ottoman Empires. Both the new states which were created and the old ones which were re-established (like Poland) faced the challenge of dealing with considerable national minorities, perhaps most notably the Germans in Poland. The inter-war system of international minority protection was built on treaties – or on sections in broader peace treaties – with these so-called "new" states, including *inter alia* Poland, Yugoslavia, Czechoslovakia, Bulgaria, Romania and Hungary.[26] The system was built around the "guarantee of the League of Nations":[27] The League warranted the inviolability of minority rights, requiring the approval of the majority of the League Council to modify them; and the League, through its Council, was

[21] Capotorti, *supra* note 18, p. 96.

[22] Arnauld, *supra* note 19, p. 351.

[23] For a somewhat differing view under Art. 27 ICCPR, *see CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, adopted at the Fiftieth Session of the Human Rights Committee, 8 April 1994, CCPR/C/21/Rev.1/Add.5.

[24] *Cf.* Henard, *supra* note 3, para. 15; Hofmann, *supra* note 3, pp. 599 et seq.

[25] *Cf.* for further references, Henard, *supra* note 3, paras. 30 et seq.; Hofmann, *supra* note 10, paras. 8 et seq.

[26] *Cf.* Meijknecht, *supra* note 4, paras. 10 et seq.

[27] *Cf. e.g.* Art. 12(1) of the Treaty between the Principal Allied and Associated Powers and Poland (signed at Versailles on 28 June 1919).

to ascertain the observation of these rights by way of a petition system, with the possibility to ultimately submit the matter to the PCIJ, which frequently had to deal with minority matters in various Advisory Opinions and judgments.[28]

Therefore, the post-First World War system of minority protection had two built-in major deficiencies. First, it relied on an ineffective petition system (between 1919 and 1939 only 16 out of 758 admissible petitions reached the agenda of the League Council), which was further limited because a direct path to the PCIJ as the principal judicial organ of the League – by its nature an inter-state court that could hear only inter-state cases and issue advisory opinions upon requests by the League Assembly and Council – was foreclosed to the minorities themselves.[29] Second, and more importantly, while seeking to establish a system premised on the principle of equality (i.e. of minorities),[30] the minority system instituted among the states was itself built on inequality. Some states were more equal than others, i.e. whereas the "new" states, such as Poland, had to submit themselves to the rules of minority protection, the old established states, notably the Allied and Associated Powers, were not subject to the same obligations regarding minorities in their territories. Such built-in inequality in a system that proclaimed to be premised on the principle of equality naturally undermined and discredited itself – and the legal norms of minority protection with it.[31] The states that had to adhere to it, like Poland, perceived the minority protection system of the inter-war period as an infringement on their sovereignty or, in turn, as an illustration of their inferior position in the concert of states in comparison to the exclusive club of the Allied and Associated Powers.[32] Thus, it should come as no surprise that from the outset the minority protection system generated a considerable amount of hostility and spurred efforts to circumvent it, or even outright boycott it;[33] as Poland opted to do from 1934 onwards.[34] This doomed the system[35] even before it eventually collapsed with the outbreak of the Second World War.

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[28] For a list of these cases, *see* Meijknecht, *supra* note 4, paras. 24 et seq.; *see also* G. Alfredsson, *German Minorities in Poland, Cases Concerning the*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022).

[29] Meijknecht, *supra* note 4, paras. 21 et seq.

[30] *See supra* Section 1 for further explanation.

[31] *See also* S. Sierpowski*, Die Stellung Polens zu den Bestimmungen des Völkerbundes über die nationalen Minderheiten*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 43.

[32] *See* Meijknecht, *supra* note 4, para. 9.

[33] *Ibidem*, paras. 26 et seq.

[34] *Cf.* C.A. Macartney, *National States and National Minorities*, Russell & Russell, New York: 1968, p. 503.

[35] *See e.g.* D. Blumenwitz, *Minderheiten und Volksgruppenrechte – Aktuelle Entwicklung*, Kulturstiftung d. dt. Vertriebenen, 1992, p. 39. However, for a more nuanced view, also emphasizing some successes of the inter-war minority protection system, *see* S. Bartsch, *Erfolge im Schatten des Scheiterns – Das Minderheitenschutzverfahren des Völkerbundes*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, pp. 67 et seq.

