ON SOME RIGHTS OF NATIONAL MINORITIES IN POLAND

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Abstract: **O některých právech národnostních menšin v Polsku**
Tento článek se zabývá vnitrostátní úpravou práva příslušníků národnostních menšin na užívání menšinového jazyka v úředním styku a na vícejazyčné názvy v Polské republice. V první části práce se autor zabývá právní úpravou dvojjazyčných geografických názvů, v druhé části pak právem na užívání mateřského jazyka v řízení před soudy a ve správním řízení. V poslední části autor hodnotí polskou právní úpravu těchto dvou práv národnostních menšin.

Key words: Republic of Poland, national minority, ethnic minority, mother language, the municipal council, court proceedings, administrative proceedings, the right to a fair trial

Klíčová slova: Polská republika, národnostní menšina, etnická menšina, mateřský jazyk, rada obce, soudní řízení, správní řízení, právo na spravedlivý proces

INTRODUCTION

The line of research initiated and conducted by doc. dr. iur. Harald Christian Scheu, Mag. phil., Ph.D. from Charles University in Prague focuses on the status of national minorities and the legal position of diasporas residing outside of their country of origin. Within this scope two issues are of particular importance. Firstly, the problem of bilingual geographical names, and secondly, the rights of minority members, parties in legal proceedings, to use their mother tongue before administrative bodies and courts. Although such substantial issues do not exhaust the complex topic of minority rights, focusing research on these particular issues is fully understandable as they highlight the importance of topography and minority members' procedural rights. These rights are used in practice and are therefore of great importance.

I.

1. The Polish law regulates the matter of national minorities on the constitutional and statutory level with the basis being the Constitution of the Republic of

Poland of 2 April 1997[1] and the Act on National and Ethnic Minorities and Regional Languages.[2] Other legislative acts refer to particular rights of national minority group members.

The following minority members' rights and freedoms are guaranteed by the Polish law: 1) the freedom of sustaining and development of one's language– Article 35 (1) of the Constitution and Article 8 and Chapter 4 of the Act on National and Ethnic Minorities and Regional Language; 2) freedom to maintain customs and traditions, and to develop their own culture – Article 35 (1) of the Constitution, Articles 1–7 of the Act of 17 May 1989 on the Guarantees of the Freedom of Conscience and Faith,[3] Chapter 3 of the Act on National and Ethnic Minorities and Regional Language; 3) the right to establish their own educational and cultural institutions, as well as institutions aiming at the protection of religious identity – Article 35 (2) of the Constitution, Article 13 of the Act of 7 September 1991 on the System of Education,[4] Act on the Guarantees of the Freedom of Conscience and Faith; 4) the right to participate in the resolution of matters pertaining to their national identity – Article 35 (2) of the Constitution, Articles 23–30 of the Act on National and Ethnic Minorities and Regional Languages; 5) the right to use their minority language freely in private life and in public – Article 2 of the Act of 7 October 1999 on the Polish Language,[5] Chapter 2 of the Act on National and Ethnic Minorities and Regional Language; 6) the right to spell their given and last names according to the spelling rules of their minority language – Article 7 of the Act on National and Ethnic Minorities and Regional Language; 7) the right to have access to the public media – Article 54 of the Constitution, Article 21 (2) (9) of the Act of 29 December 1992 on Radio and Television Broadcasting;[6] 8) the right to unrestricted performance of religious practices – Article 53 of the Constitution, Act on the Guarantees of the Freedom of Conscience and Faith; 9) the right to partake in public life and to electoral privileges for election committees of minority organisations – Article 197 of the Act of 5 January 2011 – the Electoral Code;[7] 10) the right of association – Article 58 of the Constitution and Article 1 of the Act of 7 April 1989 on Associations.[8]

In Article 35 the Constitution guarantees Polish citizens belonging to national and ethnic minority groups the freedom of sustaining and developing of their own language, the freedom of sustaining their customs, tradition and the development of their culture, which includes the right to create educational and cultural institutions as well as institutions aiming to protect their religious identity and to solve issues regarding their cultural identity.

