USE OF DIACRITICS: TOWARDS A NEW STANDARD OF MINORITY PROTECTION?

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Abstract

The right of persons belonging to a national minority to use their names in their native language shall be considered as a fundamental element of the right to express, preserve and develop their identity. This article reviews the legal basis of new developments in protection of national minorities. The nature and extent of the right to use names in a minority language under selected international instruments are examined. There are also explored some constraints impeding the writing of personal names in diacritics of the minority language from becoming a universal norm rather than an exception.

Introduction

A person's name is the main constitutive element of his or her personal identity. The right of persons belonging to a national minority to use their names in their native language shall be considered as a fundamental element of the right to express, preserve and develop their ethnic, cultural, linguistic or even religious[1] identity. Writing minority names using diacritical signs of their native language can certainly help them exercise this right.

At present, human rights documents provide no obligation of this character and the general practice of States far from this level of protection of national minorities. However, in light of new technological developments, some countries do adopt national measures aimed to allow the use of diacritics in their civil registers and even endeavour to transform these guarantees into international obligations. Italy, Denmark, Germany and Slovenia have already enacted legislation granting members of national minorities the right to the official recognition of their names, written with diacritical marks. Meanwhile, Poland,

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[1] *See* for instance *Coeriel and Aurik* v. *Netherlands*, 31 October 1994, UN Human Rights Committee, Communication No. 453/1991.

pending the adoption of a new law on minorities' protection, has even entered into negotiations with Lithuania concerning the conclusion of a bilateral agreement on the use of diacritics in the official registers.[2]

This article takes a look at the legal basis of these new developments in protection of national minorities. First, the nature and extent of the right to use names in a minority language under selected international instruments will be examined. Then, we'll see the constraints impeding the writing of personal names in diacritics of the minority language from becoming a universal norm rather than an exception.

1. Right to one's name

A person's name may be considered as a component of its private life.[3] The right to have one's name registered in a minority language is therefore specifically protected by several international instruments.

Under Article 11, paragraph 1 of the Council of Europe's Framework Convention for the Protection of National Minorities, the Parties undertake to "recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system".

Similarly, according to Article 10 paragraph 5 of the European Charter for Regional and Minorities Languages, "the Parties undertake to allow the use or adoption of family names in the regional or minority languages, at the request of those concerned".

The right to use names in a native language forms a constitutive element of a comprehensive system of protection of national minorities and shall be

[2] *See* on this subject: „Prime Ministers of Poland and Lithuania about energy security and improving situation of poles in Lithuania and lithuanians in Poland", Press Release of Ministry of Foreign Affairs of Poland, 1 July 2007, <http://www.kprm.gov.pl/english/s.php?id=814>, accessed 12 May 2008; "Litwa: polskie nazwiska zgodnie z polskim alfabetem", *PAP*, 20 April 2007; "Spór o Ś Ć Ż Ń: Brazauskas odwołał wisytę w Polsce", *Gazeta Wyborcza*, 28 March 2002, No. 74 /3982, p. 4; „Pasztet ortograficzny: Polsko Litewski spor o pisownię nazwisk', *Gazeta Wyborcza*, 3 April 2002, No. 77 /3986, p. 4.

[3] *See* notes 14, 15 *infra*.

considered together with the related provisions of the other human rights instruments. The Explanatory Report to the Framework Convention specifies that the meaning of the first paragraph of Article 11 of the Convention lies in the international principles concerning the protection of national minorities.[4] What are these norms and do they require the official recognition of diacritics? Assessment of both international documents and State practice is needed in order to determine the actual content of the right to use names in the minority language.

1.1. General provisions of multilateral documents on human rights

Basic principles of non-discrimination of linguistic minorities and protection of their identity are revealed in major human rights agreements, inspired by the Universal Declaration of Human Rights, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights.

Within the last decade more detailed minority protection measures have appeared in a number of instruments such as the Document of the Copenhagen Meeting of the Conference on the Human Dimensions of the CSCE[5], the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[6], the Council of Europe Framework Convention for the Protection of National Minorities[7] and the Minority Languages Charter[8].

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[4] "It is understood that the legal systems of the Parties will, in this respect, meet international principles concerning the protection of national minorities". *Explanatory report to the Framework Convention*, para. 68., <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention>, accessed on 12 May 2008.

[5] CSCE, *Document of the Copenhagen Meeting of the Conference for the Security and Cooperation in Europe (CSCE) on the Human Dimension of the CSCE*, Copenhagen, 29 June 1990, <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>, visited on 12 May 2008.

[6] UN Doc. A/RES/47/135, 18 December 1992.

[7] Framework Convention for the Protection of National Minorities, Council of Europe, *ETS* No. 157. The Framework Convention was opened for signature on 1 February 1995 and came into force on 1 February 1998. By May 2008, 39 European States have became parties to the Convention.

[8] European Charter for Regional or Minority Languages, Council of Europe, *ETS* No. 148. The Minority Languages Charter was opened for signature in Strasbourg on 5 November 1992 and entered into force on 1 March 1998. As at 12 May 2008 Charter has been ratified by 23 States.

Several universal principles can be found in these documents encompassing the right of persons belonging to national minorities to use of their names in their minority language, those are: principle of non-discrimination, right to maintain and develop their cultural identity (freedom from assimilation) and the protection of a person's private life.

1.1.1. Principle of non-discrimination

This basic principle stems from the Article 1 of the Universal Declaration of Human Rights, which states: "All human beings are born free and equal in dignity and rights". Article 2(1) provides that "everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as … language".

