



**THE ISSUE OF LEGAL DISCRIMINATION.  
POLISH MINORITY IN LITHUANIA**

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Budapest, Hungary 2012

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## EXECUTIVE SUMMARY

A great part of the residents of Lithuania belong to various minority groups. According to the official census held in 2011 every sixth inhabitant of the country declares himself being member of a national minority. National minorities as a whole constitute 16,1% of the Lithuanian population with the Polish as the most numerous community within the state.

For the analysis and assessment of the specific group situation the legal definitional instruments are of an indispensable character. The paper introduces theoretical framework for the notions of minority, national minority and discrimination. It presents the problem from theoretical, historical and legal perspective in order to enable its better understanding. From the legal perspective, the most crucial role is played by the so-called *Radbruch Formula* which shall be adopted, for the use of the thesis, to the situation of a minority group discrimination.

One cannot complain for the less favorable treatment *in abstracto* without making referral to any specific violations. Thereafter, the problem of minority situation in the fields of use of mother tongue, education and parliamentary representation plays a crucial role in drawing of the final assessment.

The comparative study of the laws in force and laws in practice is also to be drawn from the perspective of international minority rights protection instruments present within the frameworks of the Council of Europe, European Union or the United Nations. The effectiveness of instruments can be proved only in relation to the situation present in a specific country *ie.* Lithuania what will enable the drawing of final conclusion and deciding whether the laws could constitute institution of a discriminatory character and, if yes, whether the international system is sufficient enough in terms of opposing their discriminatory character.

## INTRODUCTION

A great part of the residents of Lithuania belong to various minority groups. According to the official census held in 2011 every sixth inhabitant of the country declares himself being member of a national minority. National minorities as a whole constitute 16,1% of the Lithuanian population. The largest group- Poles (6,6%) is followed by Russians (5,4%), Belarussians (1,3%), Ukrainians (0,6%), Jews, Latvians, Tartars, Germans and Roma<sup>1</sup>. As evident from the statistics, representatives of the Polish minority in Lithuania constitute a significant and large community within the country and therefore they have often been a trouble spot involving frictions between the two states. Currently, in the light of the serious infringements of the universally guaranteed human rights, the issue of the Polish minority in Lithuania constitutes one of the most pressing problems in the Polish foreign policy especially.

To adequately address the question posed in the title, the first Chapter will provide with the general overlook on theoretical and definitional part of the minority discrimination problem. The analysis will start with the explanation of the notion of minority as occurring always in relation to majority and the concept of minority rights. The problem of membership to a minority shall be discussed both from the negative (an individual not belonging to majority is a member of a minority group) and positive perspective (individual as a minority member without making any referral to majority). Thereafter, there will be referral made to the notion of ‘majority’ as the two groups always come together and mutually influence the understanding each other. The notion of minority will be further developed by introducing the term: ‘national minority’ particularly useful when commenting on the situation of the Polish national minority in Lithuania. After having deliberated on the conceptual framework, the

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<sup>1</sup> Materials provided by the Polish Embassy in Vilnius, *Information on Actual Problems of Polish National Minority in Lithuania*, Vilnius, 14<sup>th</sup> March, 2012.

legal framework aimed at protecting rights of a specific group of people will be presented. When the most basic, minority rights protection issues are covered, the Chapter will discuss the notion of discrimination in minority rights perspective. Furthermore, the general trend of evaluating the rights of minorities from the standpoint of the majority will be opposed in order to examine the issue from perspective of community trying to assert their rights in a society dominated by the majority. As far as the definition of discrimination is concerned, the referral shall be made towards the understanding introduced in the *International Convention on the Elimination of all Forms of Racial Discrimination*, as well as to the test established by the European Court of Human Rights (ECtHR) in its jurisdiction.

Thereafter, the thesis will draw upon the concept of the legal discrimination which is to be presented from the perspective of introduction to the internal legal systems of respective states of the provisions which constitute a source of discrimination for a specific groups. Law can be an institution which leads to actions of a discriminatory nature especially when it is supposed to deal with the sensitive areas of the rights pertaining to the vulnerable groups such as minorities. From the minority group standpoint, even an act which aim is to protect may be regarded as discriminatory. What is good and right for the majority, may be unfair for minority. In this regard, the referral to the theory of law and to the so-called *Radbruch's Formula* shall be presented. According to the *Formula*, the positive law stated unlawfully, not ensuring the fundamental rights to the people, and even opposing these rights- is not of a binding character<sup>2</sup>. Even though, the said concept was designed and used towards the Nazi's laws, it seems that some of its points are still actual and can be used in relation to today's, less invasive legal measures. Therefore, it shall be assessed whether Radbruch's demands are reflected in the today's law. After having explained the theory, the thesis shall give the general

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<sup>2</sup> G. Radbruch, *Ustawowe bezprawie i ponadustawowe prawo (Unlawful Laws, Laws Which Should Not Be Lawful)* [in:] M. Szyszkowska, *Filozofia prawa i filozofia człowieka (Philosophy of Law and Philosophy of a Human Being)* Warszawa 1988, p. 173.

overview on the social and historical background of the Polish-Lithuanian relations aiming at explaining the main problems arising in the situation of the Polish minority in Lithuania. Poles in Lithuania are an autochthonic group living in the territories that previously constituted a part of Poland. The history of the presence of Poles in Lithuania strikes back to the XII century when Grand Duchy of Lithuania was created as a part of Polish-Lithuania Commonwealth and existed until the drafting of Polish Constitution of 3<sup>rd</sup> May, 1791. Part of the current Lithuanian territory (eg. Vilnius in the inter-war period) remained within the Polish borders. But even in the inter-war period the situation of Poles as a Lithuanian minority was rather difficult. Polish ceased to be accorded an official language status in the public and religious spheres. Some administrative measures were undertaken in order to limit the possibilities of education in Polish. This led to mutual reluctance in Polish-Lithuanian relations. After World War II, even though the strong sovietization, the Polish minority managed to preserve its national and language bounds.

The second Chapter will start with the analysis of the legal framework of minority protection in Lithuania. Since 2010 Lithuania has had no internal regulation on national minority protection after the Law on National Minority Protection expired which has not been replaced with any new legal act. Also the respective provisions of the Lithuanian basic law do not give any guarantees to minorities. Apart from the Lithuanian domestic legal system, the provisions of the Framework Convention for Protection of National Minorities (FCNM) will be analyzed. Thereafter, the problem of the use of minority language in Lithuania shall be presented. Language constitutes a manifestation of the social diversity and, as such, should be preserved by the groups who are using it. In the case of the Polish minority, Poles are denied to use the standards of orthography in the official documents, as well as the Polish-language road signs even in the areas inhabited by the majority of Polish residents. According to the Lithuanian Constitutional Court's ruling in the case called *Vilnius*- the Polish orthography

standards can be used only on the secondary pages of the Lithuanian passports. The introduction of the name-spelling which would be consistent with the Polish alphabet is possible only after the payment of the duty fee. This chapter will analyze also the issue of the administrative fines imposed for the use of the Polish language road signs. The analysis will be made in the light of the case-law of the European Court of Justice (ECJ) and the European Court of Human Rights. The next problem to be raised is the one of the minority education in Lithuania. The newly amended Law on Education limited the number of the minority schools and provided for the minority schools students obligatory classes in history and geography in Lithuanian<sup>3</sup>. It also introduced some unifications in the Lithuanian language exams between minority and majority schools. The increasing number of classes taught in Lithuanian, seriously limited the role of the minority language in the process of teaching Lithuanian students. Finally, there will be presented the issue of the minority representation in Parliament.

The last Chapter will draw an analysis of the efficiency of international minority rights protection systems in the light of the specific case of the Polish minority. This part will discuss the United Nation's legal instruments with the special focus on the ICCPR and the Human Rights Committee's prerogatives embracing the individual complaint system as enshrined in the First Optional Protocol and the Universal Periodic Review mechanism. Subsequently, there will be held an analysis of the Council of Europe minority protection system (mainly in relation to: *Framework Convention for the Protection of National Minorities* and *The European Charter for Regional or Minority Languages*). Finally, the Chapter will devote some space to European Union legal minority protection system.

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<sup>3</sup>Polskie Kresy Info, *Pikietujący Polacy broniąc szkolnictwa grozili strajkiem (The Poles threatened with a strike trying to defend their educational system)*, 23 May 2011 [at:] [http://www.polskiekresy.info/index.php?option=com\\_content&view=category&layout=blog&id=123&Itemid=499](http://www.polskiekresy.info/index.php?option=com_content&view=category&layout=blog&id=123&Itemid=499)

# CHAPTER 1: MINORITY DISCRIMINATION

## 1.1. *Introduction*

The aim of this part is to explain the meaning of the terms most crucial for the thesis: discrimination and minority. The introductory theoretical perspective gives a general overlook on the notions that are to be used in the further part. As far as the notion of the discrimination is concerned, the distinction between wrongful and non-wrongful discrimination is to be drawn treating equal moral worth of persons as a determinant to decide whether or not certain mistreatment should be perceived as a symptom of wrongful discrimination. Moreover, the role of historical and social factors is to be underlined. On this theoretical background of discrimination stands the notion of equality as a counterweight.

The discrimination is to be examined both from the standpoint of minority protection as well as from the standpoint of the excessive privileging of a certain minority group that leads to less-favorable treatment towards majority group (as a specific form of a “reverse discrimination”). Therefore, the general trend of evaluating the rights of minorities from the standpoint of the majority is to be opposed and the issue to be examined from the perspective of the community which is trying to assert their rights in a society dominated by the majority.

On this background, the historical and social background of the presence of Poles in Lithuania shall be presented. According to the general census carried out in 2001 6,74% of the Lithuanian population declared Polish nationality what makes this group the most numerous minority in Lithuania. In the Vilnius region Poles constitute 61% of the whole population (including 20% of the inhabitants of Vilnius) and 80% of the solecnicki’s region population<sup>1</sup>. The great role in preserving minority language and culture played Polish- language schools, as well as political representation of the Electoral Action of Poles in Lithuania (Lietuvos lenkų rinkimų akcija, LLRA) in the Lithuanian Parliament. There is also a representative of

Polish minority in the European Parliament- Waldemar Tomaszewski. As well as numerous associations (eg. Association of Poles in Lithuania)<sup>4</sup>.

The last part of the Chapter will prove that law can be an institution of a discriminatory character. Starting with the analysis of the so-called *Radbruch's Formula* it will try to prove that laws may contribute to unfair treatment towards minorities.

## **1.2. Theoretical perspectives on minorities**

### **1.2.1. Definition**

Emergence of the communities united by the common language, history and culture contributed to the creation of a collective consciousness<sup>5</sup> which constitutes a binding force for minority groups. Minorities are groups that can be distinguished by different race, culture, descent or language. Even though, there has not yet been established one uniform definition of the term, there were already numerous attempts of specifying the notion in order to give the basis for a general understanding. According to the widely approved concept: *'minority is a small number or part, especially within a political party or structure'*<sup>6</sup>. Some authors claim that the most important is the quantitative element of the definition as minorities usually constitute minor groups living within a country and existing in relation to majority<sup>7</sup>. The 'majority-minority' relation implies only quantitative criteria<sup>8</sup>, while this mutual influence is much more complex and it would be much better to talk about dominant and non-dominant or

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<sup>4</sup> M. Wołejko, *Sytuacja mniejszości polskiej na Litwie a relacje Polsko- Litewskie (Situation of the Polish minority in Lithuania and Polish-Lithuanian relations)*, Bezpieczeństwo Narodowe 17/2011, p. 1.

<sup>5</sup> M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, Oxford, 1983, p. 28

<sup>6</sup> A. Preece, J. Jackson. *Minority Rights: Between Diversity and Community*. Polity, 2005, p. 10.

<sup>7</sup> *Ibidem*.

<sup>8</sup> Ch. Brat Paulston, *Language Policies and Language Rights*, Annual Review of Anthropology, no, 26, 1997, p. 77.

privileged and non-privileged groups<sup>9</sup>. The literal, quantitative approach was strongly criticized by the UN Secretary General in the 1950 memorandum. The quantitative definition is useless as it is too broad giving the basis for treating social classes, cultural groups and speakers of dialects as minorities<sup>10</sup>. The most significant element of the definition would be therefore, not size, but the sense of belonging<sup>11</sup>. The criteria based only on the size of the group is far too broad and, at the same time, superficial as it ignores the most important part of the definition- the element of belonging which is of a great importance when it comes to minorities. At the same time it is clear that the contemporary understanding of the term is not limited to the numerical side. Even though the size is often invoked in relation to some minority groups, this element is used only to stress the significance of the communities (the bigger the minority, the greater its importance) but it is never the most decisive factor to determine whether certain group of people can be perceived as a minority. Obviously, a state is more willing to protect numerically significant groups (but not all statistically inferior groups are in need of special protection). Therefore, a group needs to be of a sufficient size for a state to be willing to recognize it as a different part of the society<sup>12</sup>. All of the above elements are included in the definition elaborated by F. Capotorti<sup>13</sup>. While defining the notion of minority, the author started with the inferior and non-dominant position (numerical approach) but emphasized also the sense of belonging, distinctness and solidarity within the group placing all of these elements on the same level of importance. This definition is widely

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<sup>9</sup> *Ibidem*.