3. MINORITY PROTECTION AFTER 1945

The development of international and regional minority protection after the Second World War may be roughly sub-divided into two periods. The first spans from 1945 until the end of the Cold War (Section 3.1), and the second encompasses the three decades since then (Section 3.2).

3.1. Minority Protection until 1990

As explained above,[36] the unequal application of a system built on the rationale of equality discredited not only the League minority protection system, but also tainted the idea of "minority" group protection for several decades after 1945. While after the First World War emphasis was put on minorities as a collective, and these were protected as groups rather than as individual members belonging to a specific minority, the post-1945 thinking focused on the individual. The earlier post-1919 group focus was perceived as spurring, instead of taming, national tensions and threatening, instead of fostering, peace and security, particularly in Eastern Europe. Therefore, the Universal Declaration of Human Rights (UDHR) of 10 December 1948 did not make mention of minorities and minority protection, but limited itself strictly to laying out the rights of individuals rather than of groups or persons belonging to groups. Given the hostility towards the League's minority protection system, this omission was not accidental, although neither was it considered or intended to leave a considerable gap in protection. Rather, "[t]his absence [...] reflected the then prevailing attitude that international protection of minority rights, construed as group rights, could be supplemented by an effective system of human rights protection based on individual rights [...]."[37] Consequently, minority protection was left out of the post-Second World War peace treaties; and the 1948 UDHR as well as the 1950 European Convention on Human Rights (ECHR) merely contain provisions, in Art. 2 UDHR and Art. 14 ECHR respectively, pertaining to the right of the individual to non-discrimination.

On the factual side of things, one may add the almost cynical observation that the adoption of such an individualistic view and the refusal to establish any international minority protection system resembling the inter-war order was made possible by the *fait accompli* of the devastation of the Second World War and the Holocaust. Religious minorities, notably of Jewish faith, had either emigrated or had been killed, and national minorities had been considerably reduced to a fraction of their pre-1939 numbers. Taking Poland as the prime example, within less than a decade

[36] *See supra* Section 2.

[37] Hofmann, *supra* note 10, para. 11.

it had been turned from a multi-ethnic, multi-national and multi-religious country into a largely homogenous state in terms of ethnicity, nationality and religion.[38]

Nevertheless, in the 1960s the view started to take hold that a radical individualism was unable to capture certain needs for protection in the light of wide-spread discrimination based on race, ethnicity, religion and nationality, among others. Hence, in the mid-1960s, the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in 1965 and of the ICCPR in 1966 (in force since 1976) brought about some change. The CERD Committee has since then interpreted the provisions of CERD, particularly Art. 5, in order to safeguard minorities beyond their mere protection against individual discrimination.[39] Even more importantly, Art. 27 ICCPR enshrines an individual human right of "persons belonging to [ethnic, religious or linguistic minorities] not to be denied [...], in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." To some extent, Art. 27 ICCPR is a compromise between a collective and an individual view of minority rights. Although framed as an individual right of each member of the minority, it acknowledges and relies on the collective element of belonging to a group that shares certain common aspects and identity, and the right to live according to such aspects and identity. However, it is noteworthy that Art. 27 ICCPR mentions ethnic, religious and linguistic, but not national, minorities.

The 1975 Helsinki Final Act of the then Conference on Security and Co-Operation in Europe (CSCE) demonstrates, however, a change in the way of thinking about minority protection, explicitly recognizing the obligation of each state to respect the rights of national minorities on their territories and granting them equality before the law.[40] Still, the Warsaw Treaty of 1970[41] did not make mention of the protection of minority rights. This was primarily because of the political and historical baggage associated with minority rights during the inter-war period, which the German and Polish governments intended not to let burden the more pressing issue of a border agreement – and also because of the above-mentioned fact that the atrocities of the Second World War and its aftermath made the minority issue less pivotal than it had been during the inter-war period following 1919.

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[38] *See e.g.* P. Eberhardt, *Ethnic Groups and Population Changes in Twentieth Century Eastern Europe – History, Data and Analysis*, Routledge, London: 2015, pp. 74 et seq., 112 et seq., 137 et seq.