Recent minority instruments generally guarantee to persons belonging to linguistic minorities the right to enjoy their own culture and to use their own language in private and public life, freely and without interference from any form of discrimination. For instance, Article 2(1) of the UNGA Minorities Declaration proclaims the right of persons belonging to national minorities to "use their own language, in private and in public, freely and without interference or any form of discrimination". Similarly, Article 10(1) of the Framework Convention stipulates that States will recognise the right of persons belonging to national minorities to "use freely and without interference his or her minority language, in private and in public, orally and in writing".

More generally the principle of non-discrimination is set up in Protocol No. 12 to the ECHR: "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as … language, … national or social origin, association with a national minority, … or other status".[9] Article 27 of another human rights instrument – the International Covenant on Civil and Political Rights – also declares that "persons belonging to … minorities shall not be denied the right, in community with other members of their group … to use their own language".

Names are an important element of corporate identity as well, especially in the context of persons belonging to national minorities acting 'in community'.

[9] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, opened for signature on 4 November 2000, *ETS* No. 177, Article 1(l).

Consequently, national minorities also must have guaranteed the right to use their traditional names in private and public life in their original form.[10]

Respect for a person's dignity is intimately connected with respect for the person's identity and consequently for such fundamental components of the identity as the person's name or language he/she speaks. Even though the numerous international documents embodying the principle of non-discrimination do not refer expressly to the use of diacritics, neither they do mention the possibility of derogation from this basic principle on the grounds of different letters found in the minority language.

1.1.2. Right to maintain and develop cultural identity

Another step towards the protection of national minorities is the recognition of the necessity of active measures in order to protect cultural identity of their members. If a person's language is a fundamental constitutive element of personal identity, then the existence of a secure and supportive cultural and linguistic environment is an important factor in an individual's personal development. Such an environment is, however, much more likely to exist for members of cultural and linguistic majorities than for members of minorities.[11] Therefore positive actions shall be taken to preserve cultural links amongst the members of national minorities.

The Preamble to the Framework Convention provides that "a pluralist and genuinely democratic society should not only respect ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity". This effective equality means more than simply non-discrimination, positive measures are also required (Article 4(2)).

The Minority Languages Charter recognizes that a regime of linguistic tolerance is not, by itself, sufficient to meet the needs of minority linguistic communities, thus, in Article 7(1) it requires that States take positive steps to meet

[10] *See* more in Skutnabb-Kangas T. and Phillipson R., eds., *Linguistic Human Rights. Overcoming Linguistic Discrimination* (Contributions to the Sociology of Languages, No. 67), Berlin & New York: Mouton de Gruyter, 1994, 478 p.; Greve, S. H., "What's in a Name? : the Human Rights to a Recognized Individual Identity", in Breitenmoser S. [et all] eds., *Human rights, democracy and the rule of law: liber amicorum Luzius Wildhaber*, Zürich [etc.]: Dike [etc.], 2007, p. 295-312.

[11] *See* Keller P., "Re-thinking ethnic and cultural rights in Europe", *The Oxford Journal of Legal Studies* 18:1, 1998, p. 29-60.

"the need for resolute action to promote regional or minority languages in order to safeguard them". The Explanatory Report to the Charter underlines also, that having regard to the present weakness of some of the historical regional or minority languages of Europe, however, the mere prohibition of discrimination against their users is not a sufficient safeguard. Special support which reflects the interests and wishes of the users of these languages is essential to their preservation and development.[12]

In more a general formulation, The UNGA Minorities Declaration provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity" (Article 1, paragraph 1). Furthermore, "States shall adopt appropriate legislative and other measures to achieve those ends" (Article 1, paragraph 2).

A name is a constitutive element of a person's identity. The names of the persons belonging to a national minority reveal also the "corporate" identity of the minority itself. Moreover, they are also a linguistic value. Denying persons belonging to a national minority the right to use their names in their minority language would also limit their linguistic rights. The Oslo Recommendations Regarding the Linguistic Rights of National Minorities further explains: "persons belonging to national minorities have the right to use their personal names in their own language according to their own traditions and linguistic systems. These shall be given official recognition and be used by the public authorities".[13]

It can be advanced in this respect that the refusal to recognise names, given in a minority language can constitute an attempt to assimilate minorities, thus constituting a serious threat to the identity of persons belonging to national minorities.

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[12] Council of Europe, *Explanatory report to European Charter for Regional or Minority Languages*, para 27, <http://conventions.coe.int/Treaty/en/Reports/Html/148.htm>, accessed 12 May 2008.

[13] Oslo Recommendations Regarding the Linguistic Rights of National Minorities adopted by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) attempt to clarify, in relatively straight-forward language, the content of minority language rights generally applicable in the situations in which the HCNM is involved. *See* text of the Recommendation <http://www.htmh.hu/oslo.htm>, accessed 12 May 2008.

1.1.3. Right to private life

The European Court of Human Rights acknowledged recently in *Burghartz* v. *Switzerland* (1994)[14] and *Stjerna* v. *Finland* (1994)[15] that the name of a person is a component of private life. The Court also reaffirmed in these cases that a person's name and surname is closely linked with the sense of his/her identity. Even though the European Convention on Human Rights does not contain any explicit provisions on names, the Court held that as a means of personal identification and a connection to a family, a person's surname none the less concerns his or her private and family life and therefore is protected by the Convention.[16]

These decisions were interpreted by the Constitutional Court of the Republic of Latvia in its ruling relating to the use of foreign names in official documents. In case No. 2001-04-0103 on 21 December 2001 the Court accepted that reproducing a name acquired after marriage in accordance with the traditions of the Latvian language and spelling in accordance with the norms of Latvian literary language in passports issued in Latvia shall be considered as limitation of one's private life. However, it held that "in the era of globalization Latvia is the only place in the world where the existence and development of the Latvian language together with it the existence of the main nation may be guaranteed. Limitation of the usage of the Latvian language as the state language in the state territory shall be regarded as the threat to the democratic system". Hence, the Latvian Court held that, the limitation of one's private life has a legitimate objective.[17]

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[14] *Burghartz* v. *Switzerland*, 22 February 1994, ECHR, no. 49/1992/394/472, para 24, Series A no. 280-B, p. 28.