<sup>10</sup> A. Preece, J. Jackson, *op. cit.*, p. 10.

<sup>11</sup> *Ibidem*.

<sup>12</sup> B. Uddin Khan, Protection of Minorities: A South Asian Discourse, EURAC, July 2009 [at:] [http://www.eurac.edu/en/research/institutes/imr/Documents/EURASIA-Net\\_Del\\_17\\_South\\_Asian\\_Discourse.pdf](http://www.eurac.edu/en/research/institutes/imr/Documents/EURASIA-Net_Del_17_South_Asian_Discourse.pdf), p. 3.

<sup>13</sup> According to the definition: 'Minority is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being national of the state- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.' [in:] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, p. 98.

acknowledged both in doctrine and in legal practice of states<sup>14</sup> but has not attained yet any universally binding force. Another important attempt of introducing definition is the one made by Deschenes<sup>15</sup>. His definition seems to be too vague and broad when compared with the one elaborated by Capotorti. Taking into account lack of any homogeneity when it comes to the minority approaches adopted by respective states, such definition had a chance of being accepted by the international community. But a definition which is too broad gives a wide margin of appreciation to states. In this situation it would be the responsibility of the states to fill in the broad definition while implementing the criteria into their domestic system. Nevertheless, it is obvious that there is no point in adopting a definition just to fulfill the formal requirement of introducing it to the system. Even if some states had agreed on this kind of definitional framework, there are still others which prefer more restrictive criteria for recognition of the groups as minorities.

At the same time, it is important to remember that the concept of minorities can be a very misleading one. There are many places where the groups of people are treated as minorities but, in fact, they are more numerous than a 'majority' and the 'majority' is acknowledged only on the paper<sup>16</sup>. As it was claimed by P. Macklem majorities exist because international law distributes sovereign power over territory to certain groups of people and not to others<sup>17</sup>. Therefore, the nation that owns a territory is usually called 'majority', while other groups inhabiting a land and characterized by a different origin, race, language or culture are acknowledged to be minorities even if they are much more numerous than the official

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<sup>14</sup> B. Uddin Khan, *op. cit.*, p. 1.

<sup>15</sup> According to Deschenes: 'Minority is a group of citizens of a state, consisting of a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious, or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.' J. Deschenes, *Proposal concerning a definition of the term minority*, UN Doc, 14 May 1985, para.181.

<sup>16</sup> *eg.* Polish minority which constitutes 61% of the inhabitants of the Vilnius region in Lithuania (including 20% of the inhabitants of Vilnius) and 80% of the solecnicki's region population.

<sup>17</sup> P. Macklem, *ibidem*, p. 549.

‘majority’. The ‘inferiority’ of a group in respect of its size needs to be assessed in relation to the rest of the state’s population<sup>18</sup>.

In the contemporary world, dominated by democratic systems, there should be some balance preserved in order to maintain fair treatment and prevent abuse of the dominant position. The mere fact of belonging to minority involves a greater risk for the infringement of certain rights. There is also the presumption according to which the inferior numeric status is followed by the inferior political status<sup>19</sup>. Because of being greatly dependent on the decisions of states where they reside, the minority groups are very much exposed to any kind of unfair treatment. Even the fact of having ratified international legal instruments for the minority rights protection by a state does not ensure that certain provisions will be observed. Also the observance of certain international provisions cannot give any guarantees for the fair treatment of minority groups as there has not been elaborated a uniform definition explaining the term ‘minority’. It is greatly due to the fact that there still has not been established a single concept both on domestic and international level. The recognition of a specific group as a minority group is context-dependent and it is impossible to find the coherence which would enable the international community to create a uniform definition<sup>20</sup>. Indeed, it is impossible to find coherence within diversity. But the lack of standardized criteria often paralyses the minority protection system when it comes to its application in practice. Even within the European Union the member states still cannot reach consensus which could contribute to the clarification within the minority rights area<sup>21</sup>. Different policies and understandings of the concept prevented member states from elaborating one common definition (*eg.* Denmark has created a *numerous clauses* of the minorities recognized by the state authorizes, while

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<sup>18</sup> B. Uddin Khan, *op. cit.*, p. 2.

<sup>19</sup> A. Preece, J. Jackson. *op. cit.*, p. 10.

<sup>20</sup> P. Gaetano, *Minorities in International Law: An Introductory Study*, ECMI Journal 2002, p. 55.

<sup>21</sup> I. Pospisil, *The Protection of National Minorities and the Concept of Minority in the EU Law*, ECPR 3<sup>rd</sup> Pan-European Conference, Istanbul 2006, p. 6.

Hungary and Czech Republic prefer general minority-classification standards)<sup>22</sup>. In the absence of theoretical minority protection framework, the European Union managed to create legal measures and policy instruments aimed at ensuring observance of its legal framework for minority protection<sup>23</sup>. It is doubtful whether the system can work properly without the theoretical basis. The same goes to the international legal system. The international community of states still has not agreed as to the introduction of the definition even though there were numerous attempts of introducing a common concept. It is obvious that no structure can work without a proper foundation. As the role of legal ‘foundation’ is performed by definitions, the structure reflected in the form of substantive norms is not able to be appropriately applied without definition that could make the whole system work properly.

On the background of the general minority considerations and in the light of the issues to be raised in the thesis, it is essential to deliberate on the specific type of minority- national minority. Apart from the general features possessed by minorities, national minorities are characterized by the strong feeling of identification with the population that is perceived by the group as its own nation. They also feel particularly strong identification with specific territory (‘motherland’) and culture<sup>24</sup>. National minorities are usually the groups which prior to being incorporated into a larger state had formed well-organized societies living on their historic territory<sup>25</sup>. The specific feature of the national minority is the sense of autonomy towards the dominant nation. But it is not a rule. National minorities can experience both partial autonomy from and partial belonging to the majority. The self-identification with certain nation should not be assessed only from the subjective point of view (cultural or

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<sup>22</sup> *Ibidem*.

<sup>23</sup> *Minority Rights Protection in the EU: Contradictions and Problems*, European Alternatives [at:] <http://www.euroalter.com/2009/minority-rights-protection-in-the-eu-contradictions-and-problems/>.

<sup>24</sup> A. Sadowski, *National identity: the process of the construction of the national identities on the Polish-Lithuanian-Belarussian borderland*, Limes 2008, Vol. I, Issue I, p. 48.

<sup>25</sup> W. Kymlicka, *Western political theory and ethnic relations in Eastern Europe* [in:] W. Kymlicka, M. Opalski, *Can liberal pluralism be exported? Western political theory and ethnic relations in Eastern Europe*, Oxford 2011, p. 13.

communal membership within certain group) but also from the boarder-objective perspective of the possibility of reaching the dominant group by entering the national structure<sup>26</sup>. Apart from the features possessed by minorities in general, national minority is specific because its members are citizens of the state where they reside and are usually present for a long time on the territory<sup>27</sup>. According to the widely accepted definition elaborated by the Committee for Legal Matters, members of the national minority feel firm and lasting ties with the state where they reside but they display distinctive cultural, ethnic, religious or language features that they wish to preserve against the state they live in<sup>28</sup>. Even though widely accepted, this definition is highly insufficient as the terms like ‘firm and lasting ties’ ‘distinctive features’ are not sufficiently precise and leave too wide margin for the decision and elaboration of the states. By now, because of the same reasons as in the case of the general minority definition, there has not been elaborated yet a uniform definition of national minority. The term is often used alternatively with the notion of ethnic minority. The latter was used in Art. 27 of the ICCPR which was invoking ‘ethnic, religious and linguistic minorities’. But ethnicity is a much broader notion comprising not only national bounds but also cultural roots. Ethnic minorities link both their ‘private’ and ‘ideological’ fatherland with the territory of the state they live in<sup>29</sup>, while national minorities feel closer ties with other state. Documents from the inter-war period refer mainly to the racial minorities but the modern international law prefers the term: ‘national minority’<sup>30</sup>. The term was also used in the Framework Convention for the Protection of National Minorities without providing any definition. This, left for the states certain ‘margin of appreciation’ as the national minority field belongs to one of the most sensitive ones in internal politics of the states touching upon states’ sovereignty. The only limitations

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<sup>26</sup> *Ibidem*, p. 51.

<sup>27</sup> *Ibidem*, p. 45.

<sup>28</sup> A. Sadowski, *op. cit.*, p. 50.

<sup>29</sup> S. Łodzinski, *Równosc i różnica. Mniejszosci narodowe w porządku demokratycznym w Polsce po 1989 roku*.

Warszawa, 2005, p. 27

<sup>30</sup> *Ibidem*, p. 46.

on the states' exercise of their margin of appreciation place the requirement of its exercise in accordance with the general principles of international law, the principles recognized by the Framework Convention and the prohibition of using the terminological gap as a source of arbitrary or unjustified distinctions. The Convention adds also one important element to the notion of national minority- the prohibition of imposition of ethno-cultural identity on any person or group of persons in the provision stating that the protection should be offered as an option and applied only to the extent accepted by a person concerned<sup>31</sup>.

### 1.2.2. Minority rights

Existence of minorities has always constituted a major source of tensions within states. The diversity within the population was perceived as a threat to the political order. The unfavorable social moods were often followed by discrimination, forced assimilation, ghettoization, persecution, expulsion and, sometimes even by genocide<sup>32</sup>. The minority rights introduced a different view on diversity. The new approach was supporting existence of minorities within the states claiming that minorities who are recognized and supported by a state, are not willing to threaten its territorial integrity. It was aimed at enhancing government toleration and promoting the diversity<sup>33</sup>. Therefore, minority rights raised the question of the individual and collective nature treating human dignity as their basic justification<sup>34</sup>. While protecting human dignity, through emphasizing the need for preserving group identity, they often divide people into different communities by developing hostile moods among dominant and non-dominant groups. The minority rights vest in individuals who claim to be part of the non-dominant group special rights which can be used against the majority and provide some

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<sup>31</sup> S. Wheatley, *Democracy, Minorities and International Law*. Cambridge University Press, 2005, p. 49

<sup>32</sup> A. Preece, J. Jackson, *op. cit.*, p. 8.

<sup>33</sup> *Ibidem*.

<sup>34</sup> P. Gaetano, *op. cit.*, p. 50.

autonomy towards the state where they are located<sup>35</sup>. The aim of the minority rights is to create equality between dominant and non-dominant groups. The creation of special measures for national, cultural or religious groups is driven by the need for ensuring the environment for the equal treatment<sup>36</sup>. Because of their specific features, minorities are more exposed to any kind of persecution that could undermine their dignity. Legal provisions designed for their protection are aimed to prevent any interference of this kind (although they are not always efficient enough in practice). Another rationale for the existence of the rights is the preservation and development of minority cultures which, because of their nature, are endangered with extinction. Minority rights are often described as cultural rights<sup>37</sup> what puts emphasis on the anthropological element which deserves protection.

Even though many international human rights protection instruments do not make any explicit reference to minority protection<sup>38</sup>, some of the rights expressed as universal human rights *eg.* the right of everyone to education, freedom of religion, expression, association are capable of protecting various interest of minority groups<sup>39</sup>. Apart from this, there are many legal instruments like the Framework Convention for the Protection of National Minorities or European Charter for Regional or Minority Languages which were drafted exclusively as minority rights protection guarantees and as such implemented into the national legal systems. Some legal acts refer to the issue indirectly, mainly through general preamble provisions expressing concern for diversity protection<sup>40</sup>. Taking into account the international minority rights protection framework, it is highly disputable whether the system, lacking proper terminological background and provisions referring directly to the groups of people who are to be protected, is sufficient enough. In the light of great variations between states as to the

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<sup>35</sup> P. Macklem, *op. cit.*, p. 532-534.

<sup>36</sup> F. Capotorti, *op. cit.*

<sup>37</sup> *Ibidem*, p. 50.

<sup>38</sup> *eg.* Universal Declaration on Human Rights, European Convention on Human Rights, International Covenant on Economic, Social and Cultural Rights.

<sup>39</sup> P. Macklem, *op. cit.*, p. 542.

<sup>40</sup> Treaty of Lisbon, Official Journal of the European Union, Vol. 50, 19 December 2007, Preamble and Art. 21.

minority rights protection framework, it is almost impossible to establish a well-developed international system. The variations are multi-layered: they occur first as differences between the systems of respective states but also in the form of a variety of solutions within the states where different minority groups receive different treatment being given different rights and powers from the same state<sup>41</sup>. At present, the granting of certain rights to minorities and their protection constitutes an exclusively domestic matter of each state. This protection is highly dependent upon the political and legal system of the country<sup>42</sup>. Even though, there are some already existing international minority protection standards, there has not been established yet a comprehensive instrument which could replace the exclusively internal legal regulations. There is still no universal regulation which could deliver a universally binding definition of minority. However, in this context it is important to mark that even though minorities are a world problem, the definitional background is highly dependent on the internal legal systems and policies of respective states.