The construction of the described Article is twofold. On the one hand the Constitution guarantees certain rights to minority members (Polish citizens), and on the other it

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1 Journal of Laws 78, item 483, as amended; hereinafter: Constitution.
2 Act of 6 January 2005 on National and Ethnic Minorities and on Regional Languages, (Journal of Laws 17, item 141, as amended; hereinafter: Act on Minorities).
3 Journal of Laws No. 231, 2005, item1965, as amended; hereinafter: Act on Freedom of Conscience.
4 Journal of Laws No. 256, 2004, item 2572, as amended; hereinafter: Education Act.
5 Journal of Laws No. 43, 2011, item 224; hereinafter: Act on the Polish Language.
6 Journal of Laws No. 43, 2011, item 226, as amended.
7 Journal of Laws No. 21, item 112, as amended.
8 Journal of Laws No. 79, 2011, item 855, as amended.

offers institutional (the right to create educational and cultural institutions) and procedural guarantees (the right to participate in decision making processes regarding their cultural identity) to minorities as collective entities. It has to be noted, however, that the term "national minority" is contentious and there is a lack of a uniform definition, also in international law. Despite this, the Constitution has made a minority a body subject to law. It is beyond doubt that Article 35 of the Constitution is a source of subjective rights and can form a basis of a constitutional complaint.

2. The issue of bilingual geographical naming is an element of the granted by the Constitution right to sustain one's language (Article 35). However, with regards to the right to use one's language, Article 27 of the Constitution refers to international agreements (among others the Charter[9] and the Framework Convention[10]) and acknowledges the guarantees they include, but does not offer an explanation regarding this law and its elements.

The Act on Minorities stipulates the right to use a minority language, called an auxiliary language, including education through the medium of that language. However, the Act introduces high requirements for the introduction of additional names to appear next to Polish geographical names – traditional town names in a minority language, names of physiographic objects and street names.

3. An auxiliary name of a town or a physiographic object in a minority language can be established at a request of a Municipality Council, provided that the minority constitutes at least 20% of the municipality population. If the given minority does not constitute 20% of the local population, an auxiliary name can be introduced if in consultations held under the procedure established in Article 5a (2) of the Local Government Act of 8 March Act 1990 (Journal of Laws No. 142, 2001, item 1591, as amended), the majority of that municipality population, who took part in the consultations, decide for it. Additionally, the request for introduction of an auxiliary name has to receive a positive opinion of the Commission for Names of Localities and Physiographic Objects, which was established following the Act of 29 August 2003 on Official Names of Localities and Physiographic Objects (Journal of Laws No. 166, item 1612). The number of population belonging to a given minority is understood as the number officially determined by the latest general census.

The number of people eligible to take part in consultations specified in Article 12 (7) of the Act on National and Ethnic Minorities and on Regional Languages, has been limited to inhabitants of a locality in which the auxiliary name is to be introduced. Therefore the right to take part in consultations is not granted to all inhabitants of a municipality, but only to the inhabitants of a given locality.

It has to be noted that the legislator does not require a referendum to be conducted, but only consultations limited to inhabitants of the locality whose name is petitioned to appear in both languages – the official one and in the language of the minority. The vote on the resolution takes place in the council on conditions of a general vote – it is an open vote, and simple majority is sufficient for the resolution to be passed. Such a resolution

[9] European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992).
[10] Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995).

does not constitute local law and therefore does not have to be published in the Official Journal of that Voivodeship.

By introducing obligatory consultations the legislator acknowledged that matters which are to be dealt through them should not be resolved by a simple count of votes for and against. The decision-making authority has the obligation of taking into consideration the arguments of the minority, provided they are supported by valid considerations.

The additional names can only be used in territories of municipalities entered into the Official Register of Municipalities by the competent minister in charge of religious denominations and national and ethnic minorities, and where names are used in the respective minority language. The names cannot refer back to the names given in 1933–1945 by the authorities of the Third Reich and the Union of Soviet Socialist Republics. Auxiliary names are placed after the respective Polish names and cannot be used separately. Furthermore, they can be introduced in the entire territory of a municipality or in selected localities. The establishment of an additional name in a given minority language takes place in accordance with the spelling rules of the given language.

4. The procedure of establishing an additional name consists of several stages. Firstly, the Municipal Council lodges an application on the motion of municipality residents belonging to a minority or on its own initiative, for the establishment of an additional name to the competent minister in charge of religious denominations and national and ethnic minorities through the local governor's office. The application should contain:

– the municipal resolution concerning the establishment of an additional name for a place or physiographical object;
– the correct official name of the place or physiographical object in Polish;
– the proposed additional name in the minority language;
– discussion of the results of the consultation
– information regarding the costs of the introduction of the proposed change.

Next, the local governor is obligated to convey the application to the competent minister in charge of religious denominations and national and ethnic minorities, along with their own opinion of it, no later than within 30 days from the day the motion was introduced to them. The competent minister in charge of religious denominations and national and ethnic minorities then submits the motion for approval to the Committee on Names of Places and Physiographical Objects. As soon as it examines the motion the Committee on Names of Places and Physiographical Objects gives its opinion to the competent minister in charge of religious denominations and national and ethnic minorities through the agency of the competent minister in charge of public administration.

