Charles Szymanski

Uniwersytet w Białymstoku
e-mail: charles.szymanski@gmail.com

ORCID: 0000-0002-7767-0913
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Reliance on International Treaties as a Means of Protecting Minority Rights: An Effective Strategy or Waiting for Nothing? The Case of the Polish Minority in Lithuania

ABSTRACT

This article focuses on the legal and political impact of international minority rights treaties on the Polish minority in Lithuania. An analysis will be made as to whether and to what degree they have been followed by Lithuania, and, overall, whether they have been effective for the Polish minority in Lithuania. The possibility that they are more of a false promise will also be addressed, and whether or not reliance on international law – perhaps in conjunction with local political action within Lithuania – is a good strategy for Poles in Lithuania. In general, international law norms have not had a direct impact, at least as applied by various international tribunals and other bodies. Cases brought by ethnic Poles before the European Court of Justice, the European Court of Human Rights, and the U.N. Human Rights Committee have not yielded significant results. The Framework Convention for the Protection of National Minorities does directly address many of the issues raised by the Polish minority, but it is not enforceable absent enabling legislation. Yet, recent positive domestic legislation and case law in Lithuania have mitigated these concerns, suggesting that political mobilization, using international norms as a benchmark to be obtained, is much more effective than relying on international law on its own.

Key words: Minority Rights, Discrimination, Language Rights, Political Action

Introduction

Justice Chesin of the Israeli High Court of Justice, in considering a case concerning the right of the Arab minority to have street signs posted in Arabic as well as Hebrew, noted in his opinion that there were a number of international treaties that might be relevant to this issue. However, he went on to explain that "There is no reason to analyze these conventions in depth... We will not analyze these conventions because they are full of exceptions and exceptions to the exceptions and grant a lot of discretion to countries to act or to not act, all of which demonstrate the difficulties that arise when language rights are at issue and the great sensitivity involved in recognizing them".[1] In essence, the focus of this article is whether Justice Chesin's views hold true with respect to the situation of language rights for the Polish minority in Lithuania. Is international law the key to resolving Polish-Lithuanian disputes over language rights, or is it a false promise, or something in between?

Initially, some historical background will be provided about the Polish minority in Lithuania, Polish-Lithuanian relations, and the nature of the current issues regarding the use of the Polish language in Lithuania. While there are many issues, the focus here will be on the use of Polish language for names in official documents, signs, and in education. Next, an overview of the international law potentially applicable to these issues will be provided, with a view towards determining if any of these treaties or conventions directly address these problems. Finally, an analysis will be made of the actual and potential role that any relevant international treaties have in improving the language rights of the Polish minority; i.e., if international law does address these issues, is it actually enforceable or does it otherwise help push both sides towards coming to a fair resolution? Answering this question largely turns on the effectiveness of soft law or hard law as applied to the Polish-Lithuanian example. Soft law is a type of law that either has no or a very weak enforcement mechanism, while hard law is generally enforced.[2] It appears that soft international law, riddled with "exceptions and exceptions to the exceptions"[3], is at best a very slow means towards advancing Polish minority language rights in Lithuania, although not completely irrelevant. It must be used in conjunction with direct political action, until such time as more hard law protections for minority rights – as advocated herein – have settled in place.

1 Adalah, et. al. v. The Municipalities of Tel Aviv-Jaffa, et. al., Supreme Court of Israel, 25 July 2002, H.C. 4112/99, at Para. 68.

2 L. Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, "New York University Journal of International Law and Politics" [hereinafter: "N.Y.U. J. Int'l L. & Pol."] 2010, vol. 43, pp. 168-169.

3 Adalah, op. cit., n. 1.

Historical Background

Poland and Lithuania were united in a Commonwealth for hundreds of years prior to the Russian/German/Austrian partitions of the country beginning in 1772, after which time the Commonwealth disappeared from the map. During this union, it is said that the Lithuanian nobility – particularly in Vilnius, the Lithuanian capital – became "Polonized", adopting the Polish language and culture as a means of social advancement.[4]

At the end of the First World War, nationalism generally replaced the concept of multinationalism, and both Poland and Lithuania wanted to restore their independence as national states, rather than achieve a restoration of the old Commonwealth. There were some discussions about creating a new federation, but these were not successful.[5] One of the most difficult issues was resolving the status of Vilnius. For Lithuania, it had been the historical capital and Lithuania wanted it to become the capital of the restored Lithuanian state. For Poland, Vilnius (Wilno in Polish) was ethnically a Polish city (with only a small percentage of Lithuanian speakers), and Poland demanded that it become part of the new Polish national state.[6] Compounding the difficulty was the fact that the leader of newly independent Poland, Jozef Pilsudski, was from the Vilnius region and had a personal interest in seeing it remain part of Poland.[7]

Further complications arose with the Polish-Soviet war of 1920. The Western powers pressured Poland into a settlement that would leave Vilnius in Lithuania, in exchange for aid. When Poland emerged victorious against the Soviets in the war, Pilsudski wanted to reconsider the agreement about Vilnius. He arranged for the local Polish population and troops in Vilnius to stage an „uprising" and establish an independent state of Central Lithuania.[8] Subsequently, this state asked to be merged with Poland, and of course Poland agreed. The Lithuanians

4 Z. Kiaupa, *The History of Lithuania,* Vilnius 2002, p. 167 (also discussing a "political" Polonization of the Lithuanian gentry in the Commonwealth); S. Liekis, *1939: The Year that Changed Everything in Lithuania's History*, Amsterdam 2010, p. 21 (noting the argument that the inhabitants of Vilnius were Polonized Lithuanians); J. Lukowski, *Liberty's Folly: The Polish-Lithuanian Commonwealth in the Eighteenth Century, 1697–1795*, London 1991; T. Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569–1999,* New Haven 2003, pp. 22-23; *but see* L. Lubamersky, *National Self-Perception Among the Lithuanian Nobility: Evidence from the Radziwiłł Family*, "Journal of Baltic Studies" 2001, Vol. 32, No. 1, pp. 5-18 (arguing that the Lithuanian nobility in the Commonwealth still had a separate sense of identity as Lithuanians, notwithstanding their use of the Polish language).

5 Regarding Belgian mediator Paul Hyman's efforts to craft a compromise on creating new federation, see V. Bukaitė, *Pamirštos Paulio Hymanso derybos: Vilniaus krašto klausimas Briuselyje ir Ženevoje 1921m.* [Paul Hymans' Forgotten Negotiations: The Dispute over the Vilnius Region in Brussels and Geneva in 1921], "Lituanistica" 2018, Vol. 64 No 1.

6 S. Liekis, op. cit., p. 21.

7 M. Macmillan, *Paris 1919*, New York 2001, p. 221.

8 W. Jedrzejewicz, *Pilsudski: A Life for Poland*, New York 1982, pp. 128-132.

were very bitter about the breach of the original agreement on Vilnius, and did not have any diplomatic relations with Poland until 1938.[9]

The Molotov-Ribbentrop pact in 1939, dividing Poland between the Soviets and Germans, also assigned Vilnius back to Lithuania, and Lithuania to the Soviets. At the end of World War II, Lithuania remained a part of the Soviet Union, and Vilnius remained part of the Lithuanian Soviet Socialist Republic (LSSR). A problematic issue, however, was the population of Vilnius and the surrounding region, which predominantly identified as Polish. This was problematic as Vilnius was the capital of the LSSR. In the end, during the period 1945–1955, the city became more Lithuanian, in part due to the migration of Poles from Vilnius to cities in northern Poland, especially Szczecin and Gdansk. Szczecin and Gdansk had been German cities that were transferred to Poland at the end of the war, and needed to be repopulated as most of their German residents had fled or been expelled. In turn, Lithuanians from other parts of the country migrated to the new capital.[10]