Minority rights are, in contrary to human rights, the rights designed only for particular groups of people. As it was stated by the UN special rapporteur, Capotorti:

*'it is an individual as a member of a minority group, and not just any individual who is destined to benefit from the protection [of the art. 27 of the ICCPR concerning the minority rights]<sup>43</sup>.*

The non-dominant character of a minority places it in the position of claiming special treatment in the form of minority rights<sup>44</sup>. The situation when some groups are to be treated in a different way than others may lead to some kind of exclusion transforming the 'outsiders' into 'insiders'<sup>45</sup>. The previously maltreated groups which were living on the bark of the society become the more privileged ones. But the more privileged position of a minority group raises unfavorable moods within the majority. This way, minority rights in a way

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<sup>41</sup> W. Kymlicka, *op. cit.*, p. 374.

<sup>42</sup> E. Chaszar, *The International Problem of National Minorities*, Toronto, 1999, p. 27.

<sup>43</sup> *Ibidem*, p. 16.

<sup>44</sup> A. Preece, J. Jackson, *op. cit.*, p. 11.

<sup>45</sup> *Ibidem*.

oppose their original aim- which was to give equal opportunities and, at the same time, prevent any form of discrimination. Trying to prevent any unequal treatment, they often place certain social groups in a more favorable position than the rest of the citizens. This provokes mutual antagonisms and leads to hostility.

### 1.2.3. Discrimination

International law does not allow introduction of any legal provisions which would lead to the discriminatory treatment. This was confirmed by the *International Convention on Elimination of All Forms of Racial Discrimination* opened to the signature in 1965<sup>46</sup>. The Convention introduces the most universal definition of racial discrimination describing it as:

*“(...) any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>47</sup>*

Therefore, discrimination is composed not only of the measures of detriment but also of excessive privileging of one group over another. While elaborating on the issue of discrimination, it is necessary to analyze it from two perspectives- both from the point of view of the potentially discriminated who receive better treatment aimed at preventing any unfavorable situation and from the standing point of the rest of the society who does not receive any legal privileges. This form of differentiated treatment where one group is more privileged over another is aimed at nullifying the differences in social status and ensuring

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<sup>46</sup> It is both the oldest UN convention and the document ratified by the impressive number of states which constitutes the greatest number of states parties of a treaty in the UN history what emphasizes the importance of this legal instrument.

<sup>47</sup> Art. 1 of the *International Convention on Elimination of All Forms of Racial Discrimination* adopted and opened for the signature and ratification by General Assembly Resolution 2106 (XX) of 21<sup>st</sup> December 1965, entry into force 4<sup>th</sup> January 1969.

equal opportunities to both sides. But even this kind of treatment can be perceived to be discriminatory as it gives different rights on the basis of belonging to certain social groups.

According to the UN General Recommendation No. 14 including the definition of discrimination and to the text of the Art. 2 § 1 of the CERD all of the state parties to the Convention undertake to:

*' (...) amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.'*<sup>48,</sup>

This provision was turned into an unconditional one obliging states to take up subsequent measures to prevent the discriminatory laws from being applied. In order to decide whether a certain legal act can be discriminatory, it is necessary to evaluate objectively all the consequences it entails while constituting a part of a state's legal system. No tangible consequences are required in order to decide whether or not a law is discriminatory as the assessment from the objective point of view is sufficient<sup>49</sup>. The aim of the anti-discrimination law is to prevent not to remedy. Obviously, there are many cases when the legal provisions can only remedy the discriminatory treatment but the primary aim is always to prevent.

When it comes to the assessment of the treatment as discriminatory, the ECtHRs enumerated the conditions which need to be fulfilled in order to classify a treatment as discriminatory. The test is based on three separate forms of verification. These are:

1. Comparison test (assessment of whether persons in similar situations received considerably different treatment);

2. Justification test (attempt to find objective and rational justification for the differentiated treatment);

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<sup>48</sup> *Ibidem.*

<sup>49</sup> N. Lerner, *The U.N. Convention on Elimination of All Forms of Racial Discrimination*, 1980, London, p. 31.

3. Proportionality test (specifying whether the requirement of proportionality between the used measures and the aim which is to be attained are upheld)<sup>50</sup>.

In the light of the above test, discrimination is not constituted by every differentiated treatment but by a treatment which places one social group in a considerably different situation by granting it a special status. An important role is played also by the proportionality test allowing evaluation of the means which were undertaken in order to attain desired goals. Often, certain forms of diversified treatment are mainly aimed at eliminating the differences existing between some groups of people.

There are two basic types of discrimination to be distinguished- negative and positive discrimination. The latter belongs to the so-called positive actions when a dominant group decides on attributing special privileges to the existing minority in order to ensure equal opportunities and nullify the striking differences between the social status of the majority and minority groups. This contributes to the emergence of a specific type of 'reverse discrimination'. Reverse discrimination consists of special measures undertaken by a state in order to give equal opportunities to the minority groups which exist within its borders. The said treatment is purposed at redressing past legal and social inequalities when the minority representatives were denied some rights which were enjoyed by the majority<sup>51</sup>. The reverse discrimination consists of the organized preferential treatment towards the limited social resources *ie.* access to universities, employment. For example, in the case of entrance exams to the universities there are usually adopted unified standards aimed at ensuring equal opportunities to all candidates. These standards can be, at the same time, perceived as discriminatory as they do not take into account the language or ethnic differences between the candidates. Therefore, it can be said that the equal treatment may require application of different standards towards different candidates. This, often leads to the situation when there

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<sup>50</sup> W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia 2005, p. 34.

<sup>51</sup> C. Soanes, S. Hawker, *Compact Oxford English Dictionary*, 2nd edition, Oxford University Press, p. 230.

are required fewer skill from the candidates coming from the privileged groups when it comes to the educational opportunities. Each society consists of the groups which usually require differentiated and almost 'tailored' treatment. This treatment depends on numerous factors and there is no clear distinction between privileged and unprivileged groups<sup>52</sup>.

### 2.1.3. Integration versus multiculturalism

In order to analyze the phenomenon of integration and multiculturalism, it is indispensable to start from the wider perspective of the national identification. This type of ties with a state are usually precedent to the appearance of any 'external threats' like the occurrence of the minorities on its territory<sup>53</sup>. The usual reaction to any kind of threat is self-defence. In the situation when specific minorities occur within the borders of certain state, this self-defence takes the form of forced integration, assimilation or, even the more severe ones like segregation or ethnic cleansing. In the context which is to be discussed in the thesis, the most actual is the problem is integration of the Polish minority in Lithuania. This would be opposed to the notion of multiculturalism. The state's acceptance of multiple cultures living on its territory would constitute an ideal solution for the minority problems. Nevertheless, it is almost impossible to reach any consensus in this regard due to the great divergency in their internal policies towards their minorities. In Europe, two main approaches *ie.* integration and multiculturalism disabled reaching any stable agreement which would make it possible for them to prepare appropriate legal basis concerning the issue. Some states like France, Romania or Greece strongly support the idea of integration which could create homogenous nations using the same language, having the same culture and feeling the belonging to one

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<sup>52</sup> Y. Dinstein, *Terrorism as International Crime*, Israel Yearbook on Human Rights, Vol. XV, 1985, p. 28.

<sup>53</sup> M. Verkuyten, Support for Multiculturalism and Minority Rights: The Role of National Identification and Out-group Threat, *Social Justice Research*, March 2009, Vol. 22 Issue 1, p. 34.

specific state. This concept is aimed at assuring equality between citizens and uniting them by eliminating at the same time all the differences which arouse in the time perspective. Trying to integrate all the groups, the states at the same time eliminate the cultural differences between them and deny the very existence of minorities<sup>54</sup>. Integration is a term used as a description of the situation which oscillates between assimilation and segregation. The integration process involves both participation in the shared institutions and revival of ethnic bounds and group identity<sup>55</sup>. Minority integration constitutes an initiative planned and undertaken by the central government. It usually has a form of planned and well-organized initiatives. The integration process can be a response to the internal threat to the sovereignty of a certain state<sup>56</sup>.

As contradictory to the process of integration emerges multiculturalism being a policy which values and supports culturally plural society. To support multiculturalism means to value and promote cultural differences, as well as equal opportunities of all the minority groups. Multiculturalism is aimed at helping to preserve cultural differences<sup>57</sup>, not eliminating them or, as it often happens in the states' practice, pretending that they do not exist. Both multiculturalism and integration overlap up to some point as the environment of tolerant and culturally plural society facilitates the process of integration. Multiculturalism can positively influence inter-group relations<sup>58</sup>. We can also regard multiculturalism as the counterpart of integration. Even though, it seems that there is much more visible distinction between multiculturalism and assimilation, it is obvious that there are some clear differences between integration and multiculturalism. First of all, multiculturalism does not require much

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<sup>54</sup> F. Benoît-Rohmer, *The Minority Question in Europe: Towards a Coherent System of Protection for National Minorities*, International Institute for Democracy., Council of Europe, 1996, p. 18.

<sup>55</sup> T. H. Eriksen, *Ethnicity and Nationalism*, Pluto Press, 2002, p. 20.

<sup>56</sup> A. Suhrke, *The Thai Muslims: Some Aspects of Minority Integration*, *Pacific Affairs*, Vol. 43, No. 4, 1970-71, p. 531.

<sup>57</sup> K. Linda, H. Zagefka, R. González, R. Brown, M. Cinnirella, i Xue Na, *Is support for multiculturalism threatened by ... threat itself?*, *International Journal of Intercultural Relations*, no. 1, January 2012, p. 22–30.

<sup>58</sup> *Ibidem*.

‘adjustment’ on the part of culturally distinct groups towards the majority, while integration is composed of a number of compromises that need to be faced in order to create fully integrated groups in the society. In the decision-making process on the part of the minority groups representatives two factors are the most influential ones when determining their social belonging- cultural maintenance preference and contact preference. According to Berry, the first one is reflected in the desire of the minority member to preserve the original culture while the latter is based on the need to communicate and create bonds with the members of the majority group. These two preferences result in the acculturation preferences ie. integration, assimilation, ghettoization or marginalization<sup>59</sup>. While the adherence to the specific minority group depends mainly on the decision of the respective persons who decide on entering into the group, the shaping of the relation between the members of the group and the rest of the society is linked with the state’s policy. This policy may enhance the willingness of certain groups of people to make choice between the respective acculturation preferences.

### **1.3. *Historical and contemporary perspective***

Both Lithuania and Poland share over six centuries of the common history and numerous changes within their territories and boundaries. The main problem is the lack of the consistency as to the historical heritage of the said nations. There are numerous different testimonies and even more interpretations of the historical events. Because of this the Polish, Lithuanian and even Belarusian versions of history emerged and provoked the great historical ‘battle’ between the nations. The debates are aimed at deciding where was the historical center of the multinational Grand Duchy of Lithuania and which country can aspire to the range of having the historical claim to the territory. Lithuanians are of the opinion that the

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<sup>59</sup> J.W. Berry, *Immigration, acculturation, and adaptation*, Applied Psychology: An International Review, no. 46 1997, p. 5–68

statehood of the GDL was born somewhere between Kaunas and Vilnius, Poles insist that Vilnius was a part of Poland and that their historical allegations contradict any of the Lithuanian theories, while the Belarusians deny all of the above saying that the historical center was Navahrudak<sup>60</sup>. Leaving beside the Belarusian claims, we will focus mainly on the Polish-Lithuanian historical attitudes. While Poles are proud of the establishment of the Commonwealth with Lithuania, the latter perceives it in a totally different way. First of all, the Union of Krewo (1385)<sup>61</sup> is not presented as giving beginning to the close cooperation of both nations. Secondly, the Union of Lublin (1569)<sup>62</sup> is often claimed to be the national catastrophe which initiated the expansion and plundering of Lithuania by Poles<sup>63</sup>. From the Lithuanian perspective these events initiated the period of misery of their country. The use of the expression 'Polish Commonwealth' in relation to the territories which were unified on the basis of the subsequent unions, is perceived by many Lithuanians as offensive. According to the Lithuanian interpretation, the Polish-Lithuanian Commonwealth was a union of two independent and separated countries<sup>64</sup>. From the perspective of the Polish history, both unions are presented as giving rise to the emergence of the powerful Commonwealth which was one of the most significant and respected states in Europe at that time. But the Polish-Lithuanian relations are currently influenced mainly by the occupation of the Vilnius region which took place in 1920 as a part of the so-called *Żeligowski's Mutiny*. The mutiny ended up with creation of the short-lived Republic of Central Lithuania and enabled the annexation of Vilnius by Poland. In 1922 the Vilnius Parliament supported the idea of incorporation of the

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<sup>60</sup> O. Adamczyk, *Polsko-litewskie konszachty (Polish-Lithuanian Dealings)*, Nowa Europa Wschodnia, 31 March 2012 [at:] [http://www.new.org.pl/2012-03-21,polsko\\_litewskie\\_konszachty.html](http://www.new.org.pl/2012-03-21,polsko_litewskie_konszachty.html)

<sup>61</sup> which constituted one of the first attempts of unifying under the Polish Crown the territories in order to strengthen them in the struggle against the Order of Teutonic Knights. The Union was projected at Christianizing Lithuania and regaining the territories lost by the Polish Crown. The Union was to be based on a royal marriage between the Lithuanian king Jagiello and the Polish queen Jadwiga.