[39] *See* Hofmann, *supra* note 10, para. 12.

[40] *See* Conference on Security and Co-Operation in Europe, Final Act, Helsinki, 1 August 1975, p. 6.

[41] For a near-contemporaneous assessment of the Warsaw Treaty five years after its adoption, *see* H.-A. Jacobsen, *Fünf Jahre Warschauer Vertrag: Versuch einer Bilanz der Beziehungen zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen 1970-1975*, 58 Die Friedens-Warte 161 (1975).

3.2. Minority Protection since 1990

As was the case with many other legal and political areas, the end of the Cold War circa 1990 brought about significant changes in the system of minority protection, most notably in the German-Polish relations which are of particular interest for the present inquiry. Again, it was the CSCE that led the way for the promotion of minority rights. The June 1990 Concluding Document of the Copenhagen Meeting of the CSCE (Copenhagen Final Document) sets out, in its part IV, an elaborate list of rights of "persons belonging to national minorities" – thereby maintaining an individualistic approach to minority protection.[42] Para. 30 of the Copenhagen Final Document notes – in the spirit of the inter-war minority protection system – that "respect for the rights of persons belonging to national minorities [...] is an essential factor for peace, justice, stability and democracy in the participating States."[43] It also acknowledges, in a similar vein, the two central principles of minority protection, i.e. equality and identity.[44] This includes recognition that positive measures may be needed in order to warrant equality.[45] The Copenhagen Final Document also emphasizes that it is for each person to determine, upon their "individual choice", whether or not they "belong to a national minority".[46] In its following paragraphs it details the protected rights of persons belonging to national minorities, including the right to use freely their mother tongue in public and private relations, and to establish and maintain educational, cultural and religious institutions, organizations or associations, and to maintain unimpeded contacts with members of their minority within and outside their country.[47] Furthermore, the Document condemns and vows to take positive actions to prevent the root causes of minority discrimination, such as "racial and ethnic hatred, anti-semitism" or "xenophobia".[48] The 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (DRM) warrants similar rights and guarantees on the international level, along the lines of Art. 27 ICCPR.[49]

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[42] Concluding Document of the Copenhagen Meeting of the Conference on Security and Co-Operation in Europe, Copenhagen, 29 June 1990, paras. 30-40.

[43] *Ibidem*, para. 30.

[44] *Ibidem*, paras. 31, 32 (chapeau) and 33.

[45] *Ibidem*, para. 31.

[46] *Ibidem*, para. 32.

[47] *Ibidem*, paras. 32.1-32.6.

[48] *Ibidem*, para. 40.

[49] *See* United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135 of 18 December 1992.

Insofar as regards German-Polish relations after the fall of the Berlin Wall, while the 2+4 Treaty[50] did not address issues of minority protection, the 1991 Polish-German Treaty on Good Neighbourly Relations and Friendly Co-operation[51] contains, in its Arts. 20-22, several detailed provisions on minority protection (in particular Art. 20(3)), as well as positive obligations of both countries for the promotion of the persons protected under the Treaty (Art. 21). Art. 20(2) of the Treaty refers to the international standards of minority protection as acknowledged and developed in a number of treaties and instruments since 1945, including the UDHR, the ECHR, the ICCPR, the Helsinki Final Act and the Copenhagen Final Document, emulating the list of protected rights in Art. 20(3) as set out in the latter.[52] In the spirit of Art. 27 ICCPR and the Copenhagen Final Document, the 1991 Treaty takes an individualistic approach,[53] once again on the basis of the principles of equality and identity.[54] However, despite displaying all the characteristics of post-1945 international minority protection, there is nevertheless a remnant of the inter-war inequality left in the 1991 Polish-German Treaty. As an attentive reader of Art. 20(1) will detect, whereas it establishes the mutual obligations of the German and Polish states to respect and promote the rights enshrined in Arts. 20 and 21 of the Treaty, with respect to Poland it warrants these rights for "persons belonging to the German minority in Poland", while in relation to Germany it does so only regarding "persons of German citizenship with Polish ancestry." Thus, the Treaty acknowledges a German national minority in Poland, but does not do the same with respect to persons of Polish origin residing in Germany.[55] While this is arguably of no significance regarding the individual rights guaranteed by the Treaty,[56] such a distinction, as will be demonstrated subsequently,[57] is of political relevance in German-Polish relations, as well as of legal relevance with respect to the currently most important regional instrument for the protection of minority rights in Europe, i.e. FCNM.