[15] In this case concerning the right to change the name into the one held by the ancestors, the Court referred to the case of *Burghartz* v. *Switzerland* and reaffirmed, that "since [the name] constitutes a mean of personal identification and a link to a family, an individual's name does concern his or her private and family life (para 37). The fact that there may exist a public interest in regulating the use of names is not sufficient to remove the question of a person's name from the scope of private and family life, which has been construed as including, to a certain degree, the right to establish relationships with others (*ibid.*). The Court recognized also that names retain a crucial role in the identification of people (para 39). *Stjerna* v. *Finland*, 25 November 1994, ECHR, no. 38/1993/433/512, Series A no. 299-B.

[16] *Burghartz* v. *Switzerland,* note 14 *supra.*

[17] Judgment of the Constitutional Court of the Republic of Latvia "On Compliance of Article 19 of the Language Law and the Cabinet of Ministers August 22, 2000 Regulations No. 295 'Regulations on Spelling and Identification of Names and Surnames' with Articles 96 and 116 of the Satversme (Consti-

Thus, whilst the names are protected by Article 8 of the ECHR, the possibility of derogation, provided for in paragraph 2 of this Article is interpreted in practice in a rather broad manner.

The affirmation found in two recent decisions of the European Court of Human Rights that the reproducing the name in its original form does concern the right to private life has linked the use of minority languages with the issue of transforming documents issued by foreign authorities into national legal registers.

In 1973 already the attempt was made by the State Members of the International Commission on Civil Status (Commission Internationale de l'Etat Civil) to unify the writing of foreign names in national civil registers. Article 2 of the Berne Convention on the Recording of Surnames and Forenames in Civil Status Registers, established that "names and surnames shall be reproduced in a civil status register in their original form literally, without alteration or translation, including diacritic marks not existing in the language in which the record is to be made. If different characters are used in the language in which the record is to be made, names shall be reproduced as far as possible by transliteration without being translated."[18]

Only Austria, Germany, Greece, Italia, Luxembourg, The Netherlands and Turkey have become members of this Convention. In Austria, for example, persons names which are to be registered on the basis of a document presented in Latin letters must be recorded as a true copy of the original letters and characters, diacritic characters, not used in the German language must also be used.[19] Nonetheless, the national legislation of some other States also contains provisions allowing for the reproduction of diacritics of foreign languages. For instance, the Decree of Lithuanian Minister of Justice on the Civil registry provides for the possibility of transliteration – i.e. reproducing the foreign names according to their spelling and omitting the diacritics only if they can not be

tution)", 21 December 2001, <http://www.riga.lv/minelres/NationalLegislation/ Latvia/Latvia_ConstCourt2001_English.htm>, visited on 16 October 2006.

[18] Convention on the recording of surnames and forenames in civil status registers, signed at Berne on 13 September 1973.

[19] Section 5 para 3 of the Civil Status Ordinance, cited in the report of Austria under Framework Convention, note 32 *infra*.

reproduced technically. The symbols, of course, are limited to those of the Roman alphabet.[20]

Even though this is applied only to foreign nationals, it corresponds to the requirement affirmed also by the United Nations Human Rights Committee that no one shall be arbitrary forced to change his name.[21] On the other hand, what are the reasons to deprive the members of national minorities the right to use letters not appearing in the script of the official language, when such a right is guaranteed to foreigners?

It may appear that only names that once were officially recorded are protected under the right to privacy. The European Court of Human Rights has not yet pronounced on this subject. On the contrary, the Court found, for instance, that the material presented by the applicant, Tadeuš Klečkovski, who objected to the way his name was written in his Lithuanian passport, did not disclose any appearance of a violation of the rights and freedoms set out in the Convention and its Protocols (Decision on Application No. 59379/00 of May 31, 2001).

A person's name appears to be internationally protected. First of all under the right to privacy, however, if a person belongs to a national minority a name can also identify a person as belonging to a community, and any State restriction on the use of a person's name in a minority language would be an intervention in what is by its very nature a private matter.[22]

1.2. Bilateral agreements

International instruments for the protection of human rights provide for the obligation to take measures for the protection of the identity of national minorities, the extent and modalities of which is left to the States. These international documents recognize that diverse initiatives are necessary to implement

[20] Decree of the Minister of Justice of the Republic of Lithuania No. 65 of 26 March 1999, *Valstybės žinios*, 1999, No. 29-840.

[21] *Coeriel and Aurik* v. *Netherlands*, note 1 *supra*, para. 10.2.

[22] *See* also in De Varennes F., *Language, Minorities and Human Rights*, The Hague: Martinus Nijhoff, 1996, 532 p.

the principles contained therein. They refer in particular to the conclusion of bilateral agreements for the protection of national minorities.[23]

It is obvious, that bilateral agreements on reciprocal protection of national minorities can be more easily adapted to the particular needs of the Parties and the national minorities, residing in the territories of two neighboring States, and thus more effective. Besides, they can serve as an affirmation of commitments concerning territorial integrity and require the loyalty of the members of minorities and therefore can be more attractive to the governments. For instance, at the time of the ratification of the Framework Convention Poland submitted a declaration reaffirming its readiness to implement the Convention by concluding bilateral agreements.[24]

It is not surprising therefore that the use of these bilateral agreements has increased in the last few decades. Basically, they incorporate provisions of multilateral documents or just refer to them,[25] as they have to comply with the universal standards of the minority protection.[26] At the same time, the primary objective of the contracting governments may be seen as calming their respective national minorities rather than proposing additional guarantees.