<sup>62</sup> According to the Union of Lublin both states were to have the common ruler who was to be elected by the nations as a King of Poland and the Great Duchy of Lithuania. The countries were to have the same foreign policy but separated administration. It also emphasized the need of preserving separately official languages- Polish in Poland and Russian in Lithuania.

<sup>63</sup> O. Adamczyk, *op. cit.*

<sup>64</sup> *Ibidem.*

region as a part of Poland. This decision was also accepted by the Polish parliament what lead to the serious crisis in the Polish-Lithuanian diplomatic relations. This period is perceived in the Lithuanian history as Polish occupation and is omitted in the students' materials for learning history. When in 1944 the communist Red Army started the occupation of the Lithuanian territory, some of its ethnic citizens lost the feeling of the national belonging to the state and were describing themselves as being primarily communists, and Lithuanians in the second place. After Lithuania had proclaimed the declaration of independence in 1990 the Polish part of its society was highly reluctant and afraid of the prospective forced 'lithuanization'. This fear was, in fact, well-founded as the state which has just gained independence was desperately trying to redress to its citizens, the whole period of being treated like the second-class residents. While pursuing the policy of redressing all the damages, the authorities forgot about the newly emerged minority protection standards. It gave rise to the problems with the minority education, spelling of the Polish names and surnames, names of the streets as well as the earlier forced expropriation of the lands<sup>65</sup>. The fears against the Polish minority were based mainly on the lack of certainty of the independent Lithuanian statehood. The unfavorable social moods raised even more had the Polish minority expressed in the referendum disagreement towards the Lithuanian independence<sup>66</sup>. The year 1990 has not brought much interest as far as the situation of the Polish minority is concerned- neither on the part of Lithuania, nor on the Part of Poland. There were only a few appeals made by the Polish politicians concerning the recognition of the rights of the Polish minority. But they were concerning mainly the restoration of the suspended local councils located in the areas inhabited by the said group of people<sup>67</sup>. In 1996 the head of the Polish-Lithuanian Parliamentary Group, Adam Dobronski, pointed that the

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<sup>65</sup> A. B. Zakrzewski, *Litwa-Polska. Trudna miłość? (Lithuania- Poland. Difficult love?)*, *Kultura Liberalna*, [at:] <http://kulturaliberalna.pl/2010/01/19/zakrzewski-jasina-kozlowski-litwa-polska-trudna-milosc/>.

<sup>66</sup> *Ibidem*.

<sup>67</sup> A. T. Lane, *Lithuania: Stepping Westward*, Routledge, 2001, p. 209.

Polish minority was subject to some kind of unfriendly actions on the part of the Lithuanian authorities<sup>68</sup>. The lack of certainty of the Lithuanian citizens when it comes to their own nationality and long-lasting coexistence together with the Poles, lead to the strong nationalist moods directed mainly against the Poles. The hopeless state of Polish-Lithuanian relations is not only the fault of the Baltic state but it has some of its roots in the clumsy Polish foreign policy towards its neighbor. It started in the mid nineties when the former Polish president, Aleksander Kwasniewski defined Lithuania as the Polish ally without even asking it for presenting its standpoint. Even the strong attempts of the other Polish president, Lech Kaczynski have not helped in improving the inter-state relations<sup>69</sup>. Besides a few diplomatic *faux pas* committed by the Polish authorities, the general direction of the Polish foreign policy towards Lithuania has been focused on improving relations between states. But no improvement is possible because of lack of the goodwill and mistrust on the side of the Baltic neighbor<sup>70</sup>.

It seems that some part of the disagreements between Lithuanians and Poles constituting national minority, have their roots in the differences in concepts and sense of nationality between the said groups. In the era of the Grand Duchy of Lithuania the concept of belonging to the Lithuanian nation was based mainly on *jus soli*. According to this law, every resident of the GDL was considered to be Lithuanian. Even the residents who were not ethnic Lithuanians. The January Uprising considerably changed the terries law perspective by giving preference to the *jus sanguinis* on the basis of ethnic criteria (linguistic and cultural ties). At the same time, the social moods were strongly influenced by the Tsarist agents trying

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<sup>68</sup> L. Hedegaard, B. Lindström, B. Lindstrom. *The NEBI Yearbook: North European and Baltic Sea Integration*. Springer, 1998, p. 496.

<sup>69</sup> *Ibidem*.

<sup>70</sup> A. Michnik, *Z Litwą jest źle (It is Bad with Lithuania)* [in:] *wyborcza.pl*, 24 March 212 [at:] [http://wyborcza.pl/1,90913,11410963,Z\\_Litwa\\_jest\\_zle.html](http://wyborcza.pl/1,90913,11410963,Z_Litwa_jest_zle.html).

to raise aversion to the Poles in Lithuanians<sup>71</sup>. This, at least, initiated the emergence of unfavorable social moods towards the Poles inhabiting Lithuania. Apart from the *jus terries* and *jus sanguinis*, the other perspective was based on the self-determination of a person concerned. It often happened that within one family one person felt Lithuanian, other- Polish and the rest- Belarusian. The decision-making concerning ethnic and national belonging would be the best to be left to the person concerned and decided in the process of self-determination. But there was still present the belief that all the Poles inhabiting the Vilnius region are ‘Polonised’ Lithuanians. This concept gained many supporters starting with the XIX century as a part of the Polish minority living on the Lithuanian territory, decided on determining themselves as Lithuanians in fear of losing their high position in the society which was becoming more and more dominated by the strongly emerging Lithuanian nation. But when some of the anti-Polish discriminatory treatment reached the minority, Poland did not wait long with responding to it and also started discriminating the Lithuanian minority residing within its boundaries<sup>72</sup>. At the same time, the fear before the multilingualism and other languages which could replace Lithuanian emerged. The pursuit for monolingualism encouraged invention of the new name for the capital. The name ‘Vilnius’<sup>73</sup> was invented mainly because of the fear against other cultures and languages which could replace Lithuanian<sup>74</sup>. As it was stated by Z. Siemieniowicz, it has been hard for the ethnic Lithuanians to accept the fact that the Poles inhabiting the Vilnius region are not ‘Polonised’ Lithuanians and that they do not constitute a threat to the Lithuanian nation and are not interested in incorporating Vilnius as a part of Poland. The multilingualism and multiculturalism were existing in Lithuania for ages and they were widely accepted. This, is reflected in the

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<sup>71</sup> Z. Siemieniowicz, *Ślepa wierność stereotypom tkwi w sensie narodowości (The Sense of Nationality Underlines the Blind Belief in Stereotypes)*, Kurier Wileński, 22 July 2011 [at:] <http://kurierwilenski.lt/2011/07/22/slepa-wiernosc-stereotypom-tkwi-w-sensie-narodowosci/>

<sup>72</sup> B. Zakrzewski, *op. cit.*

<sup>73</sup> The most widely used names of the capital used in the chronicles were Vilna and Vilnia.

<sup>74</sup> Z. Siemieniowicz, *op. cit.*

existence of the numerous villages whose residents speak Polish, Belarusian or Russian<sup>75</sup>. All these languages have existed in the region for centuries what is clearly visible in how the ‘Lithuanian Polish’ or ‘Lithuanian Russian’ languages differ from their ‘original’ versions. In the case of the Polish language used in Lithuania, the differences are strongly visible in the accent, in the vocabulary as many of the words still used by the Lithuanian Poles have been out of use for some time already. But it is still Polish and the small varieties reflected in the accent or vocabulary cannot in any way deny this fact.

#### **1.4. Legal perspective**

Analyzing the issue of discrimination from the legal perspective, as presented in the title, it is indispensable to start with the possibility of introducing to the national legal systems of the respective states, the provisions which enable discriminatory treatment of some social groups. In this light, it is highly questionable whether or not the discriminatory laws deserve to be obeyed by institutions and citizens. The acceptance of a certain legal norm as legally binding entails the accordance with the content of its legal reasoning<sup>76</sup>.

Law, may be an institution that leads to actions of a discriminatory nature. Even an act which aim is to protect may be regarded as discriminatory from the standpoint of the minority. What is good and right for the majority, may be unfair for minority. That is why we should examine each case separately and individually as even human rights can turn out to be discriminatory for the minorities. The specificity of the notion of minority emphasizes the requirement of special treatment<sup>77</sup>. For example, it is the majority group to decide about the language policy of a state. The decisions made by the majority may disable the effective enjoyment of the basic minority rights. The other situation when it comes to the minority discrimination is the case when the human rights contribute to the deepening of the

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<sup>75</sup> *Ibidem*.

<sup>76</sup> Z. Siemieniowicz, *op. cit.*, p. 236.

<sup>77</sup> M. Freeman, *Prawa człowieka, Sic!*, 2006, p. 117.

discrimination *ie.* the right to vote or the right to the freedom of movement within a state, enable majority in outvoting minority and establishing disadvantageous rules within the language or immigration policy<sup>78</sup>.

Even the legal acts aimed at being non-discriminatory, may turn out to be discriminatory in relation to certain minority<sup>79</sup>. While analyzing respective cases from the standpoint of the potential discrimination, it is indispensable to look at them not from the point of view of the rule of law but from the perspective of minority upon which the rule of law is imposed. For example, because of the existence in the constitution of the State A of the provision according to which states one of the basic aims of the state is to preserve its integrity and entirety of the territory. In the State A a political party X was established. The party proclaims the right to self-determination of the minority living within the state's borders. When the State A prohibits the activities of the party X acting in consistence with its basic law, it violates the guarantees delivered in the international legal instruments *ie.* the European Convention of Human Rights and proclaimed by it freedom of association. Even though, the action of the state was justified in the light of its constitutional provisions and in the norms of international law concerning the right to self-determination of the entire territory of a state, it violates the internationally binding laws placing the party representing the minority in the situation of being deprived of their right to freedom of association and the possibility of protecting minority interests. Therefore, while assessing the legal provisions and minority situations in respective states, it is indispensable to oppose the general tendency of evaluating the legal provisions from the point of view of the majority. Instead, the standpoint of the minority living within the society dominated by the majority group should be taken. It is especially essential when it comes to being subjected to the certain rule of law. When discussing the rule of law and unjust legal provision, it is worth to start the analysis on the

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<sup>78</sup> *Ibidem*, p. 117.

<sup>79</sup> Thlimmenos v. Greece, Application no. 34369/97, 6 April 2000.

background of the so-called *Radbruch Formula*. According to Gustav Radbruch, the laws enacted arbitrarily, not ensuring the basic guarantees to the people do not possess the legally binding force<sup>80</sup>. The concept combines justice which is reflected in morality with positivity (legal certainty)<sup>81</sup>. This formula constitutes an exemption from the obligation of obedience towards the laws enacted by the states authorities in accordance with the national legislative procedure. There is no legal obligation of observance towards the legal provisions that breach basic human rights given by the law of nature. The observance of such norms does not bring any benefit to the society and therefore constitutes the so-called *unjust law* with legally binding force which raises many doubts as to its validity. The observance of the unjust law does not bring any benefit to the society. Moreover, when the legal provisions violate human rights, there is no need of any consistence with them as it would enhance their capability of violating human rights. The *Radbruch Formula* consists of two elements: the formula of intolerability and the formula of disavowal. The first includes lack of acceptance towards a legal provision, while the latter rejects a norm of law resulting in the lack of any legally binding force on its part<sup>82</sup>. According to the theory, these two formulas should overlap, but the practice shows that more attention is paid to the intolerability formula and the disavowal formula is used only in the cases which raise serious doubt<sup>83</sup>. In order to assess whether certain law is unjust, we need to refer to the minimal standards of justice delivered by the law of the nature. The positive law loses its legally binding force in the case of the flagrant injustice<sup>84</sup>. When assessing the positive law, one needs to keep in mind that it is usually supported and secured by legislation and power. Moreover, it takes precedence even when its content is not sufficiently just and does not bring much benefit for people. But when the

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<sup>80</sup> G. Radbruch, *op. cit.*, p. 173.

<sup>81</sup> F. Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law, Ratio Jurisprudence*, Vol. 18, No. 2, p. 167.

<sup>82</sup> F. Haldemann, *Ibidem*.

<sup>83</sup> *Ibidem*, p. 166.

<sup>84</sup> *Ibidem*, p. 3.

conflict between the law and justice reaches the degree of the utter injustice, the act loses its legally binding force<sup>85</sup>. Legality as such serves as a bridge between the assessment of a norm in the light of its legal features and its acceptance in the process of legal reasoning aimed at introducing widely accepted and enforceable provisions. In the situation of a serious conflict between the legal norm and the idea of justice, the positive law is being replaced by other positive law provision<sup>86</sup> or by the non-written legal norm existing in the sphere of the law of the nature. This way, it limits the legally binding force of the positive law. Following this theory, there should be kept balance between the norms delivered in the form of positive law and norms derived from the law of the nature<sup>87</sup>. The law which reaches the border of being extremely unjust ceases to be perceived as law and loses its whole legal value. Not every law is law what clearly contradicts the positivist theory. In this light, more important than the legal certainty is the value of justice included in the legal norm. Therefore, *Radbruch Formula* is often referred to as a validity test for the legal enactments<sup>88</sup>. The Formula draws a line between the statutory non-law which is unjust to such an extent that it cannot be accepted as a part of legal system and statutory law which is unjust but to an extent which can be accepted by the society subject to this legal provision and does not violate the basic values established in the law of the nature. The Formula, in the time of being introduced by Gustav Radbruch was aimed mainly at preventing laws from the state of ‘extreme injustice’. In the moment of its elaboration it was mainly referred to the cruelty of the Nazi times. But taking into account the continuously changing conditions and the development within the international law framework, it seems to be actual also contemporarily. Mainly in the context of the discriminatory treatment. This background enables adjustment of the *Radbruch Formula* to the contemporary conditions. The ‘unjust law’ test introduced by Radbruch can be used as a

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<sup>85</sup> S. Giovanni, *Legality Policies and Theories of Legality: From Bananas to Radbruch’s Formula*, Ratio Juris, June 2010, Vol 22, Issue 2, p. 237.

