The Domestic Contestation of International Norms
An Argumentation Analysis of the Polish Debate Regarding a Minority Law

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I. Introduction

Minority protection has emerged as one of the most prominent areas of international norm-setting activity in the post-Cold War era, as indicated by the adoption of several international documents addressing the issue, including the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE),[1] the United Nations *Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*,[2] the Council of Europe's *Charter for Regional and Minority Languages*,[3] Recommendation 1201 adopted by its Parliamentary Assembly,[4] and the *Framework Convention for the Protection of National Minorities* (FCNM).[5] In addition, the European Union has included the requirement to guarantee the protection of minorities into its political accession criteria.[6]

Despite international attempts to codify and promote minority rights, they remain contested. This contestation pertains not only to the definition and recognition of minorities and the question of whether they should be granted special rights, but also to different concepts of minority protection ranging from non-discrimination to collective minority rights. In addition, the legitimacy of demands to adopt minority protection has been curtailed by accusations of applying double standards. This problem arises specifically for the EU, because the external use of minority protection as a membership condition did not follow the establishment of an internal minority standard based on group-specific rights for national minorities. The EU has neither developed such rights within the *acquis communautaire*, nor do the member states subscribe to a single European standard.[7] Other international organizations such as the Organization for Security and Co-operation in Europe (OSCE) have been accused of applying inconsistent standards when

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[1] Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (held on 5 June to 29 July 1990).
[2] *Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res. 47/135, UN GAOR, UN Doc. A/RES/47/135 (1992).
[3] Council of Europe, *Charter for Regional and Minority Languages*, CETS No. 148 (1992).
[4] Council of Europe, P.A., 1 February 1993 (22nd Sitting), Doc. 6742 (1993).
[5] Council of Europe, *Convention for the Protection of National Minorities*, CETS No. 157 (1995).
[6] European Council, *Presidency Conclusions: Copenhagen European Council* (held on 21 to 22 June 1993).
[7] Bruno De Witte, 'Politics Versus Law in the EU's Approach to Ethnic Minorities' (2000) EUI Working Paper No. RSC 2000/4.

addressing minority protection as well.[8] Accordingly, the successful implementation of minority protection in Central and Eastern European countries (CEECs) in the context of EU enlargement has so far predominantly been used as an argument against constructivist or norm-based accounts, which generally assume consensual meaning and stability as a precondition for international norms to be considered legitimate and thus to have an impact on the domestic level. If minority rights are contested and lack legitimacy, they are not likely to be followed on the basis of constructivist processes such as persuasion and internalization. Instead, compliance (if it happens at all) should be caused by rationalist factors such as external incentives or sanction threats.

Contrary to such assumptions, this article proposes an argumentation-analytical approach to studying norms as intersubjective reasons instead of structural causes or subjective motives in order to account for the impact of contested norms in processes of domestic norm construction. This approach is based on an analysis of the conceptual frameworks, types of arguments, and coherence of the argumentation used to justify the adoption of minority rights in the domestic decision-making process.[9] As a case study, this article analyzes the parliamentary debates leading to the adoption of a Polish law on national minorities.

The article is structured as follows: Part II discusses the shortcomings of existing research on the role of norms in International Relations (IR), which fails to adequately address the intersubjective (instead of objective or subjective) ontology of norms and their role as reasons rather than causes of action, and makes the case for an argumentation-analytical approach to studying norms. Part III presents three analytical lenses for argumentation analysis: first, the contested conceptual frameworks underpinning the proposals; second the different types of arguments (utility-, value- or rights-based) utilized to justify the claims; and third, the coherence of the overall argumentation. Part IV applies the approach to the Polish parliamentary debate regarding the adoption of a minority law. Part V evaluates the use and coherence of arguments in the Polish debate, arguing that rights-based

[8] Will Kymlicka, 'Reply and Conclusion' in Will Kymlicka & Magda Opalski, ed., *Can Liberal Pluraism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2001) 347 at 381.

[9] For an overview on the historical background and different strands of argumentation analysis see Frans H. van Eemeren *et al*., *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (Mahwah, N.J.: Lawrence Erlbaum Books, 1996).

arguments referring to Council of Europe standards were the most important resource to coherently justify the adoption of the law and the individual minority rights concept that it employs.

II. Theorizing Norms as Intersubjective Reasons: Making the Case for an Argumentation-Analytical Approach

Constructivist research on norms in IR has mainly focused on 'robust',[10] i.e. strong and stable norms in order to account for the diffusion of and compliance with international norms. Even approaches that claim to 'bring agency back in'[11] against overly structural accounts, e.g. from sociological institutionalism, normally focus on agency in reaction to established norms.[12] If the evolution of norms (as opposed to the impact of a given norm) is addressed, the analysis usually seeks to establish an independent measure for norm strength,[13] while ignoring contestation and changes in the meaning of norms. Only well-defined and consensually shared norms are counted as being sufficiently strong to be effective, whereas contested norms are not expected to have any impact.

In order to overcome these limitations, two problematic features of norms have to be addressed. The first concerns the ontological status of norms as intersubjective phenomena, instead of as either objective structural constraints or subjective motivations of actors. The second is that norms cannot easily be operationalized as direct causes of action and thus treated as an independent or intervening variable in a positivist research design, but serve as public reasons for action that call for an interpretative reconstruction of reasoning processes.

Norms are consensually defined as 'collective expectations for the proper behaviour of actors within a given identity'.[14] In accordance with this

[10] Jeff W. Legro, 'Which norms matter? Revisiting the "failure" of internationalism' (1997) 51 Int'l Org. at 31 [Legro].
[11] Jeffrey T. Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 World Politics at 324.
[12] See, e.g., Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999) [Risse *et al*.].
[13] Legro, *supra* note 10 at 39; Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. at 905.
[14] Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, 'Norms, Identity, and Culture in National Security' in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 33 at 54.

definition, it is now common to distinguish norms from mere behavioural regularities,[15] as well as to acknowledge that '[u]nlike ideas, which may be held privately, norms are shared and social; they are not just subjective but intersubjective.'[16] This means that they can neither be treated as objective factors that are exogenously given and independent of actor perceptions and interpretations, nor can they be reduced to subjective ideas, beliefs or intentions held by individual actors. It follows that norms should be studied not so much on the level of cognition or behaviour, but on the level of communication, justification and argumentation.

The intersubjective ontology of norms is not easily reconciled with a positivist epistemology, which considers norms as causes of action.[17] In such a framework, only two pathways are considered to establish a sufficient causal influence of norms on behaviour: either they work as structural constraints, which are sufficiently strong to overcome even contravening ideas and interests and thereby directly determine behaviour irrespective of subjective convictions, or they work indirectly through processes of socialization and internalization, so that they influence the identities and preferences of actors and cause behaviour as subjective motives for action. As a result, norms are either 'ontologized'[18] as exogenously given social facts with a fixed and commonly known meaning and thereby assimilated to objective facts, or they are assumed to work through processes on the subjective level and hence reduced to individual motives and intentions.

Constructivists opposed to a positivist reading of the effects of norms have stressed that norms cannot be a sufficient cause of action because they are counterfactually valid[19] and 'cannot provide closure for the purposes of carrying on because rules are not the sufficient agency whereby intentions

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[15] See e.g. Neta C. Crawford, *Argument and Change in World Politics* (Cambridge: Cambridge University Press 2002) at 86 [Crawford].

[16] Martha Finnemore, *National Interests in International Society* (Ithaca/London: Cornell University Press, 1996) at 22 [emphasis omitted].