Interestingly, and importantly, a small percentage of Poles remained in Vilnius, and moreover, the Poles in the surrounding suburbs and countryside stayed in place. There was no special encouragement for these suburban or rural Poles to leave, as the main goal was to increase the Lithuanian character of the capital itself. [11]

As a result, today there remains a compact minority of Poles in the areas immediately south and east of Vilnius. According to the 2021 census, the Polish minority as a whole amounts to approximately 184,000 people, or 6.5% of the total Lithuanian population. However, in the districts immediately between Vilnius and the Belarusian border, in Vilnius county, there are over 170,000 Poles who amount to anywhere from 20 to even 70% of the local population.[12]

More recently, the Polish minority has helped their cause by forming a united coalition of Polish political parties. This new electoral block usually receives the vast majority of votes from the Polish minority, and consequently has a good political position in the Lithuanian parliament. This is especially the case when there is a division between the main Lithuanian political parties, and the Polish parties can use their leverage to extract concessions.[13]

9 S. Liekis, op. cit., pp. 21-22.

10 Snyder, op. cit., pp. 92-93.

11 Ibidem.

12 Official Statistics Portal, at https://osp.stat.gov.lt/en_GB/gyventoju-ir-bustu-surasymai1, (20.07.2022).

13 G. Kazėnas, *Lithuanian Polish Political Party in Parliamentary Election 2016 in Lithuania*, "Political Preferences" 2017, vol. 14, pp. 87-98; J. Hyndle-Hussein, *Lithuania: A new government coalition with the participation of the Polish minority party*, Centre for Eastern Studies, at https://www.osw.waw.pl/en/p ublikacje/analyses/2019-07-10/lithuania-a-new-government-coalition-participation-polish-minority, (20.07.2022).

The situation of the Polish minority has also created some tensions between Poland and Lithuania itself. A Polish program to give ethnic Poles outside of Poland (including those in Lithuania) a "Karta Polaka" – a card entitling them to some benefits in Poland - was resented by Lithuania (and also by Belarus and Ukraine, which also have Polish minorities).[14] There is also a sensitivity when Poland tries to address the problems of the Polish minority, as Lithuania regards it as interference in its own internal affairs. There is also some speculation that the issue of the Polish minority is enflamed and exaggerated by Russia, as a means of creating a wedge between two NATO allies, Poland and Lithuania.

Current key legal issues concerning language rights

When Lithuania emerged from Soviet rule in the early 1990s and once again restored its independence, there was once again a need to likewise restore its Lithuanian character after decades of Soviet (i.e. Russian) rule. This goal sometimes conflicted with Polish minority rights.

Today, there are three main areas of conflict, regarding street signs, schools and surnames. In districts where Poles have an especially high concentration, the local communities have desired to place street signs (along with other signage, on schools, for example) in Polish. These efforts were rejected by the Lithuanians, and only continue on an informal basis (i.e., some residents put Polish street signs on their homes).

Education is likewise a point of conflict. There are Polish schools and it is possible for Polish children to receive an education in Polish. In this regard the situation is in one sense quite positive, as Lithuania is the one foreign country where Poles may receive a complete pre-university education in Polish. However, under Lithuanian educational reforms, the final high school exams (required for further study at universities) needed to be completed in Lithuanian. Poles argued that this put them at some disadvantage with Lithuanian speaking students, whose entire education had been in Lithuanian. The Lithuanian response was essentially that at some point Poles had to integrate into the greater Lithuanian society and economy and the exam forced them to have greater proficiency in Lithuanian. If Poles felt disadvantaged in applying to Lithuanian universities, they could always study in Warsaw.

Finally, another sore point has been the transliteration of Polish names into Lithuanian. Polish has some specific letters and letter combinations, such as ć, ń, ó, ś, ź, ż, ą, ę, ł, and cz, rz and sz. However, in official Lithuanian

14 M. Frejute˙-Rakauskiene, O. Sasunkevich, K. Šliavaite, *Polish Ethnic Minority in Belarus and Lithuania: Politics, Institutions, and Identities,* "Nationalities Papers" 2021, Vol. 49: 6, pp. 1143-1144 ("Karta Polaka is perceived as not compatible with the oath of allegiance to the Republic of Lithuania in discussions in the Lithuanian public space").

documents, only Lithuanian letters are permitted (so "l" instead of "ł" in official documents). Consequently, these Polish letters are replaced with Lithuanian ones. A case on this issue was referred to the European Court of Justice, which essentially decided in favor of Lithuania, noting that a state had a wide margin of appreciation in these matters (the decision will be discussed at length later in this text).[15] Afterwards, a domestic legal reform allowed Lithuanian Poles to add information to an additional, secondary page to their passports, in the original Polish spelling.

The Relevant International Legal Framework

There are a number of international treaties, conventions and charters that potentially apply to the language disputes involving the Polish minority in Lithuania. These are the International Convention on Civil and Political Rights (ICCPR)[16], the European Convention on Human Rights (ECHR)[17], The Treaty of Lisbon[18], and the Framework Convention for the Protection of National Minorities[19].

A. ICCPR

Together with the International Convention on Social, Economic and Cultural Rights, the ICCPR is one of the original and main pillars of the international human rights system.[20] The ICCPR was opened for signature in December, 1966, came into effect in January, 1976, and was acceded to by Lithuania in November, 1991.[21] This treaty may be enforced by another signatory state filing a complaint against another state, or, through an optional protocol, by individuals filing a complaint with the Human Rights Committee (HRC) established by the ICCPR.[22] Articles 17, 24(2), 26 and 27 of the ICCPR are all relevant to minority rights in general and language issues in particular.

15 Runevič-Vardyn*, European Court of Justice*, May, 2011, C-391/09.

16 International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171.

17 Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 3., Nov. 4, 1950, Europ. T.S. No. 5.

18 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU).

19 Framework Convention for the Protection of National Minorities, Feb. 1, 1995, E.T.S. 157.

20 U. Davy, *How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights,* "Washington University Global Studies Law Review" 2014, Vol. 13, p. 2012.

21 United Nations Treaty Collection, at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src= IND, (20.07.2022).

22 D. Atchue, *Piercing the Veil of State Laicity In "La Belle Province": How Québec's Religious Symbols Ban Violates Article 18 of the International Covenant On Civil And Political Rights*, "American University International Law Review" 2021, Vol. 37, p. 63 (explaining the enforcement mechanisms of the ICCPR).

Article 17 of the ICCPR provides that: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."[23] While not expressly dealing with questions of discrimination, the right to privacy, family and home could encompass the right of a member of the Polish minority to have his or her name spelt in Polish (rather than Lithuanian) letters in official Lithuanian documents, such as a passport. The HRC in fact has made two decisions on the issue of a member of national minority having his or her name spelt on an official document in his or her national language.

In *Kleckovski v Lithuania*,[24] Michal Kleckovski, the author of the complaint, was a Lithuanian of Polish ethnicity who desired to change the spelling of his name in his passport to 'Michał Kleczkowski,' reflecting his name's original Polish language form. The Lithuanian authorities refused, indicating that national law only allowed the use of Lithuanian letters to spell the name of a Lithuanian citizen born in the country. Before the HRC, Kleckovski argued that "his right to have his name spelt according to the correct Polish spelling is an integral part of his right not to be subjected to arbitrary or unlawful interference with his privacy" pursuant to Article 17 of the ICCPR.[25] He further claimed that "the Lithuanian spelling of his name „looks and sounds odd" as it does not reflect a Lithuanian name or a Polish name. It gives rise to delays in the author's mail, ridicule, and difficulties in proving his relationship with other family members abroad."[26] Moreover, Lithuania's refusal of his request to use the Polish spelling of his name was arbitrary and discriminatory, in violation of Article 17, as naturalized citizens could keep the original non-Lithuanian spelling of their names.[27] In response, in pertinent part, Lithuania argued that his complaint was inadmissible, because "Article 17 does not cover or establish any specific rules or principles for writing names in identity documents. The regulation of surnames is a matter of public order and restrictions are therefore permissible".[28]

Without providing much reasoning, the HRC ultimately agreed with Lithuania's position and dismissed the case. Specifically, the HRC found that "[w]ith regard to the claim that the author's name should be spelt using Polish characters, the Committee considers that the author has not substantiated any claim under the Covenant. It thus finds that this part of the communication is inadmissible...".[29]

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23 ICCPR, op. cit., n. 16, at Article 17.
24 Kleckovski v Lithuania, Human Rights Committee, 2007, Comm 1285/2004 (HRC 2007).
25 Ibidem at Para. 3.1 and 3.2.
26 Ibidem at Para. 3.3.
27 Ibidem at Para. 3.5.
28 Ibidem at Para. 4.1.
29 Ibidem at Para. 8.3.