The additional name of a locality or a physiographical object in the minority language can be considered to be established once it is entered into the Official Register. This entry is made by the competent minister in charge of religious denominations and national and ethnic minorities upon being conveyed a favourable opinion of the Committee on Names of Places and Physiographical Objects. However, the competent minister in charge of religious denominations and national and ethnic minorities will refuse entering into the Official Register an additional name of a place or physiographical

object in a minority language or may remove this name from the Register if the name refers to a name used in years 1933–1945, given by the authorities of the German Third Reich or of the Union of Soviet Socialist Republics. Should making such an entry be refused, it is possible to lodge a complaint to an administrative court.

The costs involved in the introduction and the use of a supporting language on the territory of a given municipality and the costs involved in the introduction of additional names in a minority language, are borne by the municipality budget, except for the costs of the change of information boards, resulting from the adoption of an additional name of a place or physiographical object in the minority language – these costs are incurred by the budget of the state.

A separate matter is the scope of the introduced signage in the additional language. It cannot be limited to information boards with town names as it seems appropriate to introduce bilingual signage on train and bus stations, information boards, tourist boards, school boards, shops, leaflets, Internet websites etc.

II.

1. The right of a person unable to use Polish to use their mother tongue in court and administrative proceedings is a subjective right and is of key significance for the realization of the right to trial, proper operation of public administration, and protection of minority members' rights in general, as subjective rights are a safeguard of the proper execution of substantive law.

Foreigners are not the only addressees of this law since the use of a mother tongue is separate from membership to a given country (nationality). The right to use one's mother tongue is to be granted to both a foreigner and a Pole, who use their own language. The condition for taking advantage of this right is the inability to use the language in which a proceeding takes place. By "inability" to use a language we mean the inability to understand and speak, or not being fluent and having problems with expressing one's thoughts.

The content of the discussed subjective rights covers several issues. Above all it is about access to a translator (direct or indirect in case of translation of documents) and presence of a translator during all actions that may influence the future legal situation. Although nonessential acts may be omitted, classifying an action as such is problematic since a seemingly insignificant act in future may turn out to be a source of significant changes of the legal situation. Personal traits of a translator are also of significance – his/her objectivism, education, and preferably knowledge of legal terminology. What cannot be overlooked is the free access to a translator – his/her costs have to be incurred by the state in which the procedure is taking place. Additionally, it has to be stressed that it is the court or administrative authority that bears the responsibility for the analysis of the situation and for the decision on whether there is a need for a translator. In case such a possibility is not used it is their obligation to prove a translator was indeed not needed.

The subjective rights discussed above are not without restrictions. Restrictions depend on the type of the proceedings and may result from the uniqueness of the language

(few translators). If there is a need to use a rare language direct translation may not be possible and relay translation, where several translators are involved, may be needed. A decision against the use of a mother tongue cannot be made on the basis of the speed of the proceeding.

2. There are numerous legal acts, which regulate a minority member's access to a translator in proceedings before administrative authorities or courts.[11] Apart from the already mentioned provisions of the Constitution (in particular Article 35, which states that The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture, and Article 27 which stipulates that Polish is the official language in the Republic of Poland, and that this does not infringe upon national minority rights resulting from ratified international agreements, Article 45 (1) of the Constitution is also of importance as it grants everyone the right to a fair and public hearing of his or her case, without undue delay, before a competent, impartial and independent court. Of equal significance is the provision of the Framework Convention for the Protection of National Minorities adopted in Strasbourg on 1 February 1995, which stipulates that every person belonging to a national minority has the right to his or her minority language, in private and in public, orally and in writing. In relations between administrative authorities and persons belonging to national minorities in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, the Parties of the Convention will endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language if so requested and where such a request corresponds to a real need (Article 10 (1, 2)). Additionally it is necessary to guarantee the right to be informed in a language, which he or she understands (therefore not necessarily in the language of the minority) of the reasons for his or her arrest, and of the nature and cause of any accusation made against him or her (Article 10 (3)).

3. Implementation of the provisions of the Constitution and international law with regards to the use of a mother tongue is scattered and included in many legislative acts. With respect to court proceedings Article 5 of the Law on the System of Common Courts[12] is of significance as it stipulates that a person unable to use Polish satisfactorily has the right to address the court in a language known to them and to use services of a translator free of charge. It should be recognized that this provision broadens its scope through the use of the word "person" and not "foreigner" and through free access to a translator. However, it is not specified what kind of a translator a person can apply for in the proceeding, and it is especially unclear whether he or she should be a sworn translator.