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[50] However, it constituted the political prerequisite for striking an agreement between the two nations; see J. Barcz, *Den Minderheitenschutz Betreffende Klauseln in den neuen bilateralen Verträge Polens mit den Nachbarstaaten*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 282.

[51] Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourship and Friendly Cooperation (signed on 17 June 1991), 1708 UNTS 463.

[52] *Cf.* the almost identical wording in paras. 32.1-32.6 of the Concluding Document of the Copenhagen Meeting of the Conference on Security and Co-Operation in Europe.

[53] *See also* W. Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 American Journal of International Law 163 (1992), p. 170.

[54] *Cf.* Art. 20(1). *See also supra* Section 1.

[55] *Cf. also* Blumenwitz, *supra* note 35, pp. 82 et seq.

[56] However, for a nuanced discussion on the matter *see* Barcz, *supra* note 50, pp. 291 et seq.

[57] *See infra* in this section as well as Section 4.1.

Greeted with considerable scepticism around the time of its adoption,[58] this Convention, binding on all members of the Council of Europe (CoE), including Poland and Germany, has become, over the course of the past 20 years, the centrepiece of minority protection in Europe.[59] Unlike its CoE sister, the European Charter for Regional or Minority Languages,[60] it approaches matters of minority protection by applying a broader thematic scope, and thus gives rise to a wide array of rights, ranging from, *inter alia*, political and media (Art. 9) to linguistic (Art. 10 and 11) and educational rights (Art. 12-14). Moreover, it provides, in Arts. 24-26 FCNM, procedures for evaluation and implementation, whereby CoE Member States are required, pursuant to Art. 25 FCNM, to submit detailed reports every five years on the status of protection of the rights enshrined in the FCNM. The CoE Council of Ministers is entrusted with monitoring the rights' protection in each Member State (Art. 24 FCNM) and evaluating "the adequacy of the measures taken" by each Member State (Art. 26 FCNM).[61] Together with the 1991 Polish-German Treaty, the FCNM constitutes the central instrument of minority protection in Germany and Poland, and therefore will serve as the main yardstick for evaluating the role and relevance of minority rights in present-day German-Polish relations.

4. THE CURRENT RELEVANCE OF MINORITY PROTECTION IN GERMAN-POLISH RELATIONS

Issues relating to minority rights in present-day German-Polish relations pertain to a wide array of matters. This section presents a selection of some of the most important issues. After examining the overall situation with respect to minority rights protection of mutual relevance in both countries (with a specific emphasis on the German policy towards recognizing a Polish minority in Germany) (4.1), the inquiry turns to two more specific matters: the special situation of the Silesians in Poland (4.2); and the recent dispute over the land and administrative reform in and around the city of Opole (Oppeln) (4.3). As mentioned above, the focus will be on the rights enshrined in the FCNM, with occasional references to those contained in the 1991 Treaty. An important source of information will thus be the most recent country reports and opinions of the Advisory Committee under the auspices of the FCNM.

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[58] *See* R. Hofmann, *Die Rolle des Europarats beim Minderheitenschutz*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 145.

[59] *See*, nine years later, R. Hofmann, *Menschenrechte und der Schutz nationaler Minderheiten*, 65 Zeitschrift für ausländisches *öffentliches* Recht und Völkerrecht 587 (2005), p. 587.

[60] European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, ETS No. 148.

[61] *See also* Hofmann, *supra* note 10, paras. 33 et seq.