[17] John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 Int'l Org. 855 [Ruggie].

[18] Antje Wiener, 'Constructivism: The Limits of Bridging Gaps' (2003) 6 J. Int'l Rel. & Dev. 253 at 266.

[19] Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989) [Kratochwil]; Ruggie, *supra* note 17.

become equivalent to causes.'[20] Instead, norms 'fall into the category of reasons for actions, which are not the same as causes of actions.'[21] Treating norms as reasons asks for a communicative perspective focusing on the intersubjective validity of norms in processes of argumentation and justification. The reasons provided by actors establishing or following norms give important insights into how norms work, so that if 'norms influence decisions through the reasoning process, the processes of deliberation and interpretation deserve further attention.'[22]

Among the IR scholars studying argumentative processes, three different approaches can be distinguished. As a first strand, constructivists have sought to utilize Habermas' theory of communicative action.[23] A major aim for scholars working from this angle is to identify the role and conditions of sincere arguing processes in international relations, and to trace the consequences for processes of persuasion, socialization and normative change.[24] Arguing in this perspective is not only a distinct mode of interaction (as opposed to bargaining), but is also based on a specific logic of action in which actors are oriented towards reaching a reasoned consensus and prepared to be persuaded by the better argument. Against this view, the concept of rhetorical action, which can be defined as the 'instrumental use of arguments to persuade others of one's selfish claims,'[25] has been developed as an alternative theoretical approach to study argumentation processes. While supporting the constructivist claim that norms and justifications are not merely post-hoc rationalizations or epiphenomena to material factors, the rhetorical action approach retains a consequentialist logic of action, which means that actors engaged in arguing are not necessarily genuine and also do not internalize norms, even when they have to admit argumentative defeat.

It follows that both approaches, despite their antagonistic positions on the subject of individual persuasion and norm internalization, share a

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[20] Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989) at 51.
[21] Ruggie, *supra* note 17 at 869 [emphasis omitted].
[22] Kratochwil, *supra* note 19 at 11 [emphasis omitted].
[23] Jürgen Habermas, *Theorie des kommunikativen Handelns* (Frankfurt/Main: Suhrkamp, 1981) [Habermas 1981].
[24] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1.
[25] Frank Schimmelfennig, 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 Eur. J. Int'l Rel. 109 at 129 [Schimmelfennig].

commitment to establish the action-theoretical foundations of argumentative behaviour, i.e. try to account for argumentation as a *process* by which either argumentative success or genuine persuasion is accomplished, and the *procedural* framework conditions under which argumentation is most likely to take place and be effective. This article proposes a third perspective, which concentrates on argumentation as a *product*, i.e. the contents and types of arguments on the intersubjective level.[26]

III. Three Analytical Lenses of Argumentation Analysis: Conceptual Frames, Argument Types, and Coherence

This article focuses on the content of arguments by analyzing three central elements of contestation with regard to minority rights: first, the issue-specific conceptual framework within which a specific claim is situated–in our case, different minority protection concepts; second, the different types of arguments that are put forward to back a claim; and third, the way in which different arguments to support a position add up to a coherent argumentation.

1. The contested meanings of the minority protection norm: a conceptual framework

Far from being a stable, consensual human rights norm, minority protection remains a contested issue. This contestation pertains not only to the general validity of the minority rights norm, i.e. the question of whether minorities should be protected at all, but also to the meaning of the norm and—most fundamentally—to the concept of a minority itself. The following section elaborates on central conceptual questions connected with the protection of minorities.

The approach of a state towards its minorities can be analyzed along two dimensions: first, whether a negative or a positive attitude to protecting minorities via group-specific rights and supporting measures is taken; and second, whether the approach rests on individualist or collective assumptions about the nature of the nation, minorities, and their respective rights. In terms of the major debates regarding ethnic relations in political theory, these two dimensions can roughly be described as the distinction between nationalist and multiculturalist positions on the one hand,

[26] For the distinction between argumentation as procedure, process or product see Habermas 1981, *supra* note 23 at 47ff.

depending on whether national unity or diversity between sub-national groups is emphasized, and liberal versus communitarian positions on the other, which differ on the question of whether individual autonomy or group-membership is given priority. '[L]iberal individualists argue that the individual is morally prior to the community ... Communitarians dispute this conception of the "autonomous individual". They view people as "embedded" in particular social roles and relationships.'[27] Among the positions stressing national unity, the main theoretical distinction is between ethnic or cultural and civic forms of nationalism,[28] while on the multiculturalist side the current debate is between communitarian and liberal approaches to multiculturalism.[29]

Ethnic or cultural concepts of a nation lead to a communitarian perspective with negative implications for the protection of minorities.[30] Since the nation is conceptualized as a collective built on the ethnic or cultural traits of the majority that claims 'ownership' of the state, the identity of minorities is not a quality to be protected or even promoted, but rather a potential threat to the unity of the nation and the state. Diversity therefore has to be eliminated, not preserved. The resulting minority-related policies are different for ethnic and cultural nationalisms.[31]

An ethnic concept of the nation makes minorities permanent outsiders without any chance of integration. In this case, the only solution to minority problems is the actual removal of the minority, either by moving borders to create homogenous nation states, or by moving the minority populations to achieve this goal. A cultural concept, on the other hand, would allow minorities to stay, but only under the condition that they fully assimilate to the majority culture, be it voluntarily or by force, and thereby cease to exist as a minority in the cultural sense. Although some of these policies have been considered to be legitimate at some point in time,[32] all of them are

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[27] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) at 18ff [Kymlicka 2001a].

[28] Cf. e.g. Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in Europe* (Cambridge: Cambridge University Press, 1996).

[29] For a discussion cf. Kymlicka 2001a, *supra* note 27.

[30] Cf. Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001) at 137 [Barry].

[31] See Stephen Shulman, 'Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism' (2002) 35 Comp. Pol. Stud. 554 [Shulman].

[32] Jennifer Jackson-Preece, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms' (1998) 20 Hum. Rts. Q. 824.

rendered illegitimate by international norms today. The norm of territorial integrity is upheld against claims to change borders along ethnic lines.[33] Ethnic cleansing, i.e. '[f]orced population transfers intended or with the effect to move persons belonging to minorities away from the territory on which they live would constitute serious breaches of contemporary international standards.'[34] Furthermore, '[c]oercive assimilation is now internationally outlawed, while voluntary assimilation has become less respectable.'[35]

By contrast, liberal or civic nationalism rests on a concept of the nation as a 'community of equal, rights-bearing citizens',[36] based on the 'model of a unitary republican citizenship, in which all citizens share the identical set of common citizenship rights.'[37] In addition, all persons in the territory of a state—citizens and non-citizens alike—enjoy universally valid and equal human rights.[38] Within such an approach, the main norm to be applied to ethnic groups, be they immigrants or traditionally resident national minorities, is non-discrimination.

Applied in a strictly formal way, this framework of general human and citizenship rights precludes any group-differentiated rights aimed at specifically supporting minority groups or the persons belonging to them. Unlike ethnic or cultural nationalism, however, civic nationalism does not openly pursue the exclusion or assimilation of minorities, but aims to fully integrate them without discrimination into the national community and to tolerate and accommodate diversity within this general framework of rights. 'The liberal notion of equality before the law, so far from resting on the assumption that differences do not exist, is proposed as the fairest way of

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[33] Samuel J. Barkin & Bruce Cronin, 'The state and the nation: changing norms and the rules of sovereignty in international relations' (1994) 48 Int'l Org. 123.