Typical formulation concerning the use of first names and surnames by the persons belonging to national minorities is contained in the Poland-Germany

[23] Article 18 paragraph 1 of the Framework Convention reads: "The Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned."

[24] "The Republic of Poland shall also implement the Framework Convention under Article 18 of the Convention by conclusion of international agreements mentioned in this Article, the aim of which is to protect national minorities in Poland and minorities or groups of Poles in other States." Text of the declaration from the Archives of the Treaty Office of the Council of Europe.

[25] *See* for general approach Defeis E. F., 'Minority Protection and Bilateral Agreements: an Effective Mechanism', *Hastings International and Comparative Law Review* 22, 1999, p. 291-321.

[26] Asbjorn Edie, in his report to the Sub-Commission on Prevention of Discrimination and protection of Minorities, cited by Defeis (supra note 17 at 331), stressed that "the contents of provisions on minorities in such […] bilateral arrangements should be based on universal and regional instruments on equality, non-discrimination and minority rights". He also added, that "where specific minorities are mentioned in such provisions, the treaty should contain an additional provision ensuring that minorities not mentioned in the treaty shall enjoy the same level of protection and promotion of their existence and identity". "Possible Ways and Merits of Facilitating the Peaceful and Constructive Solution of Problem Involving Minorities", United Nations, *Report Submitted by Mr. Asbjorn Edie, Sub-Commission on Prevention of Discrimination and protection of Minorities*, UN Doc. E/CN.4/Sub.2/1993/34Add.4(1993).

Treaty on Good-Neighborliness and Friendly Cooperation.[27] Article 20 guarantees their respective minorities the right "to use their first and surnames *in the form* of the mother tongue" (emphasis added).

However, some of them contain slightly different formulations that could be interpreted as more favorable to national minorities. For instance, the Treaty on Good-neighbourly Relations and Friendly Co-operation between the Republic of Hungary and Slovakia confirms the right of the Hungarian minority in Slovakia and Slovak minority in Hungary "*to register* and use their names and surnames in this [minority] language".[28] Agreement between Hungary and Croatia on the reciprocal protection of national minorities imposes the obligation on the Contracting Parties to ensure for the members of the minorities "the *free* use and *registration* of their *original* first names and surnames".[29]

None of the bilateral agreements contain provisions concerning the obligatory recognition of diacritics. On the contrary, Article 14 of the Treaty on Friendly Relations and Good-Neighbourly Co-operation between Lithuania and Poland provides, for instance, that names and surnames must be used "*as it is pronounced* in the language of the national minority".[30]

The meaning of these provisions therefore can be found when looking at their implementation in the national legislation of the Parties. In Hungary, for instance, individuals belonging to a minority can "register their family names *in line with the rules* of their native language, and, within the framework defined in the legal regulations to have them appear in official documents". It is added, however, that "in the case of registration not occurring in the Latin alphabet the phonetic Latin-style alphabet must be used".[31] Similar provisions may be found in the regulations on civil registers of other European countries.

The overall impression after having examined the provisions of bilateral agreements concerning the use of minority names is that they tend to grant the

[27] Treaty between the Republic of Poland and Federal Republic of Germany on Good-Neighborliness and Friendly Cooperation of 17 June 1991.

[28] Treaty on Good-neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic of 19 March 1995, Article 15 (g). Emphasis added.

[29] Convention between the Republic of Hungary and the Republic of Croatia on the protection of the Hungarian minority in the Republic of Croatia and the Croatian minority in the Republic of Hungary of 5 April 1995, Article 4, para. 1. Emphasis added.

[30] Treaty between the Republic of Lithuania and the Republic of Poland on the Friendly Relations and Good Neighbourly Co-operation of 26 April 1994. Emphasis added.

[31] Report of Hungary under the Framework Convention, note 32 *infra*.

rights to write the names according the grammar rules (by adding or omitting suffixes, endings, etc.) of minority languages but not the use of its script.

It could be concluded, that bilateral agreements can serve as a source for the interpretation of the general principles on the national minorities' protection embodied in international documents. However, they do not provide the definitive answer whether those principles encompass the right to use diacritics in official documents. Therefore we shall go further and take a closer look at the arguments of those States, whose legislation does guarantee this right to their respective national minorities.

1.3. State practice allowing the use of diacritics

Pursuant to Article 25 of the Framework Convention and Article 15 of the Minority Languages Charter States Parties to these Conventions are required to submit periodic reports on their application.[32] As of 12 May 2008 there are thirty-nine countries parties to the Framework Convention and twenty-three parties to the Minority Languages Charter. Even though the majority of the State Parties to the Charter do not expressly prohibit the use of diacritics, only a few of them have indicated in their periodic reports as having already enacted domestic measures allowing the use of diacritics in their civil registers thus granting the members of national minorities the right to bear their names in the minority language, of course, in Latin characters.