Curiously, the HRC reached the opposite conclusion on the same issue in *Raihman v Latvia*.[30] In *Raihman,* the author was a naturalized Latvian citizen, born in Latvia, and of Russian-Jewish origin. After he was naturalized in 2001, he received a Latvian passport with his name spelled 'Leonīds Raihmans' (according to Latvian grammar and spelling), rather than Loenid Raihman, which was the original Russian Jewish spelling. Raihman sought to change the spelling of his name on his passport, but this request was refused by the Latvian authorities. He then brought a claim against Latvia before the HRC, alleging a violation of Article 17 (among other articles) of the ICCPR.[31]

Pursuant to his claim under Article 17, Raihman contended "that the right to retain his given and family name, including its graphical representation in writing, is an essential element of his identity. He argues that his right to have his name spelt according to its original spelling is an integral part of his right not to be subjected to arbitrary or unlawful interference with his privacy."[32] He further claimed that as written in Latvian, his "surname "looks and sounds odd" as it does not reflect a Jewish, a Russian, nor a Latvian name"; gave rise to problems with banking transactions and travel; and even effected his personal interaction with the Russian and Jewish community.[33] In response, Latvia argued that "Article 17 of the Covenant does not protect the right to a name, as the text of the provision does not make a direct reference to the name... It cannot therefore be said that this right [to privacy] encompasses the graphical representation of a name, which was solely modified to adapt it to the particularities of the Latvian language".[34] Even if such a right did exist, it is not absolute, as Latvia had justifiable grounds to protect the Latvian language, and in any case permitted Raihman to use his preferred spelling in a separate page in his Latvian passport.[35]

After considering these arguments, the HRC found that Latvia did violate Article 17 by its conduct. The right to privacy encompassed by Article 17 included the right to choose one's own name, and therefore also included the right not to have one's name unilaterally altered by the state. While Latvia's actions were lawful according to Latvian law, they were arbitrary in violation of Article 17. The HRC acknowledged the difficulties the Latvian language faced during years of Soviet oppression, but found that changing the spelling, form and sound of Raihman's name (resulting in various practical and social difficulties for

30 Raihman v Latvia, Human Rights Committee, 2010, Comm 1621/2007 (HRC 2010).
31 Ibidem at Para. 1.1.
32 Ibidem. at Para. 3.1.
33 Ibidem at Para. 5.1.
34 Ibidem at Para. 5.1.
35 Ibidem at Para. 4.2, 5.1.

him) was not reasonably proportionate with the goal of preserving the Latvian language.[36]

It is difficult to reconcile the views of the HRC in *Raihman* and *Kleckovski.* It may be that Raihman presented stronger evidence of the harm he had suffered because of Latvia's change of the spelling and grammar of his name, thus producing a different result. To the extent two decisions are irreconcilable, it is more likely that the *Raihman* decision is more persuasive as to the actual meaning of Article 17, since it was better reasoned (indeed, the *Kleckovski* decision was almost devoid of reasoning, apart from making a blanket conclusion that the spelling of names on passports was not encompassed by Article 17), and because it was later in time.

Although not addressed in either *Raihman* or *Kleckovski,* Article 24 (2) of the ICCPR also may be relevant to this issue. It states that "Every child shall be registered immediately after birth and shall have a name",[37] inferring that there is a right to a name under the ICCPR which should not be – at the very least – arbitrarily changed or taken away.

Article 26 and especially Article 27 of the ICCPR are the other, more obvious guardians of minority rights in that treaty. They respectively provide as follows:

"Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".[38]

Both articles essentially prohibit negative action by the state: a prohibition against discrimination (Article 26) and denying minorities the right to cultural, religious and language rights (Article 27). There has been an argument that Article 27 also contains positive rights. In other words, the state cannot deny these rights, and also should take positive, affirmative steps (even including financial support) to ensure that these rights exist.[39] The plain language of

36 Ibidem at Para. 8.2-8.4.

37 ICCPR, op. cit., n. 16, at Article 24.

38 Ibidem at Articles 26 and 27.

39 Y. Jabareen, *Linguistic Rights for Minorities and the Quest for Equality: The Case of Arab-Palestinians in Israel,* "University of Pennsylvania Journal of Law and Social Change" 2022, Vol. 25, pp. 262--263.

Article 27 supports the first view, that it only covers negative action: "...such minorities shall not be *denied* the right...". Moreover, the practice of the HRC and national courts support this interpretation. The HRC has found a number of examples of violations of Article 27 where the state has taken away some right enjoyed by a minority group, but has not addressed a situation of the state's failure to take positive action promoting minority rights. This is not to say that Article 27 loses most of its effectiveness when it is interpreted in such a manner. It still "provides that individuals belonging to a linguistic minority may use their language amongst themselves, and that the state must not seek to restrict their affairs because of their status as a linguistic minority. Even if a state may have no obligation to recognize minority languages, it should not interfere with minority activities involving their language. For example, linguistic minorities wishing to maintain schools teaching in their own languages should be permitted to do so, although a government is not obligated to financially support them".[40]

The HRC has touched upon the question of a state's refusal to issue passports or identity documents in accordance with a minority's national language. In *Kleckovski,* the author of the complaint did raise allegations that Lithuania violated both Articles 26 and 27 in spelling his name on his passport according to Lithuanian spelling and grammar, rather than Polish. Specifically, he alleged that he suffered discrimination under Article 26, since naturalized citizens were permitted to keep the spelling of their names on official documents in accordance with their national language, while he was not.[41] Further, the author claimed that spelling a name according to his minority language was part and parcel of his right to express his culture and use his language that was protected from interference by Article 27.[42] The HRC did not make specific findings on these arguments, but instead made a blanket ruling that with respect to "the claim that the author's name should be spelt using Polish characters, the Committee considers that the author has not substantiated any claim under the Covenant."[43] In *Raihman*, likewise, the author also alleged that Latvia's failure to spell his name in Russian in accord with his Russian-Jewish ethnicity was discriminatory within the meaning of Articles 26 and 27. However, the focus of his claim was Article 17. Since the HRC ruled in his favor on that basis, it found it unnecessary to pass upon his other contentions concerning Articles 26 and 27.[44]

40 F. de Varennes, *The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?*, "Columbia Journal of European Law" [hereinafter: "Colum. J. Eur. L."] 1996, Vol. 2, pp. 123-125.