4.1. The Overall Situation

The central aspect of minority protection in German-Polish relations with respect to Germany is that, from the persistent perspective of the German government, there is no such thing as a Polish national minority in Germany.[62] This reflects the position expressed in the previously-noted different wording of Art. 20(1) of the 1991 Treaty[63] and pertains in particular to the scope of protection under the FCNM. According to Art. 3(1) of the FCNM, "[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice." However, it has been the constant position of the German government since signing and ratifying the FCNM that since the FCNM does not provide for a definition of "national minority", "[i]t is therefore up the individual Contracting Parties to determine arbitrarily the groups to which the Framework Convention shall apply after ratification."[64] According to the German government, only autochtonous minorities fall within the purview of the FCNM, meaning that population groups, in order to be recognized as national minorities in Germany, must meet five criteria:

- "the members of the group are German nationals;
- they differ from the majority population in that they have their own language, culture and history, i.e. their own identity;
- they wish to maintain this identity;
- they have traditionally been resident in Germany (in most cases, for centuries) and
- they live in Germany within traditional settlement areas."[65]

Since German citizens of Polish origin in Germany do not fulfill the latter two criteria – in particular they have not been traditionally resident in Germany for centuries,[66] – the German government does not regard them as a national minority for the purposes of the FCNM.[67] Consequently, there persists an unevenness, or inequality if you will, in German-Polish relations on minority matters: Polish citizens

[62] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, Fifth Report submitted by Germany, pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities – received on 31 January 2019, ACFC/SR/V(2019)001, pp. 131 et seq.

[63] *See supra* Section 3.1.

[64] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 62, p. 131.

[65] *Ibidem*, p. 132.

[66] Citizens of Polish origin traditionally settling in parts of the German Reich, as in Upper Silesia or East Prussia, are not covered by the Convention, as these regions are no longer part of German territory, *cf. ibidem*.

[67] *Cf. ibidem*.

of German origin enjoy minority status under the FCNM in Poland;[68] while German citizens of Polish descent lack such status under the Convention in Germany.

As regards the overall situation of persons belonging to the German minority in Poland, besides the matters pertaining to the Silesians and the Opole dispute (which are addressed in specific sub-sections), the picture is a mixed one. As has been said, Poland recognizes a German minority in Poland,[69] which comprises roughly 150,000 people, or 0.4% of the overall Polish population, with more than half of them resident in the Opole area.[70] Polish law provides them with minority protection, most notably in Art. 35 of the Polish Constitution of 1997 and the 2005 Act on National and Ethnic Minorities and on the Regional Languages (2005 Polish Minorities Act).[71] An attempt to overhaul the Act failed after the adoption of an amendment by the Sejm was vetoed by the President of the Republic in 2015.[72] The FCNM Advisory Committee Opinion on Poland of 6 November 2019 recognizes the continued access of persons belonging to national minorities, including the German minority, to the rights enshrined in the FCNM through the 2005 Act and other instruments, and particularly emphasizes that funds spent on minority language teaching have been increased, leading to a 65% rise in the number of students learning German.[73] On the other hand, the Opinion also notes that there remains "a persistent if not worsening situation for [...] minorities, including from political figures, but also at the level of social interaction, in schools or bars or restaurants."[74] Moreover, members of the "German minority [...] have been targeted by extremist groups owing to their association with a neighbouring state."[75]

4.2. The Special Situation of the Silesians

With its long-standing Polish, Austrian and Prussian influences, Silesia and the Silesians constitute a special case. While traditionally settled by Germans since the Middle Ages, the territory of Silesia has changed hands many times, notably from Habsburg Austria to the Prussia of Frederick the Great, back to Poland after the

[68] However, regarding the special case of the Silesians in present-day Poland, *see infra* 2.

[69] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Poland – adopted on 6 November 2019, ACFC/OP/IV(2019)003, pp. 2, 8. *See also* Art. 20(1) of the Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourship and Friendly Cooperation.

[70] Deutscher Bundestag, Wissenschaftliche Dienste, *Die deutsche Minderheit in Polen*, WD 2 – 3000 – 022/18, 20 March 2018, p. 4.

[71] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 4.

[72] *Ibidem*, p. 5.

[73] *Ibidem*, pp. 5 and 37.

[74] *Ibidem*, p. 6.

[75] *Ibidem*.

First World War , back again to the German Reich during the Second World War, and back again to Poland after 1945. The situation post-1945 led many Silesians to immigrate to Germany and many ethnic Poles to move to Silesia.[76] Given its close historical link to Germany and its high historical importance in German-Polish relations, notably in the inter-war period,[77] I devote a few lines to the current situation of the Silesians in Poland.