Probably the most protective system has been created in Slovenia where the languages of Italian and Hungarian national minorities have been granted status of official languages.[33] The Law on Personal Names of the Republic of Slovenia provides that the personal names of a member of the Italian or Hungarian national minority shall be entered in Italian or Hungarian script and form, except

[32] The reports available at http://www.coe.int/t/e/human_rights/minorities/ 2._framework_convention_(monitoring)/2._monitoring_mechanism/3._state_reports_and_unmik_kosovo_report/2._second_cycle/List_SR_2nd_cycle.asp and http://www.coe.int/t/e/legal_affairs/ local_and_regional_democracy/regional_or_minority_languages/2_Monitoring/Monitoring_table.asp

[33] Article 11 of the Constitution of the Republic of Slovenia reads: "The official language in Slovenia is Slovene. In those municipalities where Italian or Hungarian national communities reside, Italian or Hungarian shall also be official languages."

if the member of the minority determines differently.[34] Bilingual documents are compulsory for the population on an ethnically mixed territory regardless of their national origin. In addition to the identity card (the form is trilingual: Slovene/Italian -Hungarian/English), passports (the passport is quadrilingual: Slovene/Italian - Hungarian/English/French) and passes for crossing the border in the border areas with Italy and Hungary, driving licences and certificates of registration, health insurance cards and weapons certificates are also bilingual.[35] As stressed in the Initial Periodic Report by Slovenia under the Minority Languages Charter: "The provision that a record in the national community language must take into account the rules of writing of the Hungarian and Italian script, respectively, is *part of the inherent right of members of the national communities to use their mother tongue*."[36]

Use of foreign diacritics is also officially recognised in Italy. Law No. 935 of 31 October 1966, amending the decree of 9 July 1939, established *inter alia* that "foreign forenames given to children of Italian nationality must be written in the letters of the Italian alphabet, including the letters J, K, X, Y and W. In case of children belonging to the recognised linguistic minorities, the forenames may be written using the above-mentioned letters together with the diacritical signs of the alphabet of the language of the minority in question".

In Denmark, the names of members of the German minority, including the letters ü and ö are recognized in public and private relations.[37] Correspondingly the members of Danish national minority in Germany are entitled to use and

[34] Personal Name Act (*Uradni list RS*, No. 2/87), Article 3: "The personal name of a member of the Italian or Hungarian nationality shall be recorded in the Italian or Hungarian script and form, unless otherwise decided by a member of this nationality." Bilingual documents are compulsory for the population on an ethnically mixed territory regardless of their national origin. In addition to the identity card (the form is trilingual: Slovene/Italian-Hungarian/English) and passports (the passport is quadrilingual: Slovene/Italian - Hungarian/English/French) and passes for crossing the border in the border areas with Italy and Hungary, driving licences and certificates of registration, health insurance cards and weapons certificates are also bilingual. *See* Initial Periodical Report by Slovenia under the Minority Languages Charter, note 32 *supra*.

[35] The use of language by the national communities is also guaranteed in some main acts. *See* Register of Births, Marriages and Deaths Act (*Uradni list RS*, No. 2/87) Article 30, para. 2, Personal Identity Card Act (Uradni list RS No. 75/97, 5 December 1997) Article 6 and Passports of Citizens of the Republic of Slovenia Act (*Uradni list RS*, No. 65/2000) Article 13.

[36] Report of Slovenia under the Framework Convention, note 32 *supra* (Emphasis added).

[37] Report of Denmark under the Framework Convention, note 32 *supra*.

adopt names in the Danish language.[38] It may be noted that only the Danish national minority (apart from dispersed Roma, Frisians and Sorbs) is officially recognised in Germany and the German national minority is the only recognized minority in Denmark.[39]

Poland's new law on national minorities came into force on 1 May 2005 providing the right to the members of a minority to spell their names and surnames in passports and civil registers according to the orthographies of their own language. This only applies, however, to the minorities using Latin alphabet.[40] Besides, Poland declares itself ready to issue identity documents using diacritics even before the adoption of the said Law.[41]

Documents providing for minority protection do not indicate expressly the obligation to allow the use of diacritical marks in the official records. The discretion how to implement principles set out in these documents is left to the State Parties through national legislation and appropriate governmental policies[42] and taking into consideration their specific conditions and historical traditions.[43]

As we have seen, at least a few State Parties to the Framework Convention referred to international standards in their implementing domestic legislation.[44]

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[38] With the 13th General Regulatory Order to Amend the General Regulatory Order to Implement the Act on Civil Status ("Standing Instructions for Registrars and Their Supervisory Authorities with regard to the *Act on Civil Status*") of 2 June 1998 (Supplement to the *Bundesanzeiger* [Official Gazette of the Federal Republic], no. 107), which entered into force on 1 July 1998, account was taken of the provisions of the Framework Convention by including the provisions of the Act [on Civil Status] in Section 381a of the Standing Instructions and having them applied in registry office practice. The *Standing Instructions for Registrars and Their Supervisory Authorities* take account of the orthographic particularities of the names of members of national minorities by providing that the diacritics (graphic accents, hooks, etc.) in names or other words shall be retained as such.

[39] Source: State reports under Framework Convention, note 32 *supra*.

[40] Law on national and ethnical minorities and regional languages [Ustawa o mniejszościach narodowych i etnicznych oraz o języku regionalnym] of 6 April 2005, Article 10, <http://www.mswia.gov.pl/index_wai.php?dzial=178&id=2958>, accessed 12 May 2008. See also Polish second report on implementation of Framework Convention, note 32 *supra*.

[41] Lentowicz Z., "Klopotliwe znaczki", *Rzeczpospolita*, 15 April 2002. Decree of the Minister of the Interior and Administration of 30 May 2005 establishes schemes of transcription of the languages, using non-Latin alphabets, <http://www.mswia.gov.pl/download.php?s=1&id=1091>, accessed 12 May 2008.

[42] Preamble of Framework Convention, note 7 *supra*.

[43] Preamble of the Minority Languages Charter, note 7 *supra*, Paragraph 35 of the Copenhagen Declaration, note 5 *supra*.

[44] *See* for instance report of Slovenia, note 32 *supra*.

Others, without referring directly, changed their domestic legislation and allowed the use of diacritics after acceding to these Conventions.[45]

On the other hand the bilateralism in assuring this right is also clearly present, underlining thus the voluntaristic nature of these arrangements.