[34] Asbjørn Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (2000) UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 at 5.

[35] Giuliano Amato & Judy Batt, 'Minority Rights and EU Enlargement to the East. Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: The Nature of the New Border' (1998) RSC Policy Paper No. 98/5 at 6.

[36] Michael Ignatieff, *Blood and belonging: Journeys into the new nationalism* (London: BBC Books, 1993) at 6.

[37] Kymlicka 2001a, *supra* note 27 at 43.

[38] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca and London: Cornell University Press, 2003).

accommodating them.'[39] The resulting policy towards minorities is a 'laissez-faire approach in which the state is as culturally neutral as possible and promotes individual, not collective rights.'[40]

Both assumptions have been criticized by adherents of a communitarian concept of multiculturalism. First, the position was challenged that a state could in fact take a neutral position in terms of culture and language. Instead, minorities are in a permanently inferior position to the majority, so that putting members of minority groups on an equal footing requires more than simply preventing discrimination on the basis of their belonging to a minority, which would always mean equality on the terms of the majority. Real equality requires permanent positive state action in support of the minority group, in order to preserve or even promote its identity and prevent assimilatory tendencies, which are not intended but could be the outcome of liberal anti-discrimination and integration policies.

Second, proponents of communitarian multiculturalism reject the 'atomism' of liberal approaches[41] and claim minority rights to be 'inconsistent with liberalism's commitment to moral individualism and individual autonomy.'[42] Instead, it is suggested that group membership needs to be recognized as a foundational value in itself, from which individual conceptions of the 'good life' are derived. It follows that, in order to achieve ethno-cultural justice, minority rights have to be conceptualized not as individual rights but as collective rights granted to the group as such,[43] so that the existence and identity of minorities can be preserved and promoted independent of the willingness and ability of the group members to do so voluntarily in each individual case.

Against this tendency to equate the necessity to protect minorities via group-specific rights with the communitarian rejection of liberal

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[39] Barry, *supra* note 30 at 68.
[40] Shulman, *supra* note 31 at 560.
[41] Cf. Shlomo Avineri & Avner de-Shalit, eds., *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992).
[42] Will Kymlicka, *Contemporary Political Philosophy: an Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002) at 337 [Kymlicka 2002].
[43] For theoretical discussions on the concept of group rights cf. Ian Shapiro & Will Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997); Christine Sistare, Larry May & Leslie Francis, eds., *Groups and Group Rights* (Lawrence, Ka.: University Press of Kansas, 2001).

individualism and its preoccupation with preserving group identities via collective rights, a liberal theory of multiculturalism[44] agrees with the critique of the classical liberal hypothesis of the 'culture-blind' state, whose minority-related policies are limited to the prevention of discrimination on the basis of general human and citizenship rights. It dismisses the communitarian claim that minority protection has to be based on a rejection of liberal individualism, arguing instead that 'there are compelling interests related to culture and identity which are fully consistent with liberal principles, and which justify granting special rights to minorities.'[45] As a solution, group-specific minority rights are granted to individuals.

In conclusion, whereas ethnic or cultural nationalism does not offer any legitimate answers to the protection of minorities (although it may still play an important role in the political debates over minority rights), the three alternative philosophical positions offered in this section are linked with three different legal ways of protecting minorities: non-discrimination, individual and collective minority rights.

Table 1: Philosophical Approaches Regarding Minorities

	Individual	*Collective*
Multiculturalist	liberal multiculturalism: individual minority rights	communitarian multiculturalism: collective minority rights
Nationalist	civic nationalism: integration/ non-discrimination	ethnic/cultural nationalism: exclusion or assimilation

[44] Will Kymlicka, *Multinational Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
[45] Kymlicka 2002, *supra* note 42 at 339.

2. Three types of arguments: utility-, value-, and rights-based

In addition to the conceptual reference frames into which specific proposals are embedded and to which arguments have to refer explicitly or implicitly, we can distinguish three types of arguments as an analytical framework to evaluate the different argumentative references that are used to back a policy: utility-, value- and rights-based arguments.[46] The distinction is drawn from Habermas, who distinguishes pragmatic, ethical and moral employments of practical reason.[47] For the application to a debate regarding the role of international norms on the national level, an additional distinction between references to internal or external reasons within each type of argument is necessary, namely whether references are made to international (external) or domestic (internal) factors as backings for a claim.

First, arguments can refer to the expected utility of an action in relation to a given purpose. Within this type of argument, a policy decision is presented as legitimate on the basis of its efficiency in reaching a goal, or by referring to interests served by the policy, such as economic gains or increased security and stability. By contrast, utility-based counter-arguments refer to the costs or negative effects of a policy. Internal utility-based arguments invoke domestically relevant factors such as the perceived problem-solving capacity of minority protection in the given case, internal pressures or demands, e.g. from sizable and powerful interest groups or the minorities themselves, and assessments of the costs of adopting a minority bill. External utility-based arguments either refer to external incentives and pressures that have an outside-in impact, such as EU conditionality or demands made by powerful kin-states of certain minorities, or conversely to the inside-out effects of the bill, e.g. with regard to external minorities.

Second, arguments may refer to the particular values defining a community. A policy decision is considered legitimate because it is appropriate in the given cultural context and in relation to the identity of the members of a given community. Internal value-based arguments refer to an identity based on national values, norms and historical legacies, whereas external value-based arguments invoke a 'European' or 'Western' identity

[46] Helene Sjursen, 'Why Expand? The Question of Legitimacy and Justification in the EU's Enlargment Policy' (2002) 40 J. Common Market Stud. 491.
[47] Jürgen Habermas, *Justification and Application. Remarks on Discourse Ethics* (Cambridge: Polity Press, 1993).

founded on assumptions that minority rights are (or are not) shared by the aspired community of values.

Third, a policy can be justified by rights-based arguments, i.e. with reference to universal rights or overarching principles of justice which are deemed to be universally valid and could be accepted by all parties concerned. In the sphere of rights-based arguments, support for (or opposition against) the adoption of internal arguments is based on an assessment of whether the argument necessarily follows from a legal obligation, e.g. enshrined in the constitution (internal) or in international minority rights instruments (external).

Table 2: Utility-, Value- and Rights-based Arguments Regarding Minority Rights

	Internal	*External*
Utility-based	problem-solving capacity internal pressures, costs, benefits	*outside in:* external incentives conditionality or kin-state demands *inside out:* reciprocity
Value-based	national identity and history	'European' identity, 'Western' values
Rights-based	constitutional obligations	international obligations

3. The role of coherence in complex argumentations

In complex situations, policy choices often have to be backed by multiple arguments to be persuasive and, to that end, different types of arguments might be deployed simultaneously.[48] There often is not one single convincing

[48] Crawford, *supra* note 15 at 23.

argument. Argumentation is therefore fundamentally different from logical proof or demonstration, because it 'is concerned with the problem of praxis, i.e., with gaining adherence to an alternative in a situation in which no logically compelling solution is possible.'[49] Additionally, multiple arguments can be the result of the need to win support in a diverse audience, or be directed towards different audiences.[50] Although it might be preferable both in normative terms and with regard to the success of the argumentation to find universally valid 'reasons that convince all the parties in the same way,'[51] this is often unachievable.