The right to use one's mother tongue is especially important in criminal proceedings[13]. In such proceedings an interpreter should be called if there is a need to question a person who does not know Polish. A translator should also be called if there is a need

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[11] Articles 9 and 10 of the Charter contain an extended regulation regarding this issue.

[12] Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws 2015, item 133, as amended).

[13] Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 89, item 555, as amended).

to translate a document written in a foreign language into Polish, or from Polish, as well as when there is a need to acquaint the accused with the contents of the taken evidence. The accused and the suspect have the right to a translator free of charge if they do not know Polish sufficiently well. Additionally, the obligation of calling a translator also pertains to actions carried out with the participation of the accused (the suspect). At the request of the accused (the suspect), or their counsel, an interpreter should be called for the accused (the suspect) to communicate with their counsel with regards to the proceedings to which the accused (the suspect) is entitled to. More importantly, the accused is provided with the decision on submission, addition or modification of charges, indictment, and a decision subject to appeal or completing the proceeding along with the translation. If the accused gives his/her consent it is enough to present the translated decision completing the proceeding if it is not subject to appeal.

The fact that criminal procedure provisions cover two phases of proceedings – both judicial and preparatory[14] is positive. Unfortunately, the scope of guarantees for the accused (suspect) is too narrow as the provision does not directly lay down the obligation to inform about the reasons for arrest and information of the appeal procedures available to him or her. The lack of a resolution regarding the costs of a translator in preparatory proceedings deserves criticism as it results in the costs being passed on to the sentenced person. The question regarding the quality control of translations is still valid – the rules in force make no provisions regarding procedures in this respect, even though the state has a monitoring obligation.[15]

In misdemeanour case proceedings,[16] if the accused does not know Polish, a motion for punishment, and the decisions subject to appeal, or those concluding proceedings, are announced or delivered along with the translation. Moreover, in misdemeanour proceedings rules of criminal procedure apply, both those pertaining to interrogations and to document translation. When referring to the content of provisions it has to be stressed that the legislator uses an unclear term that a given person "does not know Polish". What is more, provisions do not take into account the necessity or possibility to contact one's counsel, which should be criticized, as although misdemeanour proceedings involve petty crimes, they determine criminal responsibility.

In turn, in judicial administrative proceedings the abovementioned rule specified in the Law on the System of Common Courts is binding. Incurring of costs has been wrongfully specified before the administrative jurisdiction. According to the statutory regulation costs include in particular translators' fees, and the party who petitioned for taking the action connected to the costs is obliged to make an advance payment to cover those costs.

A detailed regulation concerning civil procedure[17] stipulates that the court may demand that a document written in a foreign language be translated by a sworn translator, and that it may call a translator to question a witness who does not know Polish

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[14] DŁUGOSZ, J.: *Prawo do udziału tłumacza jako jedna z przesłanek rzetelnego procesu karnego*, http://www.staff.amu.edu.pl/~inveling/pdf/Dlugosz_17.pdf.

[15] Kamasiński v. Austria ruling 19. 12. 1989 r., A. 168.

[16] Act of 24 August 2001 – Petty Offences Procedure Code (Journal of Law 2013, item 395, as amended).

[17] Act of 17 November 1964 – Civil Procedure Code (Journal of Laws 2014, item 101, as amended).

sufficiently. More importantly, an employee of judiciary authorities can take on the responsibilities of a translator without affirmation, just on the basis of his or her oath of office. Provisions of the civil procedure deserve criticism as they differentiate between a sworn translator (who gives better guarantees of the proper fulfilment of the translation task and who is only required for translation of documents needed by the court) and a translator for all other tasks. It is both surprising and deserving criticism that the role of a translator can be performed by an employee of a court who knows the needed language, as firstly, his or her work is not verifiable and secondly, he or she might not be objective in the fulfilment of the translation tasks given to them.

4. Proceedings before administrative authorities involve many bodies. However, two regulations are of particular significance. The first one refers to proceedings heard by the authorities of the municipality inhabited by the given minority, the second is the Code of Administrative Proceedings[18] which is universal and used most often.