Finally, the vast majority of State Parties to the Framework Convention and the Minority Languages Charter have not adopted this practice and, to be stressed, this was not considered a violation of the international norms. If the positive effect of the use of diacritics in preserving the identity of national minorities is obvious, then, what may be the reasons of those States in depriving them of this advantage?

2. Practical implications

Even if you are given a name in minority language, it does not necessarily mean that you will determine how it is spelt. In today's International Community ensuring this right to national minorities is still a far-away objective rather than common practice. Amongst the numerous arguments advanced by Governments the most prominent appear to be the necessity to ensure the integration of national minorities into society and the protection of the rights of other members of society.

2.1. Identity-integration conflict

International documents not only provide an obligation to respect minority rights and ensure their protection but also guarantee that the protection of national minorities does not infringe the main purpose of a State –to ensure stability and thus the integrity of its society.

In the words of the Explanatory Report to the European Minority Languages Charter, "the approach of the charter respects the principles of national sovereignty and territorial integrity. Each state is required to take into account

[45] *See* report of Germany, note 38 *supra*.

a cultural and social reality and there is no question of challenging any political or institutional order."[46]

The Explanatory Report to the Oslo Recommendations proposed the same approach which "encourages a balance between the right of persons belonging to national minorities to maintain and develop their own identity, culture and language and the necessity of ensuring that they are able to integrate into the wider society as full and equal members".[47]

Even if the minority protection documents guarantee freedom from assimilation, under Article 5(2) of Framework Convention States Parties are allowed to take measures "in pursuance of their general integration policy".

As well, Article 8(2) of the ECHR refers to the protection of the rights and freedoms of others as a ground permitting the limitation of the right to a private life.[48]

Where is the balance between the need for ensuring the identity of a national minority and the primary objective of the integration of the whole society, or a nation? When a member of a minority becomes an alien in the society?

Individuals residing in a country often ascribe themselves to more than a hundred nationalities. Various letters are used in their languages, which often are totally or in part different from the letters of the language of the State in which they live. Writing names in the language of a national minority in official documents would certainly raise problems for the integration of the members of such a minority. Of course, they may differ depending on the linguistic relation of the minority language with that of the majority of the population, the importance and density of the national minority concerned and many other factors. However, it is clear that a person would face psychological discomfort

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[46] Explanatory Report to the Minority Languages Charter, para 28, note 12 *supra*. It adds however, that, "on the contrary, it is because the member states accept territorial and state structures as they are, that they believe it is necessary, within each state, but in a concerted manner, to take measures to promote languages of a regional or minority nature."

[47] OSCE, *The Oslo Recommendations Regarding the Linguistic Rights of National Minoritie and Explanatory Note*, prepared in February 1998 by the Foundation on Inter-Ethnic Relations at the Request of the OSCE High Commissioner on National Minorities, The Hague: OSCE, 1998. Text also at <http://www.unesco.org/most/ln2pol7.htm>, accessed on 12 May 2008.

[48] A8 (2) of the ECHR reads "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

being obliged to spell out his name in every day life. For this very reason in many countries a person is entitled to change his name if the current name gives rise to pronunciation and spelling difficulties.[49]

In the modern State, the key role in integrating the whole society is attributed to the common language of its members.[50] The Official (or State) language serves to unify different national and linguistic groups. The need for such integrating value is emphasised, for example, in the Explanatory Report to the European Minority Languages Charter:

> "The affirmation of the principles of interculturalism and multi-lingualism serves to remove any misapprehension as to the aims of the charter, which by no means seeks to foster any kind of partitioning off of linguistic groups. On the contrary, it is recognised that in every State it is necessary to know the official language (or one of the official languages); consequently, none of the charter's provisions should be interpreted as intending to raising obstacles to the knowledge of official languages."[51]

According to the explication of the Constitutional Court of the Republic of Lithuania,[52] "the State language preserves the identity of the nation, it integrates a civil society, it ensures the expression of national sovereignty, the integrity and indivisibility of the State, and smooth functioning of the State and

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[49] *See* reports of Sweden, Norway, and Denmark under Framework Convention, note 32 *supra*.

[50] *See*, especially from historical aspect, Mackey W. F., "Language Diversity, Language Policy and the Sovereign State", *History of European Ideas* 13:1/2, 1991, p. 51-61.

[51] Explanatory Report to the Minority Languages Charter, para. 29, note 12 *supra*.

[52] Resolution of the Supreme Council of the Republic of Lithuania No. I-1031 of 31 January 1991 "On Writing of Names and Family Names in Passports of Citizens of the Republic of Lithuania" provided that in passports the names and family names of all the citizens of the Republic of Lithuania of Lithuanian or non-Lithuanian origin shall be written in Lithuanian letters. Under the written request of the citizen of non-Lithuanian nationality his name and family name shall be written: (a) according to the pronunciation and without conforming to the grammatical rules (without Lithuanian inflections) or (b) according to the pronunciation and conforming to the grammatical rules (by adding Lithuanian inflexions). *Valstybės žinios*, 1991, No.5-132.
Seized by a regional court, the Constitutional Court of the Republic of Lithuania established that this provision complies with the guarantee of preservation of ethnic identity, development of the culture and national self-expression of ethnic communities, provided for in Article 37 of the Constitution of Lithuania. Ruling of 21 October 1999, *Valstybės žinios*, 1999, No. 90-2662, *See* also ruling of the Constitutional Court of the Republic of Lithuania of 10 May 2006 (para. 4), <http://www.lrkt.lt/dokumentai/2006/r060510.htm>, accessed 12 May 2008.

local government establishments. The State language is an important guarantee for the equality of rights of citizens as it permits all the citizens to associate with State and local government establishments under the same conditions and to implement their rights and legitimate interests".[53]

On the contrary, the Court held in its resolution of 31 January 1991, that if legal norms provide that the names and family names have to be written in letters other than those of the State language then the constitutional principle of State language and the principle of the equality of all persons before the law would be violated.[54]