<sup>86</sup> *Ibidem*, p. 239.

<sup>87</sup> *Ibidem*, p. 241.

<sup>88</sup> *Ibidem*, p. 165.

basis for assessment of internal legal system especially in the lack of ratification by a state of respective international acts.

### **1.5. Conclusion**

Minority rights protection is a complex and multi-sided sphere of a sensitive character which is conditioned by existence of a vulnerable group which requires special treatment. The specificity of minority groups which, especially in the context of the Baltic states, are perceived as communities posing danger to the majority might is often faced by the introduction, on the part of state where the minority resides, of legal measures possessing character which could be perceived as highly discriminatory. The area of minority interests is a problematic one as the assessment of legal measures applied in different circumstances could be made from different perspectives involving different approach.

Nevertheless, some laws could be claimed to be, in a flagrant way, discriminatory and thereafter involving application of the so-called *Radbruch Formula*. The Formula requires preservation of balance between natural and positive laws. Such balance could prevent states from contributing to the acts which are clearly unjust and in an open way violate human rights.

## **CHAPTER 2: PROBLEM OF THE DISCRIMINATION OF THE POLISH MINORITY IN LITHUANIA**

## 2.1. Introduction

The aim of the Chapter is to present the level of protection enjoyed by the Polish minority in specific areas of life. The Lithuanian legal framework of the minority rights protection will be discussed on the example of the highly problematic right to the use of minority language in relation to the spelling of minority names and surnames of both natural and legal persons, Polish road signs, as well as using the language freely in contact with authorities or in private.

The next part, will elaborate on the new Lithuanian Education Law and the provisions which could be perceived as discriminatory in the context of the regulation. Education, encompassing the possibility of developing and cultivating bonds with the state of origin, is an important element conditioning preservation of national identity and therefore, any measures taken in relation to the limiting of the exercise of the right to schooling in minority schools, constitute serious threat for the individual's self-determination.

Finally, the problem of minority representation in the Lithuanian Parliament (*Seimas*) is to be discussed. According to the Lithuanian law, in order to be able to enter Parliament, all parties (even those constituting representation of national minorities) shall obtain at least 5% of the votes. This prevented the Electoral Action of Poles in Lithuania from entering parliamentary structures in 2008. The practice is to be analyzed in the light of international regulations and potential discrimination of the minority group as far as their representation in Parliament is concerned.

Finally, also the election district division that is not favorable for Polish minority is to be analyzed from the point of view whether or not this practice can be perceived as discriminatory supposing that this would seriously interfere with the sphere of internal affairs of a state.

## **2.2. Law on minority protection**

The 1989 Lithuanian Law on National Minorities expired on January 1, 2010 and has not been replaced by any new regulation. The introduction of new act encountered many problems both on the side of the Law on State Language which was not in conformity already with the previous regulation (thereafter, it was often claimed that the previous Law on National Minorities was to be replaced by an act more adjusted to the aforementioned law), as well as on the part of politicians and society for which the issue of minority protection constitutes a serious trouble spot taking into account great ethnic diversity of the country. At the same time, the Law on State Language was treated as prevailing over the regulation on national minorities<sup>89</sup> what constituted apparently unfair and discriminatory practice as the two laws are both secondary sources of law and occupy the same level in the hierarchy.

Some concern related to the lack of proper legal framework, was expressed by the European Commission against Racism and Intolerance which noticed that the legal vacuum in the said area raised significant doubts towards the authorities' attitude regarding minority groups. Therefore, the Commission, in its 2011 Report recommended Lithuania to adopt law which would, at least prescribe as minimal, the guarantees of minority protection which were present under the 1989 Law<sup>90</sup>. Importantly, the already void Law on National Minorities, stipulated the right to use national minority languages in the units of territorial administration on the territories inhabited by a significant number of minority representatives. Minority language could be used also on information signs and by the local institutions. At the same time the 1989 Law had some serious drawbacks, starting with the lack of definition of the term 'national minority' which would protect against arbitrariness in prescribing the privileged status of minority group. What is more, the act did not elaborate on the

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<sup>89</sup> European Commission against Racism and Intolerance, *Fourth Report on Lithuania*, 13 September 2011.

<sup>90</sup> *Ibidem*.

enforcement of its provisions what also, up to some extent, undermined its legal force<sup>91</sup>. Differently to the old regulation, the draft of the new Law on National Minorities is said to introduce definition of national minority and to prescribe the rights that do not narrow down the scope of protection enjoyed before by the national minorities<sup>92</sup>.

### **2.3. The use of minority language**

Starting from the broader background, language as a key element of national identity, is promoted and protected on the basis of international and regional legal instruments. The Charter of Fundamental Rights of the European Union which, in its Art. 21(1), introduces prohibition of discrimination on the grounds of language<sup>93</sup> and elaborates further (in the Art. 22) on the protection of linguistic diversity, emphasized the need for the minority language protection on the level of the European Union. According to the Art. 27 of the International Covenant on Civil and Political Rights, the states inhabited by ethnic, religious or language minorities shall guarantee that the minority groups representatives have the right to enjoy their own culture, practice their religion and use their own language<sup>94</sup>. Thereafter, a state shall enable the minority groups to pursue education in their mother tongue, to use the inscriptions, names and other signs as translated into a minority language, as well as to freely communicate in the minority language not only in private, but also with the state authorities and to use the

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<sup>91</sup> Council of Europe, Lithuania's Report on the Implementation of the Framework Convention for the Protection of National Minorities, Cycle III, 21 September 2011, p. 13.

<sup>92</sup> *Ibidem*.

<sup>93</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/01, 18 Dec. 2000, Art. 21(1): *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, **language**, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

<sup>94</sup> International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December, 1966, Art. 27.

original spelling of their names. Language rights belong to the broad category of rights which influence substantially the way of maintaining, expressing and preserving identity<sup>95</sup>.

Art. 14 (1) of the Framework Convention on the Protection of National Minorities states that each person being a member of a national minority, has the right to study her own language. Moreover, in the areas with a large number of persons belonging to national minority, if there is sufficient demand, it shall be provided for the group representatives to study the language or to be provided education in their own language<sup>96</sup>. The European Charter of Regional Languages significantly contributes to the strengthening of the special status of the protection of the minority languages obliging states to reinforce their efforts in this sphere<sup>97</sup>.

The analysis of the Lithuanian legal framework shall be based on the elaboration concerning the basic law. The Lithuanian Constitution is in line with the EU legal framework in the area of non-discrimination as well as with the international treaties adopted by Lithuania<sup>98</sup>. The basic law in its Art. 29 lays the ground for the introduction of the prohibition of discrimination on the grounds of social status, language, origin, nationality, views and belief<sup>99</sup>. The aforementioned provision introduces equality of persons among the citizens and is said to be a reflection for the implementation of the respective international human rights protection instruments.

Some doubts could be raised by Art. 14 of the Constitution according to which the Lithuanian language has a status of a state language. What follows is that it is an absolute requirement to use this language in the area of public life. At the same time, the using of minority languages has been limited only to the private sphere<sup>100</sup>. Lithuanian government

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<sup>95</sup> T. Snarski, Petition to the European Parliament, Gdańsk 31 March, 2011.

<sup>96</sup> FCNM, *op. cit.*, Art. 14 (1) and 14 (2).

<sup>97</sup> T. Snarski, *op. cit.*

<sup>98</sup> Council of Europe, Lithuania's Report..., *op. cit.*, p. 17

<sup>99</sup> Constitution of the Republic of Lithuania, 25 October 1992, Art. 29.

<sup>100</sup> Council of Europe, Lithuania's Report..., *op. cit.*, p. 62.

claims that the minority groups enjoy full freedom in the use of minority language in private. In this context, it is worth noting that the freedom to use a chosen language in private is a fundamental right of every person and shall not be subject to any authorization by the state authorities. The only area where any regulation concerning minority languages could come into play, is the public sphere and situations of contacting the authorities both in oral and in writing. At the same time, the provision of the Art. 37 gives the right to foster the language by persons belonging to national minority<sup>101</sup>.

The special status of Lithuanian language was emphasized also by the Lithuanian Constitutional Court underlying the constitutional character of the state language and its obligatory use in the public life<sup>102</sup>. Such a practice could be perceived as contradictory to the international standards, even though it was adequately justified by the Constitutional Court's judgment of October 1995 where it was emphasized that the principle *pacta sunt servanda* does not disable states from adopting different ways of implementation of respective obligations arising from international treaties. Such a right is derived from the sovereignty of states. The Court also switched from the state's being in the position of dependence towards the international structures and stated that the validity of international law provisions depends on states' acceptance expressed through implementation into the national laws<sup>103</sup>. Thereafter, it is the state that decides about the validity of a norm or treaty and it's not for a treaty to decide about the state's practice. Being aware of the fact that minority rights are highly politicized and more dependent on the so-called good will than on the objective criteria, it is for the judiciary to determine the criteria and principles for their development<sup>104</sup>. The courts in general seem to be increasingly aware of need for the obedience of the rule of law,

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<sup>101</sup> Constitution of the Republic of Lithuania, *op. cit.*, art. 37.

<sup>102</sup> *Ibidem*, p. 68.

<sup>103</sup> Council of Europe, Lithuania's Report..., *op. cit.*, p. 69.

<sup>104</sup> F. Palermo, *Judicial Adjudication of Language Rights in Central, Eastern and South-Eastern Europe. Principles and Criteria*, European Diversity and Autonomy Papers, EDAP 02/2011, p. 3.

thereafter opposing the trend for confirming of the majority-constituted law<sup>105</sup>. This seem not to be applying in the case of Lithuanian courts.

Language rights are usually presented as a precondition for the enjoyment of other minority prerogatives such as educational or participation rights<sup>106</sup>. Thereafter, the aforementioned rights could be referred to as possessing character of ‘chain rights’ inferring to a great extent with other rights and giving the basis for their enjoyment by the minority representatives. But, as it is visible from the jurisprudence of national courts, language rights are usually linked to other areas related to the administrative procedures, territorial application or the consumer protection which condition their enjoyment<sup>107</sup>.

The enjoyment of language rights by minorities is often perceived as a threat for the existence of majority language what leads to clashes between the acts on the rights of minorities and state language laws. Such a conflict of laws often ends up in the courts which are faced with the need for balancing of two different interests out of which each is legitimate and legally relevant<sup>108</sup>.

### **2.3.1. Spelling of names of natural persons**

States have been given quite a wide margin of appreciation as far as the spelling of the names of their citizens, belonging to minority groups, is concerned. This margin of appreciation is determined mainly by the alphabet of the national language. Such a margin was acknowledged by the Advisory Committee’s on the FCNM opinion on Azerbaijan where it was stated that language:

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<sup>105</sup> *Ibidem*.

<sup>106</sup> P. Blokker, *The Post-enlargement European Order: Europe ‘United in Diversity’?*, European Diversity and Autonomy Papers, EDAP 1/2006, p. 6

<sup>107</sup> *Ibidem*, p. 7.

<sup>108</sup> *Ibidem*, p. 8.

*'(...) should not be disconnected from its essential elements such as the alphabet. While recognizing that the states may use the alphabet of the official language when writing the names of persons belonging to national minorities<sup>109</sup>'.*

Even though the internationally accepted rules on the use of minority forenames and last names are rather detailed, the scope for the discretion of state, that they allow, has been often used as an excuse for the systemic violation or abuse in the area.

The conflict arising under the country's laws regulating the use national language and minority languages has been already reflected in the jurisprudence of the Lithuanian Constitutional Court. In its *Kleczkowski/Klečkovski* judgment, the Court assessed the validity of norms requiring the spelling of the names to be made not only with the use of the national alphabet, but also in the state language. The Court stated that the spelling of names constitutes an integral part of the official language. It was noted that the state language protects the identity of the nation and constitutes a guarantee for the equal treatment for the citizens who are able to communicate on equal terms with the state institutions<sup>110</sup>. The principle of formal equality may serve as a basis for the introduction of certain limitations on the enjoyment of minority rights, and therefore, some discriminatory treatment for the minority groups representatives. Even though minority rights are valid and binding upon the states, their enjoyment may be rendered ineffective by the formal reading of the principle of equality as enshrined in Art. 29 of the Lithuanian Constitution which prohibits granting of any privilege on the grounds of race, nationality, language, origin, social status, belief or the conviction of views<sup>111</sup>. Taking this provision as a basis for further elaboration, the granting of special position by making exception for the use of minority languages in the spelling of names, shall be subjected to the strict scrutiny emerging from a suspect classification on the basis of which special status would be prescribed to the minority representatives. Thereafter, the right to equal treatment shall prevail over the right to the fostering of minority language as prescribed

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<sup>109</sup> F. Palermo, *op. cit.*, p. 18.