41 Kleckovski, op. cit., n. 24, at Para. 3.5.

42 Ibidem at Para. 3.6.

43 Ibidem at Para. 8.3.

44 Raihman, op. cit., n. 30, at Para. 8.2–8.4.

With respect to posting signs in a minority language, the HRC has not addressed the applicability of Article 27. In *Adalah v. Tel Aviv-Jaffa,* however, the issue was raised before the Israeli Supreme Court.[45] In that case, the Arab minority in Israel argued that the City of Tel Aviv had an obligation to post street signs in both Hebrew and Arabic given the large Arab minority in that city. One ground for this argument was that Article 27 of the ICCPR created a positive obligation to provide street signs in a minority language, where the minority was a significant percentage of the population. The majority of the court ultimately ruled in favor of the Arab plaintiffs, but not on the basis of Article 27. Instead, the court found that the city of Tel Aviv had not reasonably exercised its discretion under Israeli law in deciding to exclude Arabic from its street signs. In Justice Chesin's dissenting opinion, however, he directly addressed the applicability of Article 27. He rejected the contention that it provided an obligation to affirmatively take positive action and add Arabic to street signs, instead finding that it only prohibited negative, discriminatory action. He did add, however, that Article 27 could also be construed to impose upon the state a duty to stop or prevent attacks by private actors on a minority's right to engage in cultural or religious activity, or to use its own language.[46]

Outside of the context of Article 27, however, the HRC did examine a prohibition on posting private commercial sings in a language other than French in the province of Quebec, Canada. This rule was instituted as a means of preserving the French language in the province. Store owners who wished to post their signs in English filed a complaint with the HRC alleging a violation of Article 19 of the ICCPR, which protects freedom of speech and expression. While appreciating the position of the French language and the value of protecting it, the HRC found that Quebec couldn't require stores to post signs only in French.[47] This was ignored, and when Canada tried to prohibit it, Quebec invoked the constitutional "notwithstanding" clause to override Canadian law.

B. ECHR

The European Convention on Human Rights is perhaps the most effective regional treaty protecting human rights. Differently from many other human rights treaties, there is an effective and well-developed mechanism for individuals to vindicate their claims of a violation of the ECHR in the European Court of

45 Adalah, op. cit., n.1.

46 Ibidem at Para. 25 and 26.

47 Ballantyne, Davidson, McIntyre v. Canada, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993). This was not an Article 27 case since English speakers, who were a linguistic minority in the province of Quebec, were a majority in Canada as a whole. Ibidem at Para. 11.2.

Human Rights (ECtHR).[48] Individuals may bring a claim before the ECtHR after they have exhausted all procedures and remedies in their national court system. If they prevail before the ECtHR, they may recover not insubstantial damages in compensation, which the state is obligated to pay.[49] Lithuania ratified the ECHR in 1995.[50] At first glance, then, the ECHR would appear to be a promising vehicle in which the Polish minority in Lithuania could pursue any claims of discrimination.

Unfortunately, the ECHR does not expressly cover discrimination against national minority groups *per se* in its original text.[51] Instead, individuals who are minorities could claim that their specific rights under the ECHR were violated. However, these types of claims do not precisely encompass issues of the use and spelling of names, language rights in education, and signage. Articles that could be relied upon by minorities are: Article 14 (non-discrimination in rights provided by the ECHR); Articles 5 and 6 (related to the use of minority language in criminal proceedings), Article 8 (right to private life), Protocol 1, Article 2 (right to education), Article 11 (participation in political, social, economic life).

Article 14 does not act as a general non-discrimination clause that can be used by minorities, as the claim of discrimination must be connected to a right already provided by the ECHR. Consequently, Article 14 claims would almost always be brought in connection with an allegation that another article of the ECHR has been violated.[52] Optional protocol No. 12 to the ECHR does provide the heretofore absent general, non-discrimination clause, expressly prohibiting discrimination[53], but not it has not been ratified by Lithuania or Poland.[54]

48 P. Saunders, *The Integrated Enforcement Of Human Rights*, "N.Y.U. J. Int'l L. & Pol." 2012, Vol. 45, p. 135 n. 113 (noting that reporting requirements of other human rights treaties were "soft" in comparison to the binding judgments entered by the European Court of Human Rights enforcing the ECHR).

49 A. Slaughter, *Judicial Globalization*, "Virginia Journal of International Law" 2000, Vol. 40, p. 1109 (ECHR and its protocols adopted by state parties permits individual complaints); J. Herrmann, *Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany*, "Hastings International and Comparative Law Review" [hereinafter: "Hastings Int'l & Comp. L. Rev."] 2008, Vol. 31, p. 446 (commenting on exhaustion requirement); Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, "American Journal of International Law" 2012, Vol. 106, pp. 262-265 (noting the power of the ECtHR to award monetary damages, although noting that the amounts awarded have been "generally modest").

50 Council of Europe, Chart of Signatures and Ratifications of Treaty 005, at https://www.coe.int/en/web/conventions/full-list?module=signatu res-by-treaty&treatynum=005, (20.07.2022).

51 E. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, "Hastings Int'l & Comp. L. Rev." 1999, Vo. 22, p. 306; S. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, "N.Y.U. J. Int'l L. & Pol." 2000, Vol. 32, p. 600 n.20 ("The ECHR... [does not] contain[] a provision on minority rights corresponding to article 27 of the ICCPR.").

52 A. Fellmeth, *Nondiscrimination as a Universal Human Right*, "Yale Journal of International Law" 2009, Vol. 34, pp. 591-594.

53 Ibidem at 593.

54 Council of Europe, Chart of Signatures and Ratifications of Treaty 177, at https://www.coe.int/en/web/conventions/full-list?module=s ignatures-by-treaty& treatynum=177, (20.07.2022).

Of the remaining potentially relevant articles, Articles 8 (privacy) and Protocol 1, Article 2 (education) would appear to have the most promise. Article 8 is essentially analogous to Article 17 of the ICCPR, and as illustrated by the discussion of the *Raihman* case, above, could support a claim concerning the spelling of names in official documents. However, the ECtHR has taken a narrow view of Article 8 and Protocol 1, Article 2 with respect to their application to minority rights.

In *Mentzen v Latvia*,[55] a Latvian national married a German national, and took the name Mentzen as her married surname. She then applied for a new Latvian passport, with her new married name. She further specifically requested that the name Mentzen should not be changed in any way, and be written exactly as it appeared on her marriage certificate. The Latvian authorities refused and, in accordance with Latvian law, wrote her name in the passport as "Mencena", consistent with Latvian grammar and spelling rules. Mentzen protested, but Latvia refused to substitute Mentzen for Mencena. After she exhausted avenues of appeal in the Latvian legal and administrative system, she filed a claim with the ECtHR alleging a violation of her right to privacy under Article 8 of the ECHR.[56]

Latvia conceded that its actions interfered with Mentzen's right to a private life, but denied that it violated Article 8 since it acted according to law and pursued a legitimate and necessary aim. Specifically, Latvia detailed the harm caused to the Latvian language during Soviet times, and stressed that it had to take steps to preserve the national language. Latvia further noted that, from the very beginnings of the written Latvian language, it had always transliterated German names in precisely the same way, and moreover such steps were grammatically necessary for other Latvians to understand that this was a name.[57]

The ECtHR essentially agreed with Latvia's position, and noted that states were afforded a wide margin of appreciation in decisions regarding the use of its national language. The Court could not say that Latvia's decision in this case was arbitrary or unreasonable, particularly in light of the need for the Latvian language to recover from the abuses of Soviet times. Moreover, the ECtHR noted that Mentzen herself had not suffered severe harm or loss because her name was spelled Mencena in her Latvian passport. Latvia itself had mitigated any harm by permitting the name "Mentzen" to appear on a subsequent page of her passport. Consequently, Mentzen's Article 8 claim was denied.[58]

55 Mentzen v Latvia, European Court of Human Rights, December 12, 2004, Application No. 71074/01.

56 Ibidem at pp. 2-4, 17.

57 Ibidem at pp. 19-21.

58 Ibidem. at pp. 24-31.

In *Cytacka v. Lithuania,*[59] a representative of the Vilnius Municipal Authority brought a claim alleging that Lithuania violated Articles 8, 10 (freedom of speech) and 14 (non-discrimination) of the ECHR by refusing to allow the name of a public school to be written in Polish ("Emilii Plater"), and instead requiring the name to be written in Lithuanian ("Emilijos Pliaterytės").[60] The ECtHR ultimately dismissed the application on procedural grounds, stating that Ms. Cytacka did not exhaust her internal, national court remedies in her individual capacity, and therefore had no right to bring a claim under the ECHR. The Court did note in passing, however, "that the applicants did not claim that there was any limitation on the children's right to attend the school or that there were any restrictions on the right to education as prescribed by Article 2 of Protocol No. 1 to the Convention. Nor was any practical inconvenience related to the use of the school's name if spelled in Lithuanian ever invoked. The applicants themselves personally were not prevented from using the form "Emilii Plater" as spelled in the Polish language".[61]