In argumentation theory, mutually supporting arguments are termed convergent. If several arguments independently lead to the same conclusion, this can enhance the persuasiveness of the overall argument.[52] This does not mean, however, that the persuasiveness of a convergent argumentation increases automatically with the number of arguments put forward. First, the fact that a proponent feels forced to provide several different reasons for her claim can raise the suspicion that the arguments themselves are weak.[53] Second, it can be assumed that the higher the number of arguments introduced, the greater the importance as well as the difficulty to achieve coherence of the overall argumentation. The concept of coherence has found its way into IR scholarship with Thomas Franck's claim that '[t]he degree of a rule's legitimacy depends in part on its coherence, which is to say its connectedness, both internally (among the several parts and purposes of the rule) and externally (between one rule and other rules, through shared principles).'[54] With regard to application of norms, coherence has to be distinguished from mere consistency. Coherence does not simply demand that a norm is applied equally to everyone, but that any distinction or exception can be justified in principled terms, so that 'a rule's inconsistent application does not necessarily undermine its legitimacy as long as the inconsistencies can be explained to the satisfaction of the community by a

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[49] Kratochwil, *supra* note 19 at 21.

[50] Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation* (Notre Dame: University of Notre Dame Press, 1969) [Perelman & Olbrechts-Tyteca].

[51] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Oxford: Blackwell, 1996) at 166 [emphasis omitted].

[52] Perelman & Olbrechts-Tyteca, *supra* note 50 at 471.

[53] Chaim Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame Press, 1982) at 139.

[54] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990) at 180.

justifiable (i.e. principled) distinction.'[55] Still, double standards constitute a major incoherence and therefore a severe challenge to the policy's legitimacy if they are based on arbitrary distinctions that cannot be justified in any reasonable way.

Although Franck takes a predominantly structural view, in which legitimacy (and therefore also coherence) figures as 'a property of a rule or rule-making institution which itself exerts a pull to compliance,'[56] this was not how the concept was originally conceived of in Ronald Dworkin's writings on the 'integrity' of legal norms and decisions, from which Franck's notion of coherence is derived.[57] Coherence (or integrity) in this perspective is not so much a structural feature of the norms themselves, but a political ideal or guiding principle at work both in the construction of norms and in their interpretation and application.[58] Hence, it can be used not only for a structural analysis of norms, but can also be applied to the analysis of complex argumentations. The most obvious form of argumentative incoherence is, of course, if arguments are not in fact convergent but controversial, i.e. support divergent or even mutually exclusive policies. But even if all arguments seemingly push in the same direction, '[t]he convergence between arguments may cease to carry weight if the result arrived at by the reasoning shows up elsewhere some incompatibility which makes it unacceptable.'[59]

IV. Case Study: Arguments in the Polish Parliamentary Debate Regarding the Law on National and Ethnic Minorities and on Regional Languages

Unlike many case studies on EU conditionality in the field of minority protection,[60] or on the impact of international human rights norms more generally,[61] Poland is not a case of strong external pressure against norm-breaching governments. International pressure and conditionality on Poland to implement minority protection beyond the level established in the initial

[55] *Ibid.* at 163.
[56] *Ibid.* at 16 [emphasis omitted].
[57] *Ibid.* at 143.
[58] Ronald Dworkin, *Laws's Empire* (Cambridge, Ma.: Harvard University Press, 1986) at 176.
[59] Perelman & Olbrechts-Tyteca, *supra* note 50 at 472.
[60] See e.g. Judith Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions' (2004) 58 Int'l Org. 425.
[61] See e.g., Risse *et al.*, *supra* note 12.

phase of democratization (1989-91) was low. However, it is also not a case of automatic and uncontested 'self-socialization' on the basis of a strong and stable domestic equilibrium in favour of minority rights.[62] Progress towards a comprehensive protection of minorities through constitutional provisions, international conventions (specifically by ratifying the FCNM), and simple legislation in form of a law on national and ethnic minorities as well as regional languages[63] has been slow and contested.[64]

This was not only due to considerable resistance from nationalist parties and a general lack of public interest. Even the supporters of minority protection were initially divided between liberals favouring a universal human rights agenda with a strong emphasis on individualism and non-discrimination, and protagonists of special minority rights formulated in collective terms, which were found both on the post-communist left and the post-Solidarity moderate right. Only gradually did these contradicting views converge on individual minority rights under the strong influence of legal advisors promoting this solution as the 'European standard'.

The development of Polish minority rights legislation is therefore an interesting case study of the role of international norms in a situation of domestic contestation. As proposed in the theoretical section, this article utilizes an argumentation-analytical approach to account for the role of norms as intersubjective reasons for deciding on a specific minority protection concept. While a full argumentation-analytical account would include all three dimensions of argumentation (product, process, and procedure) and hence also cover the process dimension (e.g. by studying the development and change of positions over time), as well as the procedural dimension (e.g. by comparing argumentation in publicly-held plenum debates with closed and small-group committee sessions, which should differ systematically according to the assumptions of theories of persuasion and deliberation), this article self-consciously restricts itself to the product dimension by taking a 'snap-shot' of the content of arguments put forward in the three readings leading to the final adoption of the Polish law on national

[62] Schimmelfennig, *supra* note 25 at 133.

[63] Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych I etnicznych oraz o języku regionalnym (Law of 6 January 2005 on national and ethnic minorities and on regional languages), Dz.U. 2005 nr 17 poz. 141.

[64] Peter Vermeersch, 'Minority Policy in Central Europe: Exploring the Impact of the EU's Enlargement Strategy' (2004) 3 Global Rev. of Ethnopol.

minorities.[65] The analysis focuses both on the conceptual distinction between non-discrimination, individual and collective minority rights and the argumentation-analytical distinction of utility-, value- and rights-based argument types. Finally, it evaluates the coherence of the overall argumentations supporting or rejecting the adoption of the bill.

1. Conceptual Issues: Individual Minority Rights and Substantive Equality vs. Formal Non-Discrimination and Ethnic Nationalism

In conceptual terms, the debate between individual and collective minority rights, which had featured prominently in earlier debates, no longer played an important role. If collective rights were invoked, it was only in the negative. The bill was presented as granting only individual rights to persons belonging to minorities, explicitly stressing several times that 'the bill does not establish any group rights.'[66] '[W]e are not speaking about minority rights as group rights. The character of this bill is founded on the point that we speak about individual rights, about citizen's rights, because this is the only way it can be formulated.'[67] It can therefore be concluded that the interpretation of minority rights as individual rights, which was a hotly contested issue among supporters of minority protection in Poland in the early 1990s, had been firmly consolidated in the discourse and conceptual thinking of Polish elites. Non-discrimination focused arguments, which in earlier debates were mainly directed against special minority rights, were added to the individual minority rights frame in support of the bill. In this line of argument, permanent group-specific measures to support minorities are presented as not only compatible with the norm of non-discrimination, but in fact necessary to achieve *de facto* equality by way of granting 'so-called positive discrimination, which aims at providing equal opportunities to preserve the mother tongue, culture, and religion.'[68]

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[65] The first reading took place in the 13th session of the 4th cadence on 15 February 2002 [Sejm IV/13]; the second reading in the 84th session of the same cadence on 23 September 2004 [Sejm IV/84]; the third and final reading in the 88th session on 4 November 2004 [Sejm IV/88]. The contributions to these three debates constitute the text corpus for the analysis. All contributions have been researched and are available under <http://www.sejm.gov.pl>.

[66] Poland, Sejm IV, *Debates*, No. 13, (Genofewa Wiśniowska) [Debate 13 (Wiśniowska)] [All translations by author].

[67] Poland, Sejm IV, *Debates*, No. 13, (Eugeniusz Czywkin) [Debate 13 (Czywkin)].