<sup>110</sup> *Kleczkowski/Klečkovski*, no. 1285/2004.

<sup>111</sup> Constitution of the Republic of Lithuania, *op. cit.*

in the Art. 37 of the Constitution<sup>112</sup>. The aforementioned decision of the Constitutional Court was overruled by the 2010 amendment which allowed the spelling of names being made in the Latin alphabet without the using of Lithuanian accents<sup>113</sup>.

The issue of language rights in relation to the use of original spelling of minority surnames was raised, on the international level- before the European Court of Justice, in the case of *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija*<sup>114</sup>. For the second time, after the *Garcia Avello* case<sup>115</sup>, the European Court of Justice referred to the issue of national identities of the Member States in relation to the EU citizenship and the freedom of movement. The first applicant- Malgožata Runevič-Vardyn as a Lithuanian national belonging to the Polish minority but not possessing Polish citizenship was using the Polish name Małgorzata and the last name of her father- Runiewicz. Her birth certificate issued in 1977 was done with the use of Cyrillic alphabet, while the one issued in 2003 was done in Roman letters and made in accordance with the Lithuanian spelling rules. Thereafter, the applicant lodged a request for changing of the spelling of the names that appear on her birth certificate from '*Malgožata Runevič*' to '*Małgorzata Runiewicz*' and for the change in her marriage certificate from '*Malgožata Runevič Vardyn*' to '*Małgorzata Runiewicz Wardyn*'. The authorities denied to change the spelling of the names invoking the national regulation<sup>116</sup>. When it comes to the second applicant, for him being a Polish citizen, it would have been possible to enter his names according to the Polish spelling rules, had he decided on getting married in Poland<sup>117</sup>. Otherwise, he was to be bound by the Lithuanian spelling rules which do not encompass the same diacritical marks as the Polish alphabet<sup>118</sup>. The court's decision in the commented case was based on the Supreme Court's ruling

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<sup>112</sup> F. Pogeschi, *op. cit.*, p. 19.

<sup>113</sup> *Ibidem*.

<sup>114</sup> European Court of Justice, Case of Runevic-Vardyn and Vardyn, C-391/09.

<sup>115</sup> European Court of Justice, Case of Garcia Avello, C-148/02

<sup>116</sup> European Court of Justice, Case of Runevic..., *op. cit.*, par. 23.

<sup>117</sup> *Ibidem*, par. 25.

<sup>118</sup> *Ibidem*.

according to which a person's forename and surname was to be entered on official documents (such as a passport) in accordance with the spelling rules of the national language not to weaken its constitutional status<sup>119</sup>.

Vilniaus miesto 1 apylinkės teismas decided on referring for a preliminary ruling the questions raised before it in relation to Art. 18 TFEU (non-discrimination and citizenship of the EU) and Art. 21 of the TFEU (freedom of movement), as well as Art. 2(2)(b) of Directive 2000/43 (indirect discrimination)<sup>120</sup>. The issues pending before the court could be divided into two groups:

1. The first one relates to determination whether Art. 2(2)(b) of Directive 2000/43, which prohibits the indirect discrimination on the grounds of ethnic origin, could make a state stop a practice of denying the spelling of minority representatives' names in conformity with their own language on the basis of national laws providing that the forenames and surnames shall be written on certificates of civil status issued by the state, only in the form which preserves the rules of the official state language without making use of diacritical marks, ligatures or other modifications of the Roman alphabet which are used in other languages<sup>121</sup>?

2. The second one is to determine whether or not Art. 21(1) of the TFEU while providing every citizen of the EU with the right to the freedom of movement and non-limited residence within the territory of Member States and Art. 18(1) of the TFEU prohibiting discrimination on the grounds of nationality, shall be understood in a way which precludes any denial of the changing of the name's spelling by the authorities of a Member State on the basis of the national law which provides that names and surnames should be entered to the certificates of civil status only in the form which preserves the rules of the official state

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<sup>119</sup> *Ibidem*, par. 27.

<sup>120</sup> *Ibidem*, par. 28.

<sup>121</sup> *Ibidem*.

language. Thereafter, their spelling shall be made only in a form of the official state language with the use of its letters not employing diacritical marks, ligatures or other modifications specific for another language<sup>122</sup>?

In relation to the first question, the European Court of Justice decided that the national laws on the certificates of civil status do not fall under the application of the Directive 2000/43<sup>123</sup>. Moreover, the applicant has in no way proved that she experienced any serious inconvenience arising from her ethnic or racial origin.

Analyzing the answer of the Court, it would be indispensable to mark the framework of application of the '*indirect discrimination*' definition which consists of the using of a seemingly neutral criteria which could contribute to a less favorable situation when compared to the other persons. EU member states are forbidden from applying such standards, unless they could provide a proper justification. The applicants invoked the prohibition of discrimination in relation to the right to access the services claiming that their situation is comprised into the framework of the Directive because it involved the necessity of presenting identity cards and other types of documents, as well as diplomas in order to be able to make use of their rights and to use the goods and services as prescribed by the Directive<sup>124</sup>.

Thereafter, for the above-mentioned practice to be assessed as discriminatory, there are not sufficient bases in Directive 2000/43 what made it impossible for the applicants to obtain a positive decision in their case. Nevertheless, it is obvious that the regulation adopted by the Lithuanian authorities is of a secondary discriminatory character. Non-harmonized spelling of forenames and surnames in the documents may involve many difficulties in cases of taking a credit or buying equipment by the couple whose names were differently spelled in official certificates.

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<sup>122</sup> *Ibidem*.

<sup>123</sup> *Ibidem*, par. 44.

<sup>124</sup> *Ibidem*, par. 38.

As far as the second issue is concerned, it cannot be foreclosed that the situation where the first and last names are spelled in different ways, could entail some difficulties on the applicants' side. Nevertheless, according to the Court's case-law and to the Art. 21 of the TFEU, for the denial of change of the spelling of names to be inadmissible, it should cause '*serious difficulties*' in the administrative, professional and private spheres<sup>125</sup>. Nevertheless, the final decision shall be left to the national court which shall balance the right to private and family life against the legitimate protection by the Member State of its national language and traditions.

As evident in the opinion delivered by the advocate general, Jääskinen, from the right to the freedom of movement and residence within territories of Member States, there could be deduced a prohibition for the Member States to enter names, taken by a citizen after a spouse being of a different nationality, in a way that would be consistent with the spelling requirements of the states so that the original wording would be discriminatory. At the same time, the EU law does not require the member states to use diacritical marks, ligatures or modifications specific for other languages<sup>126</sup>. The rules concerning spelling of the names and the documents regulating acts of civil status lay in the exclusive competence of the Member States but shall be formulated in accordance with the EU legal framework which prohibits discriminatory treatment. The Advocate General analyzed separately situations of the two applicants- deciding that there was no discrimination in relation to Mrs. Runevič-Vardyn (both as far as the temporal and material scope of the application of the EU legal framework is concerned) and that there was some discriminatory treatment on the grounds of nationality made against Mr. Wardyn as far as the refusal to enter the Polish diacritical marks is concerned. One of the most remarkable points made by Jääskinen was that the non-Lithuanian citizens are more disadvantaged when compared to Lithuanian nationals when it comes to the

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<sup>125</sup>*Ibidem*, par. 76.

<sup>126</sup>Opinion of Advocate General Jääskinen, 16 Dec. 2010, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, par. 102.

spelling of their names. Such a treatment could be assessed as constituting indirect discrimination towards the minority groups. Moreover, the Art. 7 of the Charter of Fundamental Rights as well as the Art. 8 of the European Convention on Human Rights were invoked as the basis for the right to respect for family life. This right could be opposed to the argument on the national unity which was used as justification for the discriminatory policy of the Lithuanian government towards some of its citizens. Thereafter, in the case of rules governing the spelling of names, some less restrictive rules could have been adopted by the Lithuanian government<sup>127</sup>.

The *Runevič-Vardyn* case could be compared to the above-mentioned *Garcia Avello* where the ECJ stated that the rules governing a person's surname fall within the area of a Member State's exclusive competence but the fact of the appearance of link between applicants and more than one Member States enabled application of the non-discrimination provision (Art. 12 of the EC Treaty)<sup>128</sup>. Both cases were invoking non-discrimination as a basis for the claim but making reference to different legal acts. Had the applicants in the *Runevič-Vardyn* invoked the relevant provision of the TEU, their chance for the winning of the case would be considerably more probable than when referring to the Directive 2000/43.

### 2.3.2. Geographical names

The right to topographical signs in minority language stems from the international legal framework (eg. Art. 11 (3) of the FCNM granting the right for the display of traditional local names and topographical indications also in minority language)<sup>129</sup>. But in this case two issues are at stake: the preference for the state language as enshrined in the constitutional framework and the minority rights.

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<sup>127</sup> *Ibidem*.

<sup>128</sup> *Ibidem*, par. 25

<sup>129</sup> Framework Convention for the Protection of National Minorities, Strasbourg, February 1995.

The case of geographical names display in minority language was decided by the Lithuanian Supreme Administrative Court (*Lietuvos vyriausios administracinės apeliacinės instancijos teismas*) in regard to the disputes arising between the local authorities from the regions inhabited by a significant number of minority group members and the government who ordered the removing of bilingual street-names signs<sup>130</sup>. The Administrative Court, similarly to the Constitutional Court, made reference to the Art. 29 of the Lithuanian Constitution and to the stemming therefrom principle of formal equality according to which, it was fully legitimate for the government to request the removing of the bilingual road signs. The equality argument is prevailing in the jurisprudence of the Lithuanian high courts and overweighs the rules related to the minority rights protection. This leads to the privileging of the majority over minority and could be perceived as contributing to the discriminatory treatment justified by the arguments of avoiding excessive privileging on the grounds specified by the provision, among which are language and nationality. But, in a quite an obvious way, it over-privileges majority and under-privileges minority making, at the same time, reference to the argument of legality.

The issue involving spelling of the official entity's name- namely school- arose before the European Court of Human Rights in the case *Cytacka and Others v. Lithuania*<sup>131</sup>. The applicants complained that the decision of the government denying the right to the Polish spelling of the name of the school attended mainly by the students belonging to the Polish minority group in Lithuania, violated their rights stemming from Art. 8 (right to respect for private and family life) and Art. 10 (freedom of expression) in conjunction with the Art. 14 (prohibition of discrimination) of the European Convention on Human Rights<sup>132</sup>. The government started legal proceedings against the municipality which decided on giving school

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<sup>130</sup> Supreme Administrative Court of Lithuania (*Lietuvos vyriausios administracinės apeliacinės instancijos teismas*), judgments no. A-261-997/2009 and no. A-756-152/2009.

<sup>131</sup> *Renata Cytacka and Others v. Lithuania*, application no. 53788/08, Decision of 10 July 2012

<sup>132</sup> *Ibidem*, p. 3.

the name in consistence with the Polish spelling rules. According to the government, such a decision was in consistence neither with the Law on State Language, nor with the spelling rules of the state's official language-Lithuanian<sup>133</sup>. In the judgment of the Vilnius Regional Administrative Court, it was noted that any preference for the Polish spelling of the name does not remove the obligation of the municipality to act in conformity with the rules requiring the use of the state official language when naming the public institutions. The decision was upheld by the Supreme Administrative Court which stated that in the naming of organizations or companies, the rules of Lithuanian grammar are applicable.

The European Court of Human Rights declared application inadmissible because of the lack of *ratione personae* and the non-exhaustion of domestic remedies stressing, at the same time, that there were no restrictions imposed on the children's right to education or their right to attend school. The Court noticed that there was no real inconvenience invoked by the applicants as far as the naming of the school is concerned. Moreover, the applicants still could use the Polish name (*Emilii Plater*) instead the Lithuanian one (*Emilijos Pleterytės*) in private<sup>134</sup>.

The conditions imposed by the Law on State Language were not taken into account by the authorities when deciding on the introduction of English tables with the names of the streets which were meant at changing the labeling into a more 'European' one. Such an initiative was strongly criticized by the minority lobby which stated that in most of the European countries, the names are written also in the languages of minority inhabiting designed territory<sup>135</sup>. The introduction of English-language signs with the names of streets was also perceived as a chance for the circumvention of law, namely: if the authorities place an official table with name on a building- this one would be subjected to the Law on State

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<sup>133</sup> *Ibidem*, p. 2.

<sup>134</sup> *Ibidem*.

<sup>135</sup> *Nazwy ulic – po europejsku (Names of the street – In an European way)* [at:] <http://www.wilnoteka.lt/pl/artykul/nazwy-ulic-po-europejsku>, 4 Sept., 2012

Language while any other tables would not be perceived as public signs and would not fall within the scope of application of the Law on State Language<sup>136</sup>.