The Latvian Constitutional Court also held that the threat to functioning of the Latvian language as a unified system if the spelling of foreign personal names in the documents in their original form was allowed is much greater than the discomfort a person might experience in case the surname in the passport is reproduced in State language.[55]

Thus, the right to one's identity is not absolute. For the purposes of Article 14 ECHR, a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Under the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.[56]

It is clear that the exercise of positive rights shall not impinge on the basic civil and political rights of others.[57] As the European Court of Human Rights found in case *Stjerna* v. *Finland*, cited above, "regard must be had to the fair

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[53] *Ibid.*

[54] In the dictum of the Court: "there is a fear that in case the names are written in letters, not familiar to an ordinary citizen, the activity of state and local government institutions, that of other enterprises, establishments and organizations would be disturbed. Due to this citizens would face more difficulties in implementing their rights and legitimate interests.", *Ibid.*

[55] Note 17 *supra*.

[56] *Van Raalte* v. *The Netherlands*, 21 February 1997, ECHR, no. 108/1995/614/702, *Reports of Judgements and Decisions*, 1997-I, para. 39.

[57] *See* Article 8(1) of the UNGA Declaration on Minorities, note 6 *supra*, and Article 20 of the Framework Convention, note 7 *supra*.

balance that has to be struck between the competing interests of the individual and of the community as a whole".[58]

On the other hand the Court stressed in the same case that in today's Europe, where the movement of people between the countries is becoming part of every day life, no one may complain any more of having been forced to spell out a foreign name.[59]

After all, writing of entries in the passport in official language does not deny the right of those attributing themselves to national groups to write their names and family names in any language as long as it is not linked with the sphere of use of state language. A variety of methods have been implemented to ensure the use of the official language(s) and the protection of the identity of national minorities. In Latvia, for instance, the original form of the name and surname can be reproduced in a person's passport page for 'special notes' thus diminishing the psychological discomfort of the transcription.[60] However, sometimes the compromise may threaten the identity of the national minority instead of helping to preserve it: the idea of transliteration of the symbols of minority language which coincide with those of the official language and the transcription phonetically others may lead to the creation of hybrid names, alien both to majority and minority languages.[61]

2.2. Problem of different alphabets

This goes already from the logic that the right to use the names in a minority language can be ensured only to those using the same alphabet. It is obvious that for practical reasons no Latvian passport could ever be issued in Russian and a French driving licence will not be printed in Hebrew or Arabic. The re-

[58] *Stjerna* v. *Finland,* note 15 *supra*. *See* also *Keegan* v. *Ireland*, 26 May 1994, ECHR, no. 16/1993/411/490, Series A no. 290, p. 19, para. 49.

[59] The Court held precisely, that "As to the instances of inconvenience complained of by the applicant, the Court is not satisfied on the evidence adduced before it that the alleged difficulties in the spelling and pronunciation of the name can have been very frequent or any more significant than those experienced by a large number of people in Europe today, where movement of people between countries and language areas is becoming more and more commonplace", *Ibid.*

[60] *See the* ruling of Latvian Constitutional Court, note 17 *supra*.

[61] *See* for example L. Dowdo, 'Te Krytyczne Diakrytyczne', *Magazyn Willeński,* 2001, No. 8, p. 3-4.

port of Albania submitted pursuant to Article 2, paragraph 1of the Framework Convention explains:

> "According to the law, the registration [of names] in the Civil Registry Office is made . . . on the basis of the orthography of the Latin alphabet, as the Albanian language, which is at the same time the official language in Albania, is written. This rule is also applied for the fact that the three national minorities living in the territory of Albania write their native languages on the basis of the orthography of the Cyrillic alphabet. Consequently, the registration of the names and surnames of their members on the basis of the Cyrillic orthography would cause numerous problems and confusion in their relations with the other part of the public administration and with other different institutions in Albania."[62]

In a proposal for name-writing in Swedish authorities data processing, Swedish Agency for Public Management[63] simply explains that "non-Latin letters are not included. It must be possible for government personel (and others) to understand and handle all the letters. To include non-Latin letters would be too difficult for the average civil servant and the public. It would lead to too many errors and mistakes.

Greek, Cyrillic, Arabic etc. have to be excluded in Sweden".

Thus, the controversy is clear: the right cannot be granted to one category of persons on the grounds of eliminating the discrimination because that would cause the discrimination of the other category. In other words, accepting the existence of a right of certain national minorities would automatically mean denial of that right to the others merely on the basis of the language they use.

One may argue, that it is universally accepted that the positive measures taken in order to protect minorities cannot be considered as discriminatory in respect to majority members. Article 4 of the Framework Convention provides expressly that those measures taken in order to ensure the effective equality between persons belonging to a national minority and those belonging to the majority shall not be considered to be an act of discrimination. However, this

[62] Note 32 *supra*.

[63] Swedish Agency for Public Management, Name-writing in Swedish Authorities data processing – a proposal, 8 March 2005 <http://www.statskontoret.se/upload/3655/ namewritingproposal.pdf>, accessed 12 May 2008.

concerns only minority – majority relations. None of the minority could be given advantage in rights in respect of the others.

This could be clearly illustrated by the State practice. In Malta surnames shall be spelt in the Latin alphabet, in Ukraine names are spelled in Ukrainian (using the Cyrillic alphabet) by means of the transcription, in Switzerland only Roman script is accepted in the registers of marriages, birth and deaths.[64] The German report under the Framework Convention stresses that "on account of the wide margin of discretion regarding the implementation of the Framework Convention, the legislator was at liberty to ensure that a name [of the member of national minority] also be in Roman characters/spelling which are familiar to the German civil registration system".