[68] *Ibid*.

The opposition against the bill built its rejection on a combination of arguments drawn from civic as well as ethnic versions of nationalism. On the one hand, the negative assessment of the bill was framed in terms of non-discrimination. Two non-discrimination based arguments were made. First, the adoption of a special minority law was deemed unnecessary, since large-scale discriminations of persons belonging to minorities were claimed to be absent in the current Polish situation.[69] Second, the draft itself was presented as establishing 'group privileges'[70] that go beyond non-discrimination and therefore constitute a 'discrimination of the Polish majority'.[71]

Against this it was stressed that 'the rights of national minorities are best realized in a country where the general democratic rights that apply to all citizens are obligatory and upheld'[72] and that the 'constitution guarantees equal rights to everyone, therefore also to minorities, who are citizens of the Republic.'[73] Some opponents of the bill, in line with a more restrictive and formal reading of non-discrimination, questioned even the existing Polish minority protection system. For example, it was asked whether 'the privileges the organizations of minorities have in the elections to the Sejm and the Senate (the two chambers of the Polish parliament) are compatible with the constitution; do they not breach the principle of equal elections?'[74]

Although the negation of special minority protection was never explicitly framed in terms of the intention to either assimilate or exclude minorities from the national community, stressing that '[w]e do not want to take anything away from national minorities,'[75] the individualist and supposedly civic non-discrimination argument was—although in most cases only implicitly—supplanted by arguments grounded in a more ethnic understanding of the relationship between the nation, the state, and minorities, as can be seen in allegations that one of the shortcomings of the

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[69] Cf. Poland, Sejm IV, *Debates*, No. 13, (Jerzy Czerwiński) [Debate 13 (Czerwiński)]; Poland, Sejm IV, *Debates*, No. 88, (Zbigniew Sosnowski) [Debate 88 (Sosnowski)]; and Poland, Sejm IV, *Debates*, No. 88, (Antoni Stanisław Stzyjewski).

[70] Poland, Sejm IV, *Debates*, No. 84, (Sosnowski) [Debate 84 (Sosnowski)].

[71] Poland, Sejm IV, *Debates*, No. 84, (Halina Szustak) [Debate 84 (Szustak)].

[72] Poland, Sejm IV, *Debates*, No. 13, (Tadeusz Samborski) [Debate 13 (Samborski)].

[73] Poland, Sejm IV, *Debates*, No. 84, (Tadeusz Gajda) [Debate 84 (Gajda)]; cf. Debate 13 (Samborski), *ibid*.

[74] Poland, Sejm IV, *Debates*, No. 88, (Jerzy Czerwiński) [Debate 88 (Czerwiński)].

[75] Debate 13 (Czerwiński), *supra* note 69.

draft was the lack of specific minority-related duties,[76] e.g. in form of a loyalty clause.[77]

These demands do not fit in easily with the invoked notion of equality of all citizens, which would necessarily lead to the conclusion that all members of the civic nation, i.e. all citizens independent of their ethnic origin, have not only equal rights—as argued—but also equal duties. Instead, minorities are represented as an ethnic 'out-group', which is obliged to prove its loyalty to the Polish state (as opposed to their ethnic kin-state) to a higher degree than the 'natural' members of the national community. Although only implicitly, the argument still rests on a version of ethnic nationalism, which defines the nation and the state in ethnic terms and considers minorities to be at least potentially outside the national community. Hence, claims to balance minority rights with special duties could be rejected by the proponents of the bill on the basis of the same non-discrimination arguments the opponents themselves had invoked. Since minorities were citizens, and 'from citizens you do not demand a weekly, yearly or even daily declaration of loyalty,'[78] it was argued that 'putting this group under any special duties [would] violate the constitutional clause ruling out discrimination.'[79]

2. Rights-based Arguments: Constitutional and International Obligations

One main line of argument for the adoption of the bill was the legal reasoning that it is 'a necessity following from constitutional and international obligations.'[80] In this rights-based type of argument, the proposed minority law was not only justified as being in line with national and international legal norms, but as being a necessary means of specifying and implementing existing legal obligations, which are not self-executing and therefore need to be transposed into simple legislation. At the domestic level, the constitution (in particular the minority rights clause) was the prime source of legitimacy[81] and it was argued that 'while the Constitution of the

[76] *Ibid*.
[77] Poland, Sejm IV, *Debates*, No. 84, (Zdisław Jankowski) [Debate 84 (Jankowski)].
[78] Poland, Sejm IV, *Debates*, No. 13, (Henryk Kroll) [Debate 13 (Kroll)].
[79] Poland, Sejm IV, *Debates*, No. 84, (Genofewa Wiśniowska) [Debate 84 (Wiśniowska)]; cf. Poland, Sejm IV, *Debates*, No 84, (Eugeniusz Czywkin) [Debate 84 (Czywkin)].
[80] Debate 84 (Wiśniowska), *ibid*.
[81] Cf. Debate 13 (Wiśniowska), *supra* note 66; Debate 84 (Czywkin), *supra* note 79.

Republic … introduced provisions regarding national and ethnic minorities, these provisions need to be specified at the level of simple legislation.'[82]

In analogy and mostly in direct combination with internal rights-based arguments, a prominent line of argument in favour of adopting the bill was stressing the external sources of legal obligation. In this case, the bill was again presented as a necessary implementation of existing higher-order legal obligations which had to be specified at the level of simple legislation, this time not the Polish constitution but ratified (or at least signed) international documents such as the FCNM, or the obligations following from EU membership such as implementing the Race Equality Directive.[83]

The validity of these internal as well as external rights-based arguments was put into question by the opponents of the bill in denying the claim of legal obligation. Against constitutional arguments, they either—as has been already cited in the conceptual part above—invoked the constitutional provisions regarding equality and non-discrimination against special minority rights, thereby effectively ignoring Article 35 which clearly has a group-specific content, or maintained that '[t]he Constitution of the Republic of Poland in Article 35 ensures national minorities an appropriate legal status.'[84] This means that the constitutional provisions are presented as self-executing, so that further specification and implementation via special legislation is not necessary.

The claim that the adoption of a minority bill followed directly from international legal obligations was also opposed on the basis of two arguments that denied the existence of any such obligation. Either implementation as such was unnecessary because international law emanating from ratified treaties has a direct effect on documents under the Polish constitution and documents such as the FCNM were in fact self-executing, or the implementation by way of a special law on minorities was rejected because 'Poland has not undertaken the obligation to adopt a special law on national minorities.'[85]

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[82] Poland, Sejm IV, *Debates*, No. 88, (Tadeusz Matusiak) [Debate 88 (Matusiak)].
[83] Cf. Poland, Sejm IV, *Debates*, Nos. 13, 84, 88, (Jerzy Mazurek); Debate 84 (Czywkin), *supra* note 79; Debate 84 (Wiśniowska), *supra* note 79.
[84] Debate 84 (Jankowski), *supra* note 77.
[85] Poland, Sejm IV, *Debates*, No. 84, (Czerwiński) [Debate 84 (Czerwiński)].