This comment in *Cytacka* is reflective of the limited scope of the right to education in Protocol 1, Article 2 of the ECHR. The precise wording of that Article is as follows: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".[62] In the *Belgian Linguistics Case,*[63] the ECtHR stressed that "religious and philosophical convictions" was not the same as linguistic preferences. While the right to education in Article 2 did mean a right to receive an education in the national language (or even one of the national languages, if there are more than one), it did not provide a right to be educated in a minority language. The Court explained that: "To interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there. Moreover, the preparatory work confirms that the object of the second sentence of Article 2 was in no way to secure respect by the State of a right for parents to have education conducted in a language other than that of the country in question; indeed in June 1951 the Committee of Experts which had the task of drafting the Protocol set aside a proposal put forward in this sense. Several members of the Committee

59 Cytacka v. Lithuania, European Court of Human Rights, July 10, 2012, Application no. 53788/08.
60 Ibidem.
61 Ibidem.
62 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009), at Article 2.
63 Belgian Linguistics Case, European Court of Human Rights, July, 1968, (1979-80) 1 E.H.R.R. 252.

believed that it concerned an aspect of the problem of ethnic minorities and that it consequently fell outside the scope of the Convention."[64]

In the end, while the ECHR is the gold standard of a regional treaty that effectively guarantees and protects individual human rights, it is not really designed to apply the same protections to collective minority rights. As one commentator explained, "conventions based on conceptions of individual human rights can only go so far in their protection of groups. In essence, they miss the forest for the trees. The prerogatives of the group are ignored by focusing too intently, if understandably, on the rights of individual constituents".[65]

C. EU Law

The European Union (EU) is based upon the principles of the free movement of goods, services and people. With respect to the free movement of people, Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) states that "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States...",[66] subject to certain treaty limitations. This right of freedom of movement has some implications for minority rights, and specifically for the ability to have one's name spelt in official documents in accordance with a minority national language.

A line of cases decided by the European Court of Justice (ECJ) has interpreted freedom of movement to prohibit a state from unilaterally making changes (or refusing to accept changes) to an individual's name in identity documents in certain circumstances. Such actions might impede the individual's ability to travel, work or even obtain credit across the EU. In *Konstantinidis*,[67] a Greek national working in Germany had his name incorrectly transliterated from Greek to Latin letters, so that the pronunciation found in the transliteration was quite different than that found in the Greek original form of his name. The ECJ found that Germany's actions in incorrectly transliterating his name on identity documents violated the principle of free movement of people.[68] In *García Avello,*[69] the ECJ likewise rejected Belgium's action in prohibiting parents of children who were dual Spanish–Belgian citizens to take both the father's and mother's surnames,

64 Ibidem at 282.

65 C. Furtado, Jr., *Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe*, "Columbia Human Rights Law Review" 2003, Vol. 34, p. 353.

66 TFEU, Article 21(1).

67 Konstantinidis, European Court of Justice, 1993, Case C-168/91 [1993] ECR I1191.

68 Ibidem at Paras. 14-17.

69 García Avello, European Court of Justice, 2003, Case C-148/02 [2003].

in accordance with Spanish practice.[70] Finally, in *Grunkin and Paul,*[71] a child was born in Denmark of German parents, and took the surname of Grunkin-Paul. When the family later moved to Germany, the German authorities refused to accept and register the hyphenated name, which was not permitted under German law (even though it was permitted under Danish law). The ECJ found that Germany did not have adequate justification to refuse to accept the hyphenated name, again on free movement grounds (the child would have two different names in two different member states).[72]

However, in *Sayn-Wittgenstein*,[73] the ECJ recognized that a member state could have reasonable justifications for refusing to accept the form of a name of an individual from another member state. In that case, a German national, by marriage, acquired the prefix "von" as part of her name. She subsequently moved to Austria, and initially there was no problem in affixing her surname, including "von", to her official Austrian documents. Eventually, however, the Austrian authorities informed her that the "von" would have to be removed from her name, since under Austrian law, the prefix "von" refers to one's aristocratic heritage and had been outlawed for many years. The ECJ gave Austria a wide margin of appreciation for its decision to exclude this prefix, based on historical and cultural reasons, and ruled that Austria was allowed to delete it from her surname in Austrian documents without violating the principle of free movement.

Most relevant to the question of Polish minority rights in Lithuania, in *Runevič-Vardyn*,[74] the ECJ directly addressed whether Lithuania could spell Polish surnames in accordance with Lithuanian language rules, without violating the principle of free movement of persons. The case has a somewhat complicated factual background. A Lithuanian Pole, born in Lithuania, from the beginning had her name inscribed as "Malgožata Runevič" in her national identity documents. She later went to Poland, and had a new birth certificate issued, with her name written in its Polish form, i.e., Małgorzata Runiewicz. Ultimately she married a Polish man, Łukasz Paweł Wardyn, in Lithuania. As a result of this marriage, she requested that her surname be changed to add the suffix Wardyn, and that her entire new name be written in Polish characters – Małgorzata Runiewicz-Wardyn. Instead, Lithuania wrote her name as Malgožata Runevič-Vardyn on the marriage certificate. He husband's name was written as Lukasz Pawel Wardyn; this was somewhat of a concession, as the letter "W" does not exist in the Lithuanian language. However, all Polish diacritical marks (which likewise do not exist in Lithuanian) were omitted. The Lithuanian action

70 Ibidem at Paras. 42-45.
71 Grunkin and Paul, European Court of Justice, 2008, Case C-353/06 [2008].
72 Ibidem at Paras. 31-39.
73 Sayn-Wittgenstein, European Court of Justice, 2010, Case C-208/09 [2010].

was challenged in Lithuanian courts, and since an argument was raised that this conduct violated the principle of free movement under EU law, the question was referred to the ECJ.[75]

The core of the ECJ's decision attempted to balance the competing interests of the parties in the case. On one hand, the principle of free movement may be compromised by individuals having distinct sets of identity documents with different spellings. On the other, Lithuania had special discretion in applying its own rules of language in its administrative system, particularly where there were special concerns in upholding the integrity of the national language. The ECJ ruled that the Lithuanian courts were in the best position to judge whether the importance of maintaining the Lithuanian language outweighed any inconvenience it placed upon Runiewicz-Wardyn's right of freedom of movement. However, the Court noted that as Lithuania already had used the letter "W" in writing Wardyn's name on the marriage certificate, this somewhat cut against the argument that it was impossible to do when adding that same name to Runiewicz's. The ECJ did find that Wardyn's arguments on the removal of the diacritical marks from his name were unavailing, since oftentimes such marks are removed, simply for ease of use and compatibility of word processing programs.[76] On remand, the Lithuanian court found that any travel related burdens placed upon Runiewicz-Wardyn were relatively minor, and dismissed the complaint.[77]

EU Freedom of movement rules, therefore, only go so far in protecting individual's right to keep the original ethnic minority spelling of their name. They may offer protection to individuals whose names have been altered upon moving to a new member state, but not necessarily to those who are national minorities who have been issued identification documents by the state in which they live and were born. Moreover, smaller states, such as Lithuania, which have endured many years of linguistic oppression as part of the Soviet Union, have a wide range of discretion in maintaining strict language regulations.