An auxiliary language may only be used in municipalities where the number of inhabitants belonging to a minority group whose language is to be used as an auxiliary language is no smaller than 20% of all inhabitants of that municipality, and if it has been entered into the Official Register of Municipalities. The possibility of supporting language use means that people belonging to a minority have the right to: 1) address municipality authorities in the supporting language, either in a written or oral form; 2) obtain, on his/her distinct request, an answer in the supporting language, either in a written or oral form; and 3) submit applications in the supporting language, however, the appeal proceedings may only take place in the official language. The stipulation that no-one may avoid carrying out a lawful order or decision given in the official language if the circumstances require that it be carried out immediately if it is to achieve its purpose, is also significant. This stipulation allows waiving the right to use a minority language due to the purpose of the proceeding. Such lack of precision may form a basis for abuse, especially since according to the act doubts are solved based on a document written in the official language.

The Code of Administrative Proceedings, on the other hand, provides that public authorities have an obligation of gathering and examining of evidence in such a way that allows the determination of a factual state of the case in accordance with reality, and especially an obligation to conduct a comprehensive assessment of the circumstances of the given case on the basis of all of the evidence, and present their decision in the justification of the decision. The procedure required by the act does not rule out the use of interpreters, as long as in the record of a testimony given in a foreign language, a translation of that testimony into Polish, along with the name and address of the translator, is provided. The record of the testimony should be signed by the translator. Tax Code[19] stipulates that records of testimonies given in a foreign language should include the translation of the testimony into Polish, name and address of the translator, and that the translator is obliged to sign the record of the testimony.

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[18] Act of 14 June 1960 – Code of Administrative Proceedings (Journal of Law 2013, item 267, as amended).
[19] Act of 29 August 1997 – Tax Ordinance Act (Journal of Laws 2012, item 749, as amended).

In a control procedure files written in a foreign language, along with a Polish translation, connected to the controlled cases, have to be presented upon the request of a controller.

There are numerous rights granted to members of minority groups in proceedings before the President of the Office for Foreigners[20] with respect to the use of their mother tongue and the right to a translator, in matters concerning temporary residence, when a foreigner does not have travel documents, and decisions on the obligation of a foreigner to return.[21] Unfortunately, the provisions do not specify procedures for persons taking part in an interrogation in the abovementioned administrative bodies (i.e. an officer conducting the questioning, a foreigner, a translator, a foreigner's agent, a psychologist, a representative of UNHCR etc.). The problem of the quality of translations remains. In the judgment of the Voivodeship Administrative Court in Szczecin from 9 November 2010 II SA/Sz 546/10 the court confirmed (unfortunately uncritically) that neither The Code of Administrative Proceedings, nor the 2003 Act on Aliens introduce a requirement of a sworn translator to be present during questioning. Tasks of a translator can be fulfilled by any person who knows a given language.

CONCLUSIONS

A country of the 21st century has the obligation to ensure the protection of minority rights. The actions undertaken towards this goal have to be multi-faceted. The discussed issues of bilingual names and rights of minority members in judicial and administrative proceedings are both elements of the safeguard policy.

Having analysed the first mater it can be stated that the process of bilingual sign introduction is a lengthy process. The scope of the Polish and Czech signage introduction is significant here. As these signs cannot be limited to locality name boards, it seems reasonable to introduce bilingual signage on train and bus stations, on information and tourist boards, schools, shops, leaflets, websites etc. In general, the present use of bilingual names is satisfactory, however, it should be continually monitored and improved.

The procedural situation of parties with regards to the use of a minority language is more difficult, as most often only one side of the issue is considered, namely the correct proceeding of the judicial (administrative) procedure. Courts and other authorities are to ensure the correct gathering of procedural materials (the need of translating them into Polish), however, they fail to recognise that clarifications from a minority group representative are an element of taking of evidence, and that allowing such a person to speak freely is beneficial for the establishment of material truth. Fortunately, this principle is applied most fully in criminal procedure (although some exceptions still exist).

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[20] 12 December 2013 on Foreigners (Journal of Laws, item 1650, as amended).

[21] As it ensues from the 30 October 2008 ruling of the Supreme Administrative Court (II OSK 1097/07) administrative courts should inform foreigners of their right to free services of a translator in every situation when there are justifiable concerns regarding the foreigner's level of Polish.

Two issues remain unsolved, the first of which is the obligation to bear translation costs. At this point it has to be clearly stated that these costs should be covered by the budget of the state, as it is needed for the proper functioning of the judiciary. The second issue, which requires the legislator's attention is the matter of quality control of translations. The lack of such control over translated documents or testimonies may lead to the limitation of one's right to a fair trial, as granted by Article 45 (1) of the Constitution.