The attempts undertaken in the regions inhabited by the majority of Polish population, to use the bilingual (Lithuanian and Polish) plates with the names of the streets, were fined by the authorities. The plates were composed of Lithuanian name (written in capital letters) and Polish name (written with the use of small letters) what did not involve any special burden or inconvenience for Lithuanian speakers. The fines were imposed on the directions of the Solecniki and Vilnius regions for the use of bilingual Polish-Lithuanian plates, on the owners of transport companies for the use of bilingual names of their itinerary, on the owner of grocery shop for the placing of a Polish language name (*sklep spożywczy*) on the shop window. The decision on imposing fines on the owners of transport companies was reversed by the Lithuanian Administrative Supreme Court which held that it was admissible for the company to use language other than Lithuanian, on the condition that such use was justified by the need for providing services to foreigners, tourism and other services which require the other languages for communication. One of the conditions is that the letterings made in a foreign language are not of a bigger font size than the ones made in the official state language. The other requirement is that the use of minority language does not diminish the position of the official language<sup>137</sup>.

In the light of the proposition on the changing of the street names to include their English version, it seems doubtful whether such a proposition would be fully consistent with the Law on State Language, Lithuanian Constitution and the case law of the Courts which

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<sup>136</sup> *Rząd chce wprowadzić zmiany w oznakowaniu ulic (The government want to introduce changes in the labelling of the street)* [at:] <http://pl.delfi.lt/aktualia/litwa/rzad-chce-wprowadzic-zmiany-w-oznakowaniu-ulic.d?id=59440993>, 4 Sept., 2012.

<sup>137</sup> *Walka o język polski na Wileńszczyźnie (Struggle for the Polish language In the Vilnius region)*, 3 December, 2011 [at:] <http://solidarni2010.pl/1847-walka-o-jezyk-polski-na-wilenszczyznie.html?PHPSESSID=c6bc740221e3083e99dbd976ff993655>.

repeatedly held that the use of other, than state language, would contribute to unequal treatment towards the majority representatives.

One of the most crucial ‘naming’ cases was the case of the Tuwim street. The government challenged the already existing and previously approved by the local authorities naming of one of the streets after a Polish poet. The local authorities tried to prove the poet’s connections with Lithuania by invoking his biography. Such an argumentation convinced the Vilnius District Administrative Court but the ruling of the lower instance court was eventually reversed by the Lithuanian Supreme Administration Court according to which the decision of the local authorities, to name the street after the poet, was against the Lithuanian law. According to the Court’s decision, the poet shall be a meritorious figure both for the Vilnius region, as well as for the whole Lithuania<sup>138</sup> while in the present case it was not adequately proven and thereafter, the formal conditions were not fulfilled.

The rules regarding use of the state language were challenged in the case of letters sent by the Ministry of Education to the children attending minority schools. The Ministry sent 26 thousands of letters were written in non-official languages- Polish, Russian and Belorussian. Such an initiative of the government was challenged by one of the minority rights organizations which prepared a petition asking the State Language Inspection for imposing a fine on the Ministry for taking up an action opposing the Law on State Language according to which the state language shall be used in all the fields involving official communication. Thereafter, also the correspondence addressed by the Ministry to the schoolchildren shall be subjected to these rules<sup>139</sup>. In response to the complaint, the State Language Inspection emphasized that the letters prepared in languages other than the official one were just translations of the document which was first prepared in the official state language. According

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<sup>138</sup> *Ulica Tuwima na Litwie? Sąd powiedział „nie” (The Tuwim street In Lithuania? The Court said „no”)*, 21 August, 2012 [at:] <http://wiadomosci.dziennik.pl/swiat/artykuly/401734,ulica-tuwima-na-litwie-sprawie-rozpatrzyl-sad.html>.

<sup>139</sup> Valstybinė kalbos inspekcija, Prašymas patraukti administracinėn atsakomybėn Lietuvos Respublikos švietimo ir mokslo ministrą Gintarą Steponavičių, 16 September, 2011.

to the Inspection, the law in force does not embrace prohibition of translating official documents into other languages as long as the original version was made in Lithuanian. The Inspection also lacks the competence in assessing whether the translations of official documents are prepared in consistence with other languages because its competence comprises only the state language<sup>140</sup>.

The application of the requirement of the use of state language was also raised in relation to the names companies, products and plates which are written with the use of other languages than Lithuanian. This was challenged in the light of the Art. 17 of the Law on State Language which requires names used in the public sphere to be written in Lithuanian. In response to the complain, the Vilnius District Administrative Court that the provision does not embrace the aforementioned areas. The Court stated that the vehicles registered in the Republic of Lithuania are involved in international transport and therefore their plates shall be clear, legible and understandable to other participants of international traffic, as well as to supervising officers, while the using of letters belonging to the Lithuanian alphabet on the official plates (including the diacritical signs) could significantly impair such an ability. The Court also stated that the aforementioned names consist of symbols and letters which could not be perceived as public and thereafter, the Law on State Language shall not be applicable in this case. The laws regulating naming of companies and organizations determine only the names of Lithuanian companies and cannot be applied towards the names created with the use of rules specific for other languages which are not of any literal meaning<sup>141</sup>.

Nevertheless, it seems that the same rules shall be applied both towards the naming of natural and legal persons and any exceptions arising in this sphere shall be adequately justified. Such a justification does not arise in the present case. The argument related to the vehicles' need to take part in international transport is not persuasive enough as also natural

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<sup>140</sup> Valstybinė Kalbos Inspekcija, Dėl dokumentų rengimo valstybine kalba, 28 September, 2011.

<sup>141</sup> Vilniaus Apygardos Administracinis Teismas, Case no. I-3951-208/2012, 8 November, 2012.

persons participate in the international movement taking advantage from the freedom of movement as guaranteed within the EU. Thereafter, the principle shall be obeyed particularly by the EU member states, including Lithuania<sup>142</sup>. The necessity for maintaining and preserving the identity relates equally to the natural and legal persons and shall be obeyed in relation both of them<sup>143</sup>.

### 2.3.3. The use of minority language in public and in private

The issue involving the imposition of fines for the use of minority language arose also in the case of Lietuvos Geležinkeliai (Lithuanian Railway Company) which adopted rules forbidding the use of other, than Lithuanian, language in the workplace and imposing financial fines for the non obeying of them. The aforementioned regulation was used as a basis for imposition of fines on 11 of the company's employees<sup>144</sup>. According to the point 5.13 of the Company Rules:

*,The variable part of the remuneration shall be reduced in case of non-using of the official state language (Lithuanian) at the workplace. Accordingly: managers shall have their remuneration reduced up to 100%, employees- up to 50%, persons using in a malicious way non-official language after having received a warning before- up to 100%.<sup>145</sup>,*

The Lithuanian Ministry of Culture as an institution with a competence embracing national minorities challenged a few cases involving the imposition of fines on the technical workers (eg. welder). The Ministry stressed that technical staff was not enumerated in the

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<sup>142</sup> The issue of freedom of movement and the inconveniences related to the spelling of names has already been raised in the case of

<sup>143</sup> European Foundation of Human Rights, *Ciąg dalszy walki o pisownię nawisk (The struggle about the spelling of names continues)*, 16 November, 2012 [at:] <http://www.efhr.eu/2012/11/16/ciag-dalszy-walki-o-pisownie-nazwisk/#more-4128>

<sup>144</sup> European Foundation of Human Rights, *Sprawa ukaranych powraca (The Case of fined comes back)*, 20 January, 2012 [at:] <http://www.efhr.eu/2012/01/20/sprawa-11-ukaranych-powraca/#more-1585>

<sup>145</sup> European Foundation of Human Rights, *Odezwa do pracowników Lietuvos Geležinkeliai (Address to the employees of the Lietuvos Geležinkeliai)*, 24 November, 2011 [at:] <http://www.efhr.eu/2011/11/24/odezwa-do-pracownikow-ab-%E2%80%9Elietuvos-gelezinkeliai%E2%80%9C/#more-1290>.

rules on the use of state language as adopted by the Company and thereafter, the enlarging of the already existing catalogue was against the adopted law. The Ministry stated that the regulation was consistent both with the Lithuanian Constitution and with the Framework Convention on National Minorities as the requirement of possessing of the knowledge of the state language does not entail the duty to use it during the whole working time, apart from the situations where such a need is substantial and real<sup>146</sup>.

Nevertheless, the imposition of fines on the persons who were not in charge of communicating with the company's clients and whose denial to use the state's official language did not contribute to creating any dangerous situation for the clients, seems to be unjust even in case when the technical staff was to be enumerated among the employees covered by the duty of using the state language at work. Therefore the decision of the Lithuanian ministry could be assessed as too liberal and was, as such, challenged by the Lithuanian representative to the European Parliament- Valdemar Tomaševski who claimed that the aforementioned law is contrary to the Art. 29 of the Lithuanian Constitution including a non-discrimination clause according to which human rights shall not be limited on grounds such as nationality or language<sup>147</sup>, as well as to the FCNM as ratified by Lithuania in 2000. The parliamentarian claimed that the laws forbidding the use of mother tongue were unlawful and disgraceful for the country on the international arena<sup>148</sup>. Thereafter the issue of legality of the regulation and its discriminatory character were raised in order to challenge validity of the rules.

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<sup>146</sup> European Foundation of Human Rights, *Ministerstwo Kultury kwestionuje przypadek ukarania kolejarzy (The Ministry of Culture challenges the case of imposing fines on the railwaymen)*, 13 February, 2012 [at:] <http://www.efhr.eu/2012/02/13/ministerstwo-kultury-kwestionuje-przypadek-ukarania-kolejarzy/#more-1737>.

<sup>147</sup> Constitution of the Republic of Lithuania, *op. cit.*

<sup>148</sup> V. Tomaševski, Letter to the Ministry of Culture (Kultūros Ministrui), 18 January, 2012.

## 2.4. Education

This part is aimed at analyzing the new Lithuanian Education Law which provisions, already in force since July 2011, limit the number of Polish schools by closing the establishments located in small towns, by introducing the unification of Lithuanian language exams for Lithuanian and minority schools and by providing obligatory classes in geography, history taught in Lithuanian even for pupils attending minority schools<sup>149</sup>. The new Education Law systematically increases the number of classes taught in Lithuanian eliminating courses taught in the language of national minority. Moreover, the said law introduced the requirement of reducing the number of minority language schools in the case when the number of students decreases below the required to continue education in the secondary school. The above mentioned law marginalizes both Polish speakers and Polish as a language of a minority.

Being an indispensable element of the preservation of national identity by both majority and minority groups, the right to education emerges as one of the most important which enjoyment shall be provided to the communities.

The Lithuanian legal framework of the right to education on the national level consists mainly of the basic law (Constitution of the Republic of Lithuania of 1992) and the recently amended Law on Education. According to the latter act Lithuanian educational system consists of primary, basic, secondary education, vocational training and higher studies. The secondary schooling program is followed by a final examination- *Matura* which, was organized separately, according to different standards for the users of Lithuanian as native and state language. The differentiated language exam standards were highlighted in the Lithuania's third report to the CoE submitted pursuing to the implementation of the FCNM as introducing unequal treatment and requiring the unification through the introduction of single

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<sup>149</sup>Polskie Kresy Info, *op. cit.*

examination formula both for Lithuanian national and minority representatives. Such a procedure was aimed at ensuring adequate facilities in the education process particularly towards the creating of equal opportunities for pupils when it comes to entering establishments of higher education which shall be facilitated by the aligning of the teaching programs in the area of state language<sup>150</sup>. Thereafter, two programs- Lithuanian as state and native language shall be joined together into a unified form. The government claimed that the aforementioned measures are consistent with the Art. 12 (3) (equal access to all levels of education for persons belonging to minority groups), Art. 4 (2) (equality between minority and majority representatives). Such an initiative was aimed at integrating students coming from different social backgrounds by providing them with adequate conditions to live, work and study, as well as with the conditions for preserving of their identity<sup>151</sup>.

According to the Art. 30 of the Law on Education, schooling with the minority language of instruction shall be provided in the areas inhabited densely by national minority groups after having received a formal request by the municipality<sup>152</sup>. Thereafter, schools with Polish as a language of teaching are located in the Vilnius, Trakai, Šalčininkai and Švenčionys regions.

The number of schools was growing fast during the first two decades after the restoration of independence by Lithuania. In the present moment, the number is decreasing even though there are more and more students willing to attend the minority language institutions. According to the statistics, the growing trend encompassed Polish schools in the first twenty years after the restoration of Lithuania's independence just to decrease in the third decade. The government claimed that such a tendency related also to the Lithuanian schools. The Law on Education stipulates that the schools with the teaching of minority language shall be established in the areas with such a need being tangibly realistic. Even more complicated

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<sup>150</sup> Council of Europe, *Lithuania's Report of the Framework...*, *op. cit.*, p. 72.

<sup>151</sup> *Ibidem*, p. 73.

<sup>152</sup> *Ibidem*, p. 76.

seems to be the introduction of the minority language as a language of instruction- two conditions shall be fulfilled: the condition of realistic need and the condition of availability of specialist in the respective domain<sup>153</sup>. According to the Lithuania's 3<sup>rd</sup> report to the FCNM, the decreasing number of schools is due to the introduction of the new school network system which contributed to the drop down in their number<sup>154</sup>. The fostering of national identity shall embrace also the teaching of culture and history. The latter is particularly significant in the light of Polish-Lithuanian disputes about the 'right' version of history as the two attitudes towards the historical events differ greatly between the nations. Minority schools pursue the same general curricula required on all the educational levels and, additionally, offer teaching of the native language for students.