3. Value-based Arguments: Polish Tolerance and European Norms

Internal value-based arguments, i.e. references to Polish identity and history, were frequently made by both sides of the debate. What is most interesting is that, unlike most of the other types of arguments, the disagreement between supporters and opponents of the bill was not in the grounds presented as justification, i.e. the values and legacies invoked, but in the conclusions drawn from largely convergent assessments. Polish tolerance as a character trait and historical fact was almost routinely invoked in the majority of presentations, both in favour of and against the adoption of the bill. The proponents, on the one hand, presented 'traditional Polish tolerance' as an aspiration to live up to. Adopting the bill was therefore argued to 'adhere to the honourable tradition of Poland as a tolerant country.'[86]

Negative 'lessons of the past' were also presented in support of minority protection. While the negative example of the communist period was invoked as a reminder that even in a country with a long tradition of tolerance the protection of minorities cannot be taken for granted, the inter-war period was utilized as support for the rights-based argument that a constitutional provision had to be specified and implemented to guarantee effective protection.[87]

On the other hand, the very same imagery of Poland as a traditionally tolerant country was invoked by the opposition to the bill as an argument against the necessity of any legal regulation, stressing that 'Poland always was, is and will be an example of tolerance for Europe, and for that we do not need any special law, empty rights, provisions on paper.'[88] If Poland is 'by nature' a tolerant country, minorities do not need special protection in order to be treated appropriately.

Since international obligations based on European standards formed an important part of the argument in favour of adopting the bill, external value-based arguments, especially regarding the status of minority protection as a shared European or Western norm, were also part of the argumentation for or against adoption. Although on the supporting side the claim that

[86] Debate 13 (Wiśniowska), *supra* note 66; cf. Debate 88 (Matusiak), *supra* note 82; Poland, Sejm IV, *Debates*, No. 84, (Jan Byra) [Debates 84 (Byra)].

[87] Cf. Debate 13 (Kroll), *supra* note 78; Debate 84 (Czywkin), *supra* note 79.

[88] Debate 13 (Czerwiński), *supra* note 69; cf. Poland, Sejm IV, *Debates*, No. 84, (Marek Kuchciński).

protecting minorities was part of Poland's 'return to Europe' was often implicit in the rights-based arguments about international obligation, some proponents nonetheless explicitly held that 'the principle regarding the protection of minorities is almost generally applied in Europe.'[89] However, it was granted that 'there is not a single model of policy for national minorities among the countries of the European Union, also with regard to legal regulations.'[90] Value-based arguments were utilized to represent minority protection as a Western European norm in the abstract, rather than to derive the specific content of the norm. But even this was heavily contested by the opposition to the bill. Especially the absence of minority protection in general and special minority laws in particular in several EU member states and the issue of setting double standards as conditions to become members of the Western community of values was used as a mobilizing argument against the bill.

First, examples of EU countries without minority protection were cited in order to shatter the image of minority protection as a European standard and expose the hypocrisy of Western promotion of minority rights in the CEECs. The argument that European standards should serve as a model for Poland was even reversed: it was argued that instead of invoking the 'European standard' to justify the introduction of a special minority rights bill, the existing 'Polish standard'—*nota bene* without a minority law—'can stand as a model for other countries in Europe to copy.'[91]

Second, 'because there are special laws for the protection of minorities in Lithuania, Belarus and the Ukraine, but there are no such laws in Germany, Spain or France,'[92] the bill was presented as belonging to an Eastern rather than Western identity. Hence, while the aspiration to belong to the Western community of values was uncontested, implementing minority rights via special legislation was rejected as not being part of the value system of this in-group, but rather as a characteristic of the out-group, i.e. the context of Eastern Europe that Poland wants to escape.

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[89] Debate 88 (Matusiak), *supra* note 82.
[90] *Ibid*.
[91] Debate 84 (Szustak), *supra* note 71; cf. Poland, Sejm IV, *Debates*, No. 84, (Stanisław Gudzowski); Debate 13 (Czerwiński), *supra* note 69; Debate 88 (Sosnowski), *supra* note 69.
[92] Debate 88 (Czerwiński), *supra* note 74.

4. Utility-based Arguments: Costs, Consequences, Conditionality and Reciprocity

The first set of utility-based arguments relate to the costs of adopting the bill in a narrow, monetary sense. The financial burdens of implementing minority protection, which had not been a major point of contestation in earlier debates on the constitution and the ratification of the FCNM—largely because they concerned the commitment to minority protection in general and did not imply any direct implementation measures—were now addressed by the opponents of the bill, although they were hardly a central point in their argumentation. Criticizing the fact that the draft was presented without any detailed estimates of the expected financial effects,[93] they argued that 'the bill causes considerable costs,'[94] which would be excessive for a country that is 'poor and in crisis.'[95] The advocates of adopting the bill, although in the defensive on this issue and unable to provide detailed estimates, claimed to the contrary that the costs would be moderate at best.[96]

The second set of arguments forwarded under the auspices of utility-based reasoning concerns the expected consequences and the assumed efficiency and problem-solving capacity of adopting minority rights legislation. Although this issue was not very prominent and mostly implicit in the arguments put forward in favour of the bill, the underlying image was that the adoption of minority protection norms would contribute to solve remaining—albeit not hugely problematic—ethnic tensions. It would therefore be a positive and effective tool to improve the relations between ethnic groups in Poland and would 'favour the integration of persons belonging to national and ethnic minorities as citizens.'[97]

On the opposing side it was argued that the bill is unnecessary, because 'in practice, nationality problems constitute no real conflictive element in public life.'[98] This argument is grounded in the assumption that minority protection is not a right to be granted regardless of the current situation of minorities, but rather a problem-solving device that is only necessary when ethnic tensions are considered to be problematic. Moreover, this line of reasoning was even reversed to project possible negative consequences of

[93] Poland, Sejm IV, *Debates*, No. 84, (Leszek Samborski).
[94] Poland, Sejm IV, *Debates*, No. 13, (Marek Kuchciński) [Debate 13 (Kuchciński)].
[95] Debate 13 (Czerwiński), *supra* note 69.
[96] Debate 13 (Czywkin), *supra* note 67.
[97] Debate 88 (Matusiak), *supra* note 82.
[98] Debate 13 (Samborski), *supra* note 72.

adopting the bill. It was argued that instead of contributing to the solution of (non-existent) ethnic problems, extensive minority protection 'creates the field for potential conflicts.'[99] Minority rights were therefore not presented as an effective problem-solving device at all, but as disruptive and problem-creating.[100] In the most extreme statements, it was predicted that minority protection would further the 'balkanization of Central Europe,'[101] create the 'preconditions for separatist aspirations,'[102] and lead to the 'disintegration of the state'[103] or, on a specifically anti-German note, to a 're-Germanization'[104] of certain parts of Poland such as Silesia.