An ongoing dispute over Art. 3 FCNM pertains to whether or not to recognize the Silesians as a national minority in Poland. According to the 2011 Polish census, no less than 846,700 persons identified as Silesians, "far more than for any of the recognized minorities" in Poland.[78] As with the German citizens of Polish descent in Germany,[79] the issue of Silesians' minority status is thus a politically sensitive one, given the sizable number of persons belonging to these groups and the considerable legal and administrative consequences following a recognition of their minority status under the FCNM. While many Silesians perceive themselves as separate – in terms of language, culture, and tradition – from Poles (or even Germans for that matter), the Polish government disagrees, holding "that the language, culture and tradition of Silesians are not separate from the Polish language, culture and tradition but rather form 'an integral part thereof' and that Silesian is a variant of the Polish language."[80] Similarly to the discussion with respect to the German citizens of Polish descent in Germany, the lack of an authoritative and universally-accepted definition of "national minority" in the FCNM leads to tensions between the margin of appreciation of FCNM member states to determine what constitutes a national minority for the purposes of the FCNM, and the right of free self-identification enshrined in Art. 3 FCNM.

An interesting aspect of the minority rights of Silesians was brought before the European Court of Human Rights (ECtHR) in the case of *Gorzelik and Others v. Poland*. In this dispute the applicants alleged a breach of Art. 11 of the ECHR because they had been refused permission to register an association called "Union

[76] For a brief summary of the history of Silesia, *see* ECtHR (GC), *Gorzelik and others v. Poland* (App. No. 44158/98), 14 February 2004, para. 13.

[77] For a comparison of selected cases and advisory opinions pertaining to various German interests in Upper Silesia, *see* M. Hartwig, I. Seidl-Hohenveldern, *German Interests in Polish Upper Silesia Cases*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022); *see also* Alfredsson, *supra* note 29.

[78] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 8.

[79] *See supra* Section 4.1.

[80] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 8; *see also* Advisory Committee on the Framework Convention for the Protection of National Minorities, Comments of the Government of Poland on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Poland – received on 6 April 2020, GVT/COM/IV(2020)002, p. 10.

of People of Silesian Nationality."[81] The Grand Chamber declined to address the specific matter whether the Silesians qualified as a "national minority", focusing instead on the matter at issue, i.e. whether the association should have been registered under the above denomination and thus as an "association of a national minority", which under Polish law entails certain further privileges, including with respect to national and local elections.[82] The Court emphasized that determining what constitutes a "national minority" "must, by the nature of things, be left largely to the State concerned,"[83] for no international instrument, including the FCNM, authoritatively defines the term.[84] Moreover, the Court found that the Polish authorities had not denied a group of Silesians to form any kind of association, but rather merely this specific kind of association, which recognized their minority status. Moreover, it held that Poland did neither infringe upon the association's right to speak on behalf of the minoritynor violate certain electoral privileges, such as the right of members of the association to run as candidates in elections as members of the association and thus, in turn, as representatives of the minority. In the opinion of the Polish authorities, this would have sparked unrest among many other groups claiming the same status and therefore led to considerable tensions within Poland, let alone to pressure to acknowledge a wide range of other groups as "national minorities" against the official policy of the Polish government. The Court accepted Poland's assessment as falling within its margin of appreciation.[85] Consequently, it declined to find a violation of Art. 11 in the *Gorzelik* case.

4.3. The Opole Dispute

In recent years a dispute has arisen pertaining to the situation of the German minority in the region of the city of Opole (Oppeln), where over half of the people identifying themselves as belonging to the German minority in Poland reside. The FCNM Advisory Committee Opinion on Poland of November 2019 describes the dispute in the following terms:

> With effect from 1 January 2017, nine localities in three municipalities (Dobrzeń Wielki, Komprachcice, and Prószków) which are on the Official Register for German as a supporting language, were incorporated into the city of Opole. Opole has only a small German minority population [...]. This administrative-territorial reform has also led to a lower percentage of persons identifying with the German minority in the remainder of

[81] ECtHR (GC), *Gorzelik and Others v. Poland* (App. No. 44158/98), 14 February 2004, para. 3.
[82] *Ibidem*, para. 105.
[83] *Ibidem*, para. 67.
[84] *Ibidem*, para. 68.
[85] *Ibidem*, para. 105.