74 Runevič-Vardyn, op. cit., n. 15.

75 Ibidem at Paras. 21-28.

76 Ibidem at Paras. 66-94.

77 A. Mickonytė, *The Right to a Name Versus National Identity in the Context of EU Law: The Case of Lithuania*, "Review of Central and East European Law" 2017, Vol. 42, p. 337. However, it should be pointed out that Runiewicz-Wardyn doggedly pursued litigation on this issue after this setback, on behalf of herself and her family, and eventually achieved some measure of success in 2019. In part this was due to her reliance on other sources of law, including the Framework Convention for the Protection of Minorities, discussed below. I. Lewandowska, *Sąd potwierdził: Oryginalny zapis imienia także dla Polaków z Litwy*, "Kurier Wilenski" 2019, October 24, at https://kurierwilenski.lt/2019/10/24/sad-potwierdzil-oryginalny-zapis-imienia-takze-dla-polakow-z-litwy, (22.07.2022).

D. The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities ("Framework Convention")[78] quite possibly fills the gap in human rights law with respect to the protection of minority rights.[79] Significantly, it was ratified by both Poland and Lithuania in 2000,[80] and therefore is applicable to the question of Polish minority rights in Lithuania. Its key articles address directly the rights of minorities to use their language in various ways.

Article 10 provides a general right for national minorities to use their own language in public and in private. In geographic areas where minorities have traditionally lived or currently live in substantial numbers, they should also have a right to deal with public administration in their minority language.

The question of spelling of names and posting of street signs is directly addressed by Article 11. It states in the pertinent part that:

"1 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.

2 The Parties undertake to recognise that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.

3 In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications".[81]

Article 11 therefore allows minorities to have their name spelled in their own language, to post private minority language signs, and obliges the state to display street names in the minority language. At the same time, these rights and obligations are couched in less than absolutely mandatory terms. There is a right to spel names in the minority language, but only "according to modalities" in the

78 Framework Convention, op. cit., at n.19.

79 A. Korkeakivi, *In Defense of Speaking Out: The European Human Rights Regime and the Protection of Minority Languages*, "Intercultural Human Rights Law Review" 2008, Vol. 3, pp.138-142 (remarking on the "added value" of the Framework Convention, in the context of existing international treaties).

80 Council of Europe, Chart of Signatures and Ratifications of Treaty 157, at: https://www.coe.int/ en/web/conventions/full-list?module =signatures-by-treaty& treatynum=157, (20.07.2022).

81 Framework Convention, op. cit., n. 19, at Article 11.

state's legal system. The right to minority language signage should be within "the framework of the state's legal system", "taking into account specific conditions", where there is a "sufficient demand." So, there still exists some leeway on the part of the state with respect to these issues.[82]

Articles 12, 13 and 14 all deal with the educational rights of minorities. Article 12 calls for measures to promote the learning of minority culture, religion, history and language, and equal opportunity of access to education at every level for minorities. The right to set up private minority language schools is set forth in Article 13. Going beyond the protections offered by the ECHR, Article 14 states that:

"1 The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

2 In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

3 Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language".[83]

Again, there is some limiting language here- the state should "endeavor to ensure" these rights, "as far as possible", within the framework of the educational system, and without prejudice to learning the national language.[84] But as one commentator aptly noted, in the context of international treaties that must be ratified by a number of states, "Don't let the perfect be the enemy of the good".[85]

The Framework Convention is enforced by a monitoring system carried out by an Advisory Committee of experts. In the case of Lithuania, this Committee has issued four opinions, the most recent of which was adopted in May, 2018.[86] In its latest opinion, the Committee gave some praise to Lithuania for carrying out its obligations under Article 10, with respect to the use of minority languages in dealing with administrative bodies. Certain municipalities allow communication in minority languages, including Polish, as well as other state administrative bodies or institutions. This is generally the case when there is a high density

82 C. Furtado, op. cit., pp. 364-365 (Observing that the protections found in Article 11 "are undercut by qualifying language.").

83 Framework Convention, op. cit., n. 19, at Article 14.

84 C. Furtado, op. cit., p. 365.

85 A. Korkeakivi, op. cit., p. 146.

86 Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/OP/IV(2018)004, Fourth Opinion on Lithuania – adopted on 30 May 2018, at https://rm.coe.int/4th-advisory-commitee-opinion-on-lithuania-english-language-version/1680906d97, (20.07.2022).

of Poles or other minority group in a given municipality, such as Šalčininkai. However, the Committee also stressed that Lithuania should implement more clear standards as to when municipalities or administrative bodies are obligated to allow the use of minority languages, rather than leave it at the discretion of local administration on an ad hoc basis.[87]

In contrast, the Committee expressed some disappointment with respect to Lithuania carrying out its obligations under Article 11, with respect to the spelling of names and use of minority language street signs. At the time of the Committee's opinion, there had been some uneven progress on the issue of spelling Polish names in official documents, particularly through Lithuanian case law. The trend had been for the courts to allow Polish names to be spelled in the Polish manner, so long as: the letter was found in the Latin alphabet, and that the name at issue was acquired through marriage to a foreigner or by birth to a foreign parent. The Committee welcomed this progress, but also noted that even under these rulings, names not acquired through a foreign spouse or parent would still be required to be transliterated into Lithuanian, and certain Polish letters not found in the Latin alphabet, including those with diacritical marks, would still not be used. The Committee offered stronger criticism of Lithuania's failure to allow minority language street signs, in those areas with a high density of a given minority, and urged Lithuania to satisfy the requirements of Article 11.[88]

The Committee was mostly satisfied with Lithuania's compliance with the guarantees of educational rights for minorities ensconced in Articles 12 and 14. It noted the possibilities of Poles in particular to be educated in their national language as early as kindergarten, and the healthy number of Polish (as well as Russian) public schools established in the country.[89] There was, however, some criticism reserved for the composition of the university entrance exam at the end of high school, which is required for students pursuing a higher or university level education in the country. This exam tested competency in the Lithuanian language, and one popular foreign language, usually English, but not Polish. The Poles and other minorities claimed this put them at a disadvantage for admission into a Lithuanian university. The Committee recommended in a general way that Lithuania take the importance of a national minority language, such as Polish, more into account in the structure of this exam.[90]

87 Ibidem at Paras. 67-69.
88 Ibidem at Paras. 70-75.
89 Ibidem at Paras. 87-93
90 Ibidem at Paras. 94-100.

In 2021, Lithuania submitted its 5th cycle state report on its compliance with the Framework Convention.[91] In this report, Lithuania addressed some of the concerns raised by the Committee in its 2018 opinion. With respect to Article 10, and the use of minority languages in dealings with administrative bodies, Lithuania pointed out a new draft law on the protection of minorities essentially incorporated the position laid out by the Committee. Minorities would be allowed to used their language in such situations, where they were a certain percentage (as yet not determined) of the population of a given municipality.[92]

Progress was also reported in the right to spell minority names in official documents, referenced in Article 11. Case law had continued to progress, allowing minorities to use Latin letters to spell their names in official documents. Moreover, a draft law addressing this issue had been submitted and would essentially codify these court decisions.[93] Subsequent to Lithuania's submission of its report, it must be added that a new law has been enacted, effective May 1, 2022, that would enable Poles to use Latin letters to spell their names in official documents. This would apply to all national minorities, not just those married to foreign spouses or born to a foreign parents, though certain conditions must be met. However, even with this positive development, there is still no provision in the law that would allow the use of special Polish letters or diacritical marks.[94] Again, though, the courts appear to be ahead of this issue, with a recent decision in Vilnius allowing the use of "n" with a diacritical mark.[95]

Lithuania provided a similar response to the right to have street signs in a minority language (also set forth in Article 11), in the sense that a draft law had been prepared which would allow municipalities with a certain percentage of a given minority to permit such signs.[96]

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91 Advisory Committee on the Framework Convention for the Protection of National Minorities ACFC/SR/V(2021)004, Fifth Report submitted by Lithuania, Pursuant to Article 25, paragraph 2 of the Framework . Convention for the Protection of National Minorities – received on 19 July 2021 ("Fifth Report").