The third set of utility-based arguments concerns the question of whether the development and adoption of the bill was a reaction to domestic or external incentives or demands. As for the internal argument, neither proponents nor opponents claimed that the bill was the result of pressure or bargaining power of the minorities themselves. Although the pro-side did mention that the bill was 'elaborated together with the minority leaders'[105] and addressed their wishes,[106] minority mobilization was not presented as the main cause of the efforts. Rather, it was stressed that the bill was necessary in spite of the small size and bargaining power of the minorities.[107]

Much more contested was the question of external influences. In addition to the rights-based arguments about international legal obligations (which included the norms of the EU anti-discrimination *acquis*) and the value-based arguments about minority protection as a shared European norm, the supporting side also included utility-based arguments about EU conditionality.[108] However, it was stressed that the adoption of the bill– although in line with the international obligations Poland has undertaken, EU conditions and the non-discrimination *acquis*—would be adopted 'without pressure from international relations, out of the free will of the

[99] Poland, Sejm IV, *Debates*, No. 84, (Adam Lipiński) [Debate 84 (Lipiński)].
[100] Cf. Debate 13 (Czerwiński), *supra* note 69; Debate 13 (Kuchciński), *supra* note 94; Debate 84 (Sosnowski), *supra* note 70; Debate 84 (Szustak), *supra* note 71.
[101] Poland, Sejm IV, *Debates*, No. 13, (Janusz Dobrosz) [Debate 13 (Dobrosz)].
[102] Debate 13 (Kuchciński), *supra* note 94.
[103] Debate 13 (Czerwiński), *supra* note 69.
[104] Debate 13(Dobrosz), *supra* note 101.
[105] Debate 13 (Czywkin), *supra* note 67.
[106] Poland, Sejm IV, *Debates*, No. 13, (Jerzy Szteliga).
[107] Debate 13 (Wiśniowska), *supra* note 66.
[108] Cf. Debate 13 (Wiśniowska), *supra* note 66; Debate 88 (Matusiak), *supra* note 82.

legislature.'[109] On the other side of the argument, one of the most outspoken representatives of the opposition to the bill claimed that adopting the bill would be bowing to external demands that are not in the Polish interest. While in the first reading EU conditionality was still invoked, it was dropped in the second and third readings, which were held after Polish accession to the EU on 1 May 2004. Instead, the bill was denounced as a reaction to German demands, citing a resolution of the German Bundestag of 1998.[110]

One of the main lines of argumentation against the adoption of the bill concerned the issue of reciprocity, i.e. the link between granting rights to minorities in Poland and the legal situation of Poles living in neighbouring countries. Thus, it was argued that if 'we introduce special rights for minorities … we expect similar solutions in other countries with a considerable amount of people of Polish descent'.[111] Conversely, 'this project with its unilateral creation of privileges for minorities in Poland leads to the final legalization of the existing asymmetry in this matter to the disadvantage of Poles in neighbouring countries.'[112]

Although the reciprocity argument is represented as a utility-based argument—because its central points are the external effects of domestic minority rights legislation and the question of whether adopting far-reaching minority rights would be in the Polish interest or, conversely, weaken its bargaining position on the international stage—it is important to stress that the reciprocity argument in itself is a complex argument that also includes value- and rights-based elements. First, the idea that the situation of Poles abroad should be considered when discussing domestic legislation again reveals an ethnic conception of the nation—from a civic perspective, foreign citizens simply have no bearing upon decisions regarding rights for Polish citizens, regardless of their ethnicity—and implicitly rests on a value-based assumption, namely that a national community has a special kinship-based duty towards foreign citizens of the same ethnicity. Second, the argument

[109] Poland, Sejm IV, *Debates*, No. 13, (Helmut Paździor); cf. Debate 13 (Czywkin), *supra* note 67.
[110] Debate 13 (Czerwiński), *supra* note 69; Debate 84 (Czerwiński), *supra* note 85.
[111] Debate 84 (Lipiński), *supra* note 99; cf. Debate 84 (Jankowski), *supra* note 77; Debate 84 (Gajda), *supra* note 73.
[112] Debate 13 (Czerwiński), *supra* note 69; cf. Debate 13 (Kuchciński), *supra* note 94.

was also explicitly framed in rights-based terms by presenting reciprocity as 'a generally applied principle in international relations.'[113]

The supporters of the bill responded to the demand of reciprocity in two ways. First, they rejected reciprocity as a relevant issue to be addressed in the consideration of minority rights in Poland by rejecting both the rights-based and utility-based arguments brought forward in support of the application of negative reciprocity. On the one hand, it was argued that 'the principle of reciprocity in Europe, above all, does not apply to national minorities.'[114] Invoking reciprocity as a norm in international relations was therefore presented as 'inappropriate and even disgraceful.'[115] On the other hand, the utility-based logic behind the idea of using internal minority rights as a 'bargaining chip' against states with Polish minorities was exposed and rejected, claiming that '[c]itizenship rights are not a good, which can be exchanged "tit-for-tat". Either the state wants to put into practice the constitutional principles it undertook, or it does not want to do so.'[116] As a second counter-argument, one proponent of the bill replaced the negative logic of reciprocity as presented by the opposition to the bill with a positive link between granting minority rights internally and supporting Polish minorities in other states, because 'with the adoption of a law on minorities, as Hungary shows us, we mobilize other countries to a better treatment of Polish minorities.'[117]

V. Evaluating the Use and Coherence of Utility-, Value- And Rights-Based Arguments

What conclusions can be drawn from analyzing the arguments put forward in the debate? Recall that argumentation analysis cannot explicate the subjective motivations of actors, but nevertheless reveals intersubjective reasons for action presented as mobilizing arguments to justify a policy decision. Keeping this in mind we can assess the role played by international norms for the adoption and content of the minority rights law. Such an assessment rests on three observations: first, whether we can see a dominant

[113] Poland, Sejm IV, *Debates*, No. 13, (Antoni Stanisław Stzyjewski); cf. Debate 13 (Czerwiński), *supra* note 69; Debate 84 (Czerwiński), *supra* note 85.
[114] Debate 88 (Matusiak), *supra* note 82.
[115] Debates 84 (Byra), *supra* note 86.
[116] Debate 13 (Czywkin), *supra* note 67.
[117] Debate 13 (Kroll), *supra* note 78.

pattern of general justifications as opposed to singular and isolated references; second, whether and to what extent an argument accounts for the adoption of the minority bill and justifies the decision along three dimensions: the general validity of minority rights, the content of the bill, and the specific applicability to the Polish situation; and third, whether each argument rests on plausible grounds and whether the overall argumentation of either side is coherent, i.e. whether arguments that are plausible in themselves are devalued by incompatibilities with other arguments put forward.

Utility-based arguments did not play a prominent role in justifying the adoption of the bill. This analysis confirms the assumption that the size, mobilization and bargaining power of the minorities were not decisive factors. Neither side alleged that the bill was a reaction to minority demands. Supporters mentioned that it was in line with the requests and expectations of the minorities, but stressed that it was necessary because of the weakness and small size, not the power of the minorities. This claim was not contested by the opposition, which would have certainly capitalized on any plausible argument that the bill was forced by minority pressure. From this follows, moreover, that the problem-solving capacity of minority rights was also not an important point: neither supporters nor opponents considered the situation of minorities in Poland to be problematic; the opponents even questioned the problem-solving character of minority protection in principle. Arguments concerning costs were presented mainly against the bill. It has to be noted, however, that the debate reveals very divergent interpretations of the benefits and costs of norm-adoption. At the very least this shows that adoption costs are not easily transformed into an objective measure of the likelihood of norm-adoption, although it has to be granted that the perception of non-prohibitive costs among a majority of members of parliament was probably a factor that enabled adoption of the bill.

The situation is less clear with regard to external incentives and pressures. EU conditionality was—albeit rarely—mentioned by supporters as a reason for adopting the bill, and it was invoked by one opponent as an argument to undermine the 'ownership' of the decision.[118] While considerations about EU conditionality may have therefore played a secondary role in the decision, two reasons speak against external incentives

[118] Cf. Jeffrey T. Checkel, 'Compliance and Conditionality' (2000) ARENA Working Paper WP 00/18.

as the main driving force. First, the advocates of adopting the bill conceded that EU conditions did not prescribe any specific minority protection system. Second, although EU monitoring was mentioned, adopting the bill was not presented as necessary to gain accession. Also, the opponents' use of the argument that the bill was externally coerced by EU conditionality declined in the second and third reading (i.e. after Poland had acceded to the EU) and it was not replaced by the plausible point that adoption was no longer necessary after accession.