> these three municipalities. Two additional localities with a significant German minority population were incorporated into the city of Opole.[86]

The administrative reform, incorporating several municipalities with a high percentage of persons belonging to the German minority into the larger city of Opole, which has only a small percentage of such persons, has an effect on several rights enshrined in the FCNM.

Art. 10 of the FCNM grants national minorities the right to use their minority language in relations with the administrative authorities. The 2005 Polish Minorities Act permits registration in the Official Register of those municipalities where persons belonging to a certain national minority constitute at least 20% of the local population.[87] Due to the territorial reform in the Opole region, the overall percentage in what now has become part of the city of Opole is below the 20% threshold, meaning that in the said municipalities now incorporated in the city of Opole the German minority effectively loses its right to use German in their dealings with administrative authorities. Similarly, the 2005 Polish Minorities Act requires a 20% threshold for topographical indications such as town signs to also be mandatory in the minority language, with the administrative reform in Opole thus leading also to such topographical signs being taken down in nine municipalities, which concerns the corresponding right under Art. 11 of the FCNM.[88]

Most critically in terms of the present dispute, Art. 16 of the FCNM provides that: "The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention."

The territorial and administrative reforms in Opole have had the effect that "following the 2018 municipal elections, representatives of the German minority in [the] former villages have no representative in the Opole City council, while they used to have several in the municipalities to which they previously belonged."[89] Moreover, the replacement of bilingual town signs in several localities and municipalities due to their falling below the 20% threshold after the incorporation in the city of Opole is also relevant in terms of the guarantees of Art. 16 of the FCNM.

Overall, the Polish authorities have underlined that the administrative and territorial reform in the Opole region was undertaken solely for economic motives,

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[86] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 30, para. 115.

[87] *Ibidem*, p. 30, para. 113.

[88] *Ibidem*, pp. 31-32, paras. 120, 122.

[89] *Ibidem*, p. 45, para. 182.

intended to "contribute to the development of Opole, and consequently the entire region."[90] However, the reform was carried out in a very short time frame (18 months from its announcement to its entry into force), and notwithstanding the fact that local consultations demonstrated the "overwhelming opposition" of the local population in the affected towns and villages.[91] The Opole dispute has led to the most significant tensions in German-Polish relations regarding minority issues in recent years, and will continue to be of relevance in the upcoming years.

CONCLUDING REMARKS

Minority protection, discredited by the deficient League system of the inter-war period[92] and dormant for most of the Cold War,[93] has since 1990 achieved an increased, albeit moderate, relevance in German-Polish relations, both legally and politically. Insofar as regards the scope of protection, the most important instruments are the 1991 German-Polish Treaty and the 1995 FCNM, the latter in force with respect to Poland since 2001 and with respect to Germany since 1998.[94]

However, issues pertaining to minority status and their scope of protection in German-Polish relations retain an element of the inglorious post-1919 era, since they continue an aspect of unevenness that has the potential to strain the bilateral minority protection regime: Polish citizens of German origin enjoy minority protection; whereas German citizens of Polish descent in Germany do not. This is particularly due to the lack of a definition of "minority" in the FCNM, thus granting to each Member State considerable margin of appreciation in defining which groups it treats as a "national minority" and which it does not.[95]

In current German-Polish relations, besides the German refusal to recognize a Polish minority in Germany and the Polish refusal to acknowledge a Silesian minority in Poland, the dispute about the Opole administrative and territorial reform constitutes perhaps the most prominent matter of contention regarding minority protection.[96]

[90] *Ibidem*, p. 45, para. 181.
[91] *Ibidem*, pp. 45-46, para. 184.
[92] *See supra* Section 2.
[93] *See supra* Section 3.1.
[94] *See supra* Section 3.2.
[95] *See supra* Section 1 and 4.1. and 2.
[96] *See supra* Section 4.3.