92 Ibidem at pp. 93-96.

93 Ibidem at pp. 96-97.

94 European Foundation of Human Rights, The President of Lithuania signed a bill concerning the writing of names and surnames in the Latin alphabet in Lithuanian documents (Jan. 2022)(hereinafter "Surname Bill"), at https://en.efhr.eu/2022/01/25/the-president-of-lithuania-signed-a-bill, (0.07.2022).

95 European Foundation of Human Rights, A victory secured by the EFHR – the Court ruled that surnames could be registered in their original form using a character with the diacritical mark "ń", (Feb. 2022), at https://en.efhr.eu /2022/02/04/a-victory -secured-by-the- efhr-the-co urt-ruled- that-surnames-could- be-registered-in-their- original-form-using-a- character -with-the- diacritical-mark -N, (20.07.2022).

96 Fifth Report, op. cit., n. 91, pp. 98.

In terms of the right to an education in a minority language, set forth in Articles 12-14, Lithuania correctly emphasized the prevalence of Polish (and Russian) language schools for minorities at every level. As for the problem of the university entrance exams not including a Polish language component, it was stressed that this was not a disadvantage for Poles, as opportunities existed for them to obtain a university education in the Polish language within Lithuania. Specifically, the University of Białystok had a branch campus in Vilnius offering education in Polish, and Vilnius University itself also had a specific program offered in the Polish language (which was actually offered to all students, and not only Poles).[97]

E. 1994 Polish–Lithuanian Treaty

There are arguments from both the Polish and Lithuanian sides that the question of the proper spelling of the Polish minority names in Lithuania had been definitively settled by the 1994 treaty on Friendly Relations and Good Neighbourly Co-operation between the two states. According to the both sides, the text of the treaty is clear on this issue. Unfortunately, however, the parties did not agree on an official English language text of the treaty. Instead, there are only official Lithuanian and Polish texts, and they both say quite different things.[98]

An English translation of the official Polish text of Article 14 reads: "The Contracting Parties declare that the persons referred to in Article 13, paragraph 2 have in particular the right to... use their names and surnames *in the version used* in the language of the national minority." The English translation of the same text in Lithuanian, on the other hand, states that: "The Contracting Parties declare that the persons, named in Article 13 paragraph 2, also have the right... to use their names and surnames *according to the sound* of the national minority language".[99] If the Polish version is correct, Poles should have the right to spell their names in official documents as it is written in the Polish language, i.e., the version of their name in Polish. If the Lithuanian text is correct, then the Lithuanian practice of transliterating Polish names with Lithuanian letter, so that the sound of the name remains the same, would be perfectly legal under the Treaty.

The problem most likely arose from a translation error. The Polish word used in Article 14 is "brzmienie", is defined in English as: "(i) the appearance as sound, voice; the making, producing of sound, voice(ii) a particular wording,

97 Ibidem at pp. 103-109.

98 J. Walkowiak, *One Word, Two Languages, Two Interpretations: The Polish-Lithuanian Treaty of 1994 and How it Was (Mis)Understood*, "Comparative Legilinguistics" 2014, Vol. 18/201488.

99 Ibidem, p. 90.

particular content, thought(iii) the total of an acoustic phenomenon or sound impression; the sum of the characteristic features of a sound, voice; colloquially: timbre(iv) rare a speech sound." This definition allows for its meaning to include "wording" (definition ii) or "sound" (definitions i, iii and iv). The Lithuanian word used, "skambesys", in contrast, is *only* defined in English as related to "sound": "(i)ringing sound (of a key, of metal)(ii) the height of sound, the total of [its] intensity and timbre". [100]

Whatever the cause, the error did lead to deeply held misconceptions on both sides. Many Poles in government, including the Treaty's negotiator's and the President, thought the matter had been definitively resolved in Poland's favor. Lithuanian officials replied that the text was clear and allowed for the phonetic transliteration of Polish names.[101] Had the matter been clarified at the time and a definitive English translation of the 1994 Treaty been agreed upon, the question may have been settled some 28 years earlier.

Waiting for Gadot? The practical effect of international law on Polish minority rights in Lithuania

The longstanding criticism of public international law is that, as a form of soft law, it is essentially unenforceable. There are certainly deep flaws in the international legal system in this regard, as exemplified by Russia's invasion of Ukraine in February, 2022. The attack was blatantly illegal under the UN Charter, and yet no effective UN action was taken to stop it. Such dramatic examples magnify doubts as to the actual value of international law.

In the case of Polish minority rights in Lithuania, especially with regard to the spelling of names, use of street signs, and educational standards, the relevant body of international law (as outlined above) is actually a mix of pure soft law (the Framework Convention and ICCPR) and more enforceable European law (ECHR and EU law). The Framework Convention, which includes a number of articles of which directly address the main concerns raised by the Polish minority, is not self-executing. That is, it requires national enabling legislation to be directly enforceable in each state signatory to the Convention.[102] Lithuania has yet to enact a comprehensive minority rights law incorporating the terms

100 Ibidem, pp. 91-92.

101 Ibidem, pp. 92-93.

102 O. Dajani, *Responding to Ethnic and Religious Conflict in the Emerging Arab Order: The Promise and Limits of Rights*, "UCLA Journal of International Law and Foreign Affairs" 2013, Vol. 17, p. 63 ("the Convention is explicitly non-self-executing, its principles to be implemented «through national legislation and appropriate governmental policies»".); L. Langer, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets*, "Vanderbilt Journal of Transnational Law" 2010, Vol. 43, p. 890 n. 165 ("The Framework Convention is not considered self-executing.").

of the Convention, and thus it does not yet have the force of law in Lithuania. The Framework Convention does have reporting requirements, however, with an Advisory Committee evaluating each state signatory's compliance with the Convention on a periodic basis. However, these reports are not binding and simply (and theoretically) place pressure on the state to take steps to comply with the terms of the Convention and correct any deficiencies in that regard.[103] The ICCPR does permit individuals to file complaints against state parties, such as Lithuania, which have signed an optional protocol to that treaty. These complaints are heard by a Human Rights Committee (HRC), which issues its views on the dispute. However, the decision of the Human Rights Committee are not binding upon states.[104] Likewise, the ICCPR's reporting requirements, and the HRC's views on these reports, do not result in any binding obligation upon states to change their behavior.

In contrast, the terms of the ECHR are enforceable through the ECtHR, which even awards pecuniary damages in appropriate cases for violations of that Convention.[105] The enforcement of EU law is more complex and somewhat indirect, with national courts most often referring difficult questions of EU law to the European Court of Justice (ECJ) for resolution. The European Commission also retains the right to directly initiate a case in the ECJ against a member state for the violation of EU law. In either case, member states most often comply with the ECJ's decisions and regard them as binding.[106]

The problem for the Polish minority is that the applicable "hard" law, as construed by the ECJ and ECtHR, gave them no relief and mostly rejected their legal arguments. EU law does grant freedom of movement, and this could extend some protection to the spelling of names in official documents of EU citizens who travelled between member states. However, this may be overridden by special historical concerns of the state. In the case of Lithuania, the state had important concerns in preserving the Lithuanian language, especially in light of the Soviet occupation and the Soviets' attempts to suppress that language during that period. Consequently, Lithuania had a wide margin of appreciation of how it

103 G. de Búrca, *Beyond The Charter: How Enlargement Has Enlarged The Human Rights Policy Of The European Union*, "Fordham International Law Journal" 2004, Vol. 27, pp. 711-712 (outlining the Framework Convention's requirement to submit reports to the advisory committee every 5 years, and pointing out some deficiencies in this system).

104 G. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members*, HRP 16-02 (Dec. 2016), at p. 3, accessed at http://hrp.law.harvard.edu/wp-content/uploads/2016/12/Gerald-L-Neuman_HRP-16_002.pdf, (20.07.2022), ("A key limitation of the HRC's role is that its evaluation of state reports and its final decisions on communications do not produce legally binding outcomes.").