An external influence invoked by one of the nationalist opponents was that the bill responded to kin-state demands from Germany. However, the argument was backed by questionable data. The temporal proximity between the first introduction of the bill to the Sejm and a resolution of the German Bundestag is not a convincing point, since the bill was prepared long before. Furthermore, the resolution did not make any concrete demands, was never followed up, and, if anything, sparked a strong negative reaction in Poland. Germany certainly did not block Polish accession to the EU, although the adoption of the bill was uncertain until the end. The argument therefore seems to be a purely rhetorical tool to utilize anti-German sentiment among Polish politicians.

The issue of reciprocity and the linkage between internal and external minorities does play a very important role in the debate, but it is disconfirmed as an alternative explanation for the adoption of minority rights because in the Polish context it was one of the most frequently and forcefully presented arguments against adopting the bill. Although the 'positive reciprocity' argument was made as well, this remained a singular point put forward by only one speaker and was not generally applied as a supporting argument. In sum, it has to be concluded that considerations of reciprocity and support for external minorities hindered rather than promoted the domestic adoption of minority rights legislation in Poland.

Value-based arguments referring to Polish values and traditions were routinely invoked, showing that these arguments in principle were regarded as important. However, two aspects strongly suggest that national norms or legacies played no decisive role in determining the Polish minority protection system. First, the invoked values were shared and stable, but indeterminate in their conclusions. Therefore, although there was a 'robust' perception of Poland as a traditionally tolerant country, this could be equally

used as an argument for and against minority protection. Second, the values and traditions were much too broad and general to give any guidance as to how minority protection should be achieved. Particular historical solutions, e.g. the constitutional provisions of the inter-war period, were seldom directly cited, and even then never used as a guide or example for the current system under consideration. In other words, domestic values and traditions did not give any clear behavioural prescription with regard to the adoption of minority protection legislation.

A similar conclusion applies to arguments referring to external, i.e. Western or European values. Again, two factors speak against a direct guiding influence of this factor. First, as even the proponents invoking minority protection as a shared European value had to admit, the European practice of instituting minority-related policies is much too diverse to derive specific prescriptions from the 'fuzzy' concept of minority protection as a shared European norm. Second, the opponents were not even forced to resort to openly anti-European arguments to justify their rejection on value-based grounds, but could exploit the existence of double standards to argue that minority protection was not part of a Western or European identity. Therefore, although the aspiration to belong to the Western community of values remained uncontested even by representatives of the nationalist right, indicating that the Polish 'return to Europe' was indeed an 'unobjectionable'[119] point of reference and potentially a powerful legitimizing argument, the behavioural prescription derived from it was hotly contested.

Rights-based arguments stressing domestic/constitutional and international obligations were the dominant line of reasoning presented by the proponents of norm-adoption, both as a guide towards the content of the provisions and as a justification of the necessity of its adoption. Taking into consideration that the minority rights clause in the Polish constitution was already inspired and guided by Council of Europe standards this indicates a significant role of European norms in the process of domestic norm-construction. In fact, international obligations derived from Council of Europe and EU documents are the only factor that accounts for all three elements that are important with regard to the justification of norms: their general validity, their content, and their applicability in the specific case.

[119] Ole Elgstrøm, 'Consolidating "Unobjectionable" Norms: Negotiating Norm Spread in the EU' (Paper presented at the ECPR 4th Pan-European IR-conference, Canterbury, 8-10 September 2001) [unpublished].

The opponents, on the other hand, were hard-pressed to deny the claim to international obligation. They did so by contesting the applicability, but not the general validity or content of these norms. Moreover, they felt the need to present reciprocity as an alternative international legal principle to justify their opposition. However, this attempt to find a rights-based argument to support reasoning grounded in value-based (ethnic community) and utility-based (instrumental use of domestic legislation) considerations runs into problems with the coherence of the overall argumentation: Although reciprocity is indeed a general principle of international law, it is expressly non-applicable to human rights issues. Also, while the reference to the possibility of bilateral agreements as additional measures to implement minority protection is indeed made in the FCNM, this in no way discourages, let alone precludes the implementation via domestic legislation. Most importantly, however, the idea of reciprocity is irreconcilable with general considerations of rights and equality because it would make the treatment of each minority group dependent on the policies of their kin-state (which can differ considerably) and by definition exclude minorities without kin-states. It follows that the rights-based part, although repeatedly and forcefully put forward, was a weak point of the opponents' argumentation.

The problem of coherence in the argumentation of the opponents also concerns the conceptual underpinnings of the arguments. On the one hand, the opponents explicitly framed their rejection in terms derived from a civic perspective on the nation, i.e. on individual non-discrimination and the equality of all citizens. On the other hand, their propositions were implicitly based in part on assumptions derived from ethnic nationalism, e.g. the call for special duties and proofs of loyalty for minorities or the idea of reciprocal treatment of minorities according to their kin-state's policy towards citizens of Polish descent. It can be assumed that an openly ethnic nationalist discourse was not possible or at least not deemed to be beneficial by the opponents, so that the civic discourse was chosen as the more legitimate point of reference. However, although both propositions are convergent—i.e. they can both lead to a negative conclusion with regard to the adoption of special minority rights—they are also incoherent, because claims that are derived from one set of assumptions (ethnic nationalism: differential treatment of citizens according to ethnicity) are incompatible with the core axioms of the other (civic nationalism: equality of citizens regardless of ethnicity).

By contrast, the advocates of adopting the bill were able to present their claim coherently in terms of constitutional and international obligations by relying on the framework of individual minority rights as established by Council of Europe norms, which had already been transposed into the Polish constitution. Additionally, they utilized the partial overlap and 'translatability' between individual minority rights and substantial non-discrimination. This combination was used for mainly two reasons: first, a non-discrimination based argumentation was needed in order to counter the opponents' position that the bill violated the principle of equality; and second, it supplied the supporters with yet another basis for their claim that the bill responded to international obligations, namely that it was also implementing the EU anti-discrimination *acquis*.

VI. Conclusion

This article developed an argumentation-analytical approach to studying the role of contested international norms in domestic settings and applied it to the parliamentary debate leading to the adoption of a Polish minority law. It proposed to study the content of arguments supporting or opposing minority protection along three lines: first, the minority rights concepts upon which the proposed position are built, i.e. non-discrimination, individual or collective minority rights; second, the type of arguments used to back the claims, i.e. utility-based, value-based and rights-based arguments; third, the coherence between the different types of arguments put forward to support a position, i.e. whether single arguments add up to a coherent overall argumentation.

The analysis of the debate on adopting the Polish minority law showed that while both sides used all types of arguments in complex argumentations, only the supporting side was able to capitalize on rights-based claims referring to international norms and constitutional provisions to construct a coherent case for adoption of the law, whereas the opponents tried but failed to reframe rights-based claims to support their rejection in such a way that it was coherent with their other arguments. Value- and utility-based arguments taken alone were not able to decide the argumentation in either direction. It can therefore be concluded that rights-based arguments in general and arguments referring to international norms in particular played a crucial role in determining which side of the argument was able to justify its position in a coherent way.

While the analysis of arguments as intersubjective reasons cannot (and does not aim to) provide an explanation of the outcome in terms of the objective causes or subjective motives that led to the decision—in fact the positions in the Polish debate were already mostly fixed—it still gives important insights into how international norms inform and justify positions in domestic debates, even in cases where external pressure is weak and the norms in question contested.