It can also be found in bilateral agreements. For instance, the Collaboration Agreement between Moldova (using the Latin alphabet) and Belarus (using the Cyrillic alphabet), referred to in the report under the Framework Convention, contains similar wording as the bilateral agreements of the countries using the same alphabet. Its Article 5 guarantees national minorities the right "to use their names and family names, *inter alia*, in official documents, in accordance with the rules of their mother tongue". It also provides that this should be done "in conformity with the rules on transcribing proper nouns into another language". It is implied that the right to use names in a minority language is limited to the form of the name and not it's spelling.[65]

International documents also reveal the fact that the right of the members of a national minority to use names in their native language does not extend to the use of the script of that language in official documents.

2.3. Practical limits defined by international documents

It is expressly stated in the Explanatory Report to the Framework Convention in relation to the provision concerning the right of persons belonging to a national minority to use names in the minority language and the right to their

[64] Data from the State reports under of the Framework Convention, note 32 *supra*.

[65] *See* also Czech report under the Framework Convention, note 32 *supra*, where also it is accepted that the requirement to change the surnames of persons belonging to national minorities by adding feminine suffixes can be considered to be a discriminating restriction of their linguistic rights, but the problem of the use of diacritics is not mentioned.

official recognition, that "in view of the practical implications of this obligation, the provision is worded in such a way as to enable Parties to apply it in the light of their own particular circumstances. For example, Parties may use the alphabet of their official language to write the name(s) of a person belonging to a national minority in its phonetic form."[66]

A similar provision is found in the Explanatory Note to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities: "This right, the enjoyment of which is fundamental to one's personal identity, should be applied in light of the circumstances particular to each State. For example, public authorities would be justified in using the script of the official language or languages of the State to record the names of persons belonging to national minorities in their phonetic form."

As concerns the right of the persons belonging to linguistic minorities to enjoy their own culture and to use their own language in private and public life, freely and without interference of any form of discrimination, it should be stressed, that, although the instruments refer to that right as an inalienable right[67], these same instruments do not precisely delimit the 'public' as opposed to the 'private' spheres.

According to professor de Varennes, using a person's name during a religious ceremony, a private discussion at home or in a public street, or on a sign or poster on private property, still involves a person using words from a minority language in the private sphere. A State which would attempt to forbid a person belonging to a minority from using his or her own name because only names in the official, non-minority language are permitted would clearly be in breach of the principle to use one's own language in private and in public, freely and without interference or any form of discrimination.[68]

According to the Explanatory Report to the Framework Convention, the use of a minority language in "public life" is restricted to use in public places or in the presence of others, and, even though the Convention guarantees the right to use the minority language not only orally but also in writing (Article10.1),

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[66] Explanatory Report to the Framework Convention, note 3 *supra*, para. 68.

[67] *See* preamble to the Minority Languages Charter, note 8 *supra*.

[68] De Varennes F., *To speak or not to speak: The Rights of Persons Belonging to Linguistic Minorities*, Working Paper prepared for the UN Sub-Committee on the rights of minorities, 1997, <http://www.unesco.org/most/ln2pol3.htm>, accessed 12 May 2008.

it is not concerned with communications with public authorities or use of the minority language in official contexts,[69] such as official identity documents.

The right to use a minority language, embodied in international law, is limited therefore by the script of the State language. On the other hand, whilst a State would not be obligated to use a particular script in any of its official activities, universally recognized principles of minority protection do prevent a State from banning the use of a minority script (as an aspect of language) in the private sphere. Whether involving script use in private correspondence, the printing of a book by private entities, or on signs posted by a private entrepreneur, all these activities represent situations where persons have the right, in private or in public, to use their own minority language.

Therefore, it should be stated beyond any doubt that despite the spreading practice of States, at the present stage of development, international law provides no obligation to ensure the use of diacritics in the official documents of a person, belonging to a national minority.

Conclusions

International instruments for human rights protection obliged States to take measures for the protection of the identity of national minorities, the manner in which this is implemented is up to the States. Some of them permit national minorities to use names in the script of their native language, including diacritical marks.

However, this is far from becoming a common standard. Notwithstanding the attempts to unify the reproduction of foreign names in national civil registers, international practice reveals the right of States to use official State language in the person's identity documents.

At the present stage of development international law also reserves the possibility of using the alphabet of the official language to write the name of a person belonging to a national minority in its phonetic form.

On the other hand, it can be considered common practice that the minority names are used in their original form, that is, according to the grammar rules (by adding or omitting suffixes, endings, etc.) of minority languages. Besides, the diacritics are normally reproduced when the names of foreign citizens are

[69] Explanatory Report to Framework Convention, note 4 *supra*.

registered in civil registers. From the technical aspect, at least, this right can be also granted to minorities, using the different diacritical marks of their native language.

Thus, the present principles of international protection of names of national minorities can be best described by the words of professor Fernand de Varennes: "States operating within a democratic framework . . . must acknowledge the role and contributions of all of their peoples. Individual human worth and dignity, as a cornerstone of the international human rights edifice, implies a democratic State structure that values all of its citizenry. In terms of language or cultural preferences, this does not exclude a state from adopting a common or official language, but it does mean that value must also be attached to the worth and dignity of the whole population. Minorities within the State which differ from the majority must thus not simply be tolerated, but embraced and accommodated within the State as much as is reasonably possible to do given the situation of the minority and the conditions within the State. That is the very essence of the modern concept of human and minority rights." [70]

Finally, the practice of States is encouraging in this context. The international protection of national minorities is constantly developing. The adoption of new measures aimed at the protection of the identity of persons belonging to national or linguistic minorities is ongoing and promoted by competent international bodies.

[70] De Varennes F., *To speak or not to speak,* note 67 *supra.*