105 Y. Shany, op. cit., n. 49.

106 D. Tsiros, *The "Ouzo" Case: Towards a New Assessment of Member State Obligations under the Treaty and the Commission's Discretion in the Exercise of Public Enforcement*, "Colum. J. Eur. L." 2006, Vol. 12, pp. 810-811 (providing an overview of enforcement mechanisms for EU law).

applied its language laws, and did not abuse its discretion in the manner it handled the spelling of Polish names in passports and other documents.[107] Similarly, the ECtHR gave Latvia and Lithuania wide discretion on how to resolve language issues, given the special historical need to protect their own national languages, and rejected challenges relating to the spelling of minority names.[108]

Consequently, all that was left for the Polish minority to rely upon was soft law. Despite the valid criticism about its lack of enforceability, there are still some arguable benefits to soft law instruments such as the Framework Convention. Unlike other general or ambiguously worded treaties, this Convention directly addressed the issues raised by the Polish minority in Lithuania. Through the Convention's reporting requirements, and the regular opinions by the Advisory Committee on Lithuania's compliance with that treaty, pressure would mount for the Lithuanians to ultimately adopt national legislation to conform to the terms of the Convention. Moreover, external pressure by Poland could be applied to ensure Lithuania adhered to the provisions to which it had agreed. Finally, the Lithuanian courts could be influenced by these provisions, which would allow them to reach the same result under national law as that set forth in the Convention.

All these potential "positive" outcomes, however, are far from guaranteed. The Framework Convention was ratified by Lithuania in 2000. 22 years later, there finally was a legislative compromise with regard to the spelling of minority names in official documents. However, even this new law does not guarantee the use of unique Polish letters, for example, those with diacritical marks.[109] Provisions on street signs and the composition of university entrance exams are still lacking. Clearly, this has been a slow legislative process which has still not been completely realized.

The possibility of using the Framework Agreement by Poland in its foreign relations with Lithuania, as a means to push Lithuania into faster reforms, has not necessarily proven effective. State to state relations have many aspects, particularly between states such as Lithuania and Poland which have such a long history together. Certainly Polish commentators and politicians have used this and other treaties as a basis to make strong complaints about the treatment of the Polish minority in Lithuania,[110] but this does not translate into an effective policy. Lithuania may be even more resistant to change upon hearing such complaints, regarding them as Polish interference in Lithuania's internal affairs. Even for Poland, trade and defense issues with Lithuania may take a higher priority than

107 Runevič-Vardyn, op. cit., n.15.

108 Mentzen, op. cit., n. 55.

109 Surname Bill, op. cit., n. 94.

110 J. Błaszczak, *The implementation of commitments regarding the Polish minority in Lithuania in the Council of Europe's system*, "Border and Regional Studies" 2020, Vol. 8(3), pp. 95-109.

questions concerning the spelling of surnames in passports, and these issues may be sidelined as secondary matters.

Lithuania's courts have moved in the direction of fulfilling the requirements of the Framework Convention, at least on a piecemeal basis, over the years. In that sense the Convention at least provides an aspirational benchmark, hovering in the background, indirectly influencing the judiciary. The problem with such a patchwork, case by case approach to ensuring minority rights is the uncertainty and lack of uniformity of the process of litigation. A comprehensive, legislative approach is much preferred. To the extent that court decisions have at least in part driven or expedited legislative reform – perhaps, for example, with regard to the new law on the spelling of minority names – this would be considered the most positive outcome.

At the same time, it could also be argued that any of the soft law benefits recounted above are actually quite speculative. Court decisions and legislation that has concretely protected the rights of the Polish minority may not, after all, have been heavily influenced by the Framework Agreement or other principles of international law. Such legislation may be more the result of better Polish political coordination in Lithuania and better strategic decision making in domestic Lithuanian politics. It may also be the by-product of improved bilateral Polish-Lithuanian relations, now focused on facing a real threat from the common danger of Russian aggression. The courts are less influenced by politics, but it is certainly conceivable that they may have reached the same result anyway, with or without the Convention. Indeed, given the number of decisions of international courts and bodies that went against the Polish positions on name spellings, there is certainly an argument that international law has not necessarily been a determining factor in influencing the Lithuanian courts.

As one commentator suggested, the main issues facing the Polish minority in Lithuania may be more political than legal. Specifically, in the words of a Polish politician in Lithuania, speaking in the wake of the European Court of Justice's decision in *Runevič-Vardyn*: "I believe that this is not a legal but a political matter. I believe that sooner or later, Lithuania will have the political will to settle it, because you cannot defy the expectations of such a large group of your citizens".[111]

Notwithstanding such views, it would go to far to suggest that the question is *entirely* political. Relevant international law still lies in the background of disputes over street signs, schools and spellings, and can at certain points drive or at least influence the political debate over these issues. Moreover, there is the hope that the enforceability of international law may continue to evolve in a more positive

111 R. Mieńkowska-Norkiene, *The Political Impact of the Case Law of the Court of Justice of the European Union,* "European Constitutional Law Review" 2021, Vol. 17, 1-25, p. 19.

way, so that a court may eventually directly protect minority rights grounded in a treaty. So international law still has a role to play. But eschewing political action in favor of only relying upon international law is not a viable option. In that case, the Polish minority would truly be Waiting for Godot.

Conclusions

The issues raised by the Polish minority in Lithuania concerning spellings, signage and education are connected to international legal norms. However, with respect to European Union Law and European human rights law, the ECJ and ECtHR have given Lithuania wide birth in maintaining laws which protect the Lithuanian language, especially given the threat posed to the language during Soviet times. Unfortunately for the Poles, it was precisely these European laws that offered the best prospects of enforceability, as the decisions of these two courts are generally respected. A 1994 bilateral treaty between Poland and Lithuania may have solved some of the issues concerning the spelling of surnames, but due to an apparent translation error (leaving opposite meanings in the respective Lithuanian and Polish language versions) rendered it useless. The remaining relevant international law, including the ICCPR and especially the Framework Convention, was favorable to the Polish position but at the same time constituted classic soft law; that is, law that was not directly enforceable.

Nevertheless, the legislation was finally enacted by Lithuania in 2022 which largely resolved the name spelling issues, and there has been some progress on signage and educational matters. This "breakthrough" however, must be attributed more to political efforts than through litigation. International law is not entirely irrelevant, however. It still has a role in pushing forward potential political resolutions, by establishing a baseline of expectations for the Polish minority and the Lithuanians, and also carrying a threat that eventually a court may impose a judicial solution if the parties cannot come to an agreement.

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SUMMARY

Reliance on International Treaties as a Means of Protecting Minority Rights: An Effective Strategy or Waiting for Nothing? The Case of the Polish Minority in Lithuania

The Achilles heel of international law is its enforceability. The Polish minority in Lithuania has relied upon various treaties that, on the surface, appear to address most of their concerns regarding the use of Polish language in the spelling of names, on street signs, and in education. However, in actions brought before international tribunals to enforce these rights, the Poles have been generally unsuccessful. States are afforded a wide margin of appreciation regarding minority language rights, particularly, where, as here, the state's own language had been suppressed

for decades during the Soviet occupation. Moreover, the most relevant treaty, the Framework Convention for the Protection of National Minorities, is not enforceable by any international court- only an advisory committee makes periodic reports about a state's compliance with the treaty. While the direct application of international law has largely failed, recently, there has been progress in addressing these issues through domestic Lithuanian legislation and in the Lithuanian courts. These gains should be mostly attributed to renewed political mobilization of the Polish minority, but not entirely. The benchmarks set by international law can been seen as an asset in the Poles' political action, as both a rallying cry for support and as a bargaining chip in negotiations with the Lithuanian government and other Lithuanian political parties.