A great battle started over the new Education Law which introduced teaching of history and geography in the Lithuanian language in the state-funded minority schools. Heavy criticism came both from Poland and Russia which opposed the Lithuanian Ministry of Education's standpoint according to which the teaching of state language would enhance integration and give better possibility of start on the labour market. According to the Lithuanian government, Lithuania is classified as the best one within the EU in terms of providing adequate minority education<sup>155</sup>. This is not necessarily true- Lithuania is a small country but 'rich' when it comes to a variety of minority groups. With such a ethnic variety and necessity of ensuring minimal standards to the groups, Lithuania could 'score' some additional percentage in the statistics what does not necessarily entail high quality of minority establishments. The educational reform is quite a controversial initiative in the light of the high number of minority students (3,2% of Polish and 4% of Russian students- what gives more than 7% of students belonging only to two minority groups). The Polish government

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<sup>153</sup> *Ibidem*.

<sup>154</sup> *Ibidem*, p. 77.

<sup>155</sup> R. M. Tracevskis, *Poland's war against Lithuania over education law*, 6 April, 2011 [at:] <http://www.baltictimes.com/news/articles/28383/>

assessed Lithuania's educational reform as constituting a step towards assimilation and violating the 1994 Treaty on Friendly Relations and Good Neighborly Cooperation concluded between Poland and Lithuania which precludes worsening of minority groups situation in both countries. New Lithuanian educational standards ideally reflect the changes introduced in Poland towards the schools for Lithuanian minority students. Thereafter, the two countries started the politics of 'eye for eye' without holding a more elaborated analysis of the minority group situation and avoiding the dialogue and intercourse between the countries<sup>156</sup>. The highly critical reaction in Poland was, according to some of the Lithuanian media, overexaggerated and mainly due to the lack of understanding of the language and cultural standards<sup>157</sup>.

The new Education Law is in force since 30 March, 2011 prescribing, apart from the aforementioned changes, also the introduction of Lithuanian language schooling in kindergartens with the number of four lessons per week. The minority schools' students will be pursuing the same Lithuanian language curriculum as the students of Lithuanian origin. The changes introduced by the Law encountered huge opposition on the side of the Polish community which collected over 60 thousand of signatures in defence of the Polish teaching establishments. After the protest, the Ministry of Education agreed on introducing a 'transition period' for the minority students. During the aforementioned period of time, there would be different criteria used towards those students in order to make them able meet the educational curriculum's requirements. The Polish minority representatives opposed the idea of the authorities raising arguments according to which the language learned would never be used equally with the mother tongue and thereafter, any unification of language teaching standards would create a situation of unequal treatment as the environment from which students come vary significantly and while for some of them, using of Lithuanian language in everyday life

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<sup>156</sup>*Ibidem.*

<sup>157</sup>*Ibidem.*

situations is natural and fluent, for others such an ability may be significantly impaired. Such a reform is even more controversial in the light of the present regulation according to which teaching in the minority schools in Lithuania is conducted fully in the minority language, with exception of the Lithuanian language course<sup>158</sup>.

The new Law on Education introduced also quite a controversial right for the authorities to close down schools the minority schools in the countryside and replace them with Lithuanian schools. Such solutions were highlighted in the report published by the Freedom House which stated that both the introduction of Lithuanian as a language of instruction for the general teaching of history, geography or the civic and political course, as well as unified standards in the Lithuanian language examination encouraged protests on the side of Polish population of the country<sup>159</sup>.

Also financing of the minority schools raises some serious doubts. While the Lithuanian educational establishments are financed by the government, the Polish ones are financially supported only by the local self-governments which are not financially efficient enough to modernize and develop the schools<sup>160</sup>.

According to the statistical data, the Polish community is in general educated on a much lower level than the one attained by the native Lithuanian citizens. The 2001 census revealed that 126 per 1000 native Lithuanian citizens get a University degree while only 63 per 1000 Poles have pursued higher education. This places this minority together with the Roma community<sup>161</sup>. The census of 2011 has not revealed any major change and just underlined the differences arising among community members inhabiting the cities and

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<sup>158</sup>E. Szałkowska, *Dyskryminacyjny program ujednolicenia nauczania litewskiego-już w drodze (Discriminatory program of the Lithuanian language education- already on the way)*, Kurier wileński, 2 March, 2011 [at:] <http://kurierwilenski.lt/2011/03/02/dyskryminacyjny-program-ujednoczenia-nauczania-litewskiego-%E2%80%94-już-w-drodze/>

<sup>159</sup>Freedom House, *Lithuania 2012 Report* [at:] <http://www.freedomhouse.org/report/freedom-world/2012/lithuania>

<sup>160</sup>W. Stankiewicz, *Przestrzeganie praw mniejszości polskiej na Litwie (Respect the rights of the Polish minority in Lithuania)*, The Poland-Polonia Review, issue 2/2011, p. 183.

<sup>161</sup>*Ibidem*.

countryside (eg. Solecniki region 66 per 1000 people with a University education, Vilnius region 78 per 1000 and the city of Vilnius 176 per 1000 persons)<sup>162</sup>. The lack of higher education results in a growing unemployment. According to some statistics such a situation is due to the lack of sufficient knowledge of the Lithuanian language and lack of appropriate vocational qualifications<sup>163</sup>. The collected data according to which 42% of Poles encountered difficulties while applying for a job was presented as a justification for the introduction of the new Law on Education aimed at enhancing minority representatives' position on the labour market. The said data was also used in a report submitted by Lithuania to the Fundamental Rights Agency of the European Union. Nevertheless, the data submitted in the report reflected only fears of respondents rather than the real situation. In fact, only 3,9 % of Poles faced any difficulties in finding a job which were caused by the insufficient knowledge of state language<sup>164</sup>. Such an interpretation gives the basis for making a presumption that it is not due to the lack of fluency in the state language but rather to the lack of appropriate education that the Polish minority is not economically efficient enough when compared to the majority group.

## **2.5. Minority representation in Parliament**

Similarly to many of the post-soviet republics with the newly created democracy which emerged during the 90s, for Lithuania democracy has been perceived as a reflection of the *'lesser evil'* in the governance of the state and proclaimed to be the only possible solution for the state which suffered a lot from the communist regime. The mere fact that since 1990 Lithuania has successfully managed to conduct the seventh election in a row, constitutes quite

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<sup>162</sup>*Ibidem*, p. 184.

<sup>163</sup>*Ibidem*.

<sup>164</sup>European Foundation of Human Rights, *Europejska Fundacja Praw Człowieka udowodniła że cytowane przez władze litewskie wyniki badań nie odpowiadają prawdzie (The European Foundation of Human Rights proved that the data cited by the Lithuanian authorities do not meet reality)*, 28 March, 2011 [at:] <http://www.efhr.eu/2011/03/28/europejska-fundacja-praw-czlowieka-udowodnila-ze-cytowane-przez-wladze-litwy-wyniki-badan-nie-odpowiadaja-prawdzie/#more-91>

a legible proof for this democracy to be consolidated and institutionalized<sup>165</sup>. Nevertheless, democracy in any conditions is and will be seen as a part of the political game with the attempts of 'buying' of the votes (quite common in the environment of the Lithuanian electoral campaigning<sup>166</sup>) or the continuous changes of electoral laws which could be perceived as limiting the political freedom in the country.

Just to give a bit of the political background for the further analysis, the Lithuanian parliament (*Seimas*) is a one-chamber body consisting of 141 representatives out of whom 71 members are elected in single-member majoritarian constituencies and 70 come from one national constituency (parallel mixed electoral system)<sup>167</sup>. In the majoritarian contests the winner shall gain at least 40 percent of the votes (or 20 percent in case of lower voting result). While in the proportional contest the party shall pass the 5 percent threshold to be able to enter the parliament and the election is legally valid if the turnout of votes reaches at least 25 percent<sup>168</sup>.

The legal framework for the election comprises both basic and secondary laws. The first category comprises the 1992 Constitution and the second is based on the 1992 Law on Elections to the Parliament, the 2002 Law on the Central Election Commission, as well as the 2004 Law on the Funding of the Political Parties and Political Campaigns<sup>169</sup>. The main concerns expressed by the ODIHR representatives are related to the campaign financing (claimed to be too complex and restrictive), as well as to the media access in the campaigning

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<sup>165</sup> M. Jurkynas, *Pięć zalet wyborów (Five advantages of elections)*, 23 Oct. 2010 [at:] pl. delfi.lt. Moreover, some concerns were expressed also in the OSCE/ODIHR Needs Assessment Mission Report 26-28 June 2012 where the authors stated that, based on the previous elections experience, there could arise the possibility of buying the votes by offering gifts to the voters, especially in the areas inhabited by the national minorities (p. 4).

<sup>166</sup> It is often claimed by the Lithuanian press that the more wealthy parties try buying votes especially in the small villages. Mair of the Vilnius region, Maria Rekšć stated that: '*Lithuania can have problems in the future. People got used to the selling of their votes what has become a part of an obvious dirty business*' [in:] E. Maksymowicz, *Wyborczych wspomnień czar (The electoral memories)*, 17 Oct. 2012.

<sup>167</sup> Republic of Lithuania Parliamentary Elections 14 October 2012, OSCE/ODIHR Needs Assessment Mission Report 26-28 June 2012, p. 1-2

<sup>168</sup> *op. cit.*, p. 3.

<sup>169</sup> *op. cit.*

process which was claimed to be overregulated and promoting non-interactive electioneering<sup>170</sup>. Moreover, the representatives of the Electoral Action of Poles in Lithuania strongly criticized the re-districting of the electoral constituencies as discriminatory towards the Polish national minority<sup>171</sup>. According to the laws, the re-districting could be handled out legally 95 days before an election is scheduled to take place. The introduction of new territorial voting division was claimed to be discriminatory and illegal in the light of the Code of Good Practice in Matters of the Venice Commission according to which the re-districting should be done without any damage on the minority population's voice power<sup>172</sup>. The General Electoral Commission decided on creating new election districts by joining some parts of the Vilnius region (densely populated by the Polish national minority) to the *święciański* and *malacki* districts where the said minority constitutes only 6 percent of the population. Thereafter, the fear arises that the significance of the Polish population's votes could decrease what would disable the passing of the 5 percent threshold required for all of the parties (including the minority ones) for being able to enter the *Seimas*<sup>173</sup>. The new territorial voting division was contributed to quite impropotional vote-distribution (eg. The Kaunas region with its 90 thousand of inhabitants, lacking any significant number of minority- was designed to elect three parliament representatives, while the Vilnius region possessing quite numerous minority groups was designed to elect only two parliamentarians). Two of the areas- Vilnius (75 thousand of voters, including 61% of Poles) and *Soleczniki* (31 thousand of voters, including 79% of Poles) were joined together with the neighboring regions inhabited mainly by the originally Lithuanian communities what significantly weakened the power and

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<sup>170</sup>*op. cit.*

<sup>171</sup>*Ibidem*, p. 2.

<sup>172</sup>*Ibidem*.

<sup>173</sup>Electoral Action of Poles in Lithuania, *Obecna władza Litwy nie zdaje egzaminu (The Lithuanian authorities do not pass the exam)*, 11 June 2011 [at:]

[http://www.awpl.lt/index.php?option=com\\_content&view=article&id=349%3Allra-lietuvos-dabartin-valdia-neilaiko-egzamino&catid=42%3Aaktualia&Itemid](http://www.awpl.lt/index.php?option=com_content&view=article&id=349%3Allra-lietuvos-dabartin-valdia-neilaiko-egzamino&catid=42%3Aaktualia&Itemid)

relevance of the Polish community representatives' voice<sup>174</sup>. The said party emphasized also the problem of the lack of the translation of official election materials into minority languages and the lack of representatives in the Constituency Electoral Committees<sup>175</sup>. Some criticism was also made by the Association of Poles in Lithuania who opposed the so-called 'artificially created' electoral regions that substantially limit the ability of electing minority group representatives in the single member constituencies. According to the Association representatives, there are at least three such electoral regions in Lithuania what contributed to the situation where only in one electoral region, Poles constitute majority of voters (the soleczniki region)<sup>176</sup>. In its report, the Association underlined that, in case of the electoral division consistent with the EU standards, Poles would constitute majority in at least four regions. Even though such a division of constituencies was posing a serious threat to the voting power of minority representatives and their ability of electing the politicians to the parliament, in the 2008 elections the Electoral Action of Poles in Lithuania gained 4,79% of votes and three mandates (in case of passing the threshold of 5 %, the party would be very likely to get seven mandates<sup>177</sup>). In the October 2012 elections, the Polish minority party reached 5,83% of votes and gained five (out of 70) mandates in *Seimas* what was probably directly linked to the party transformation from a regional into- the national one, as well as the to the switch from the nationalistic and confrontational rhetoric what helped in gaining votes of the Lithuanian nationals. While the second idea for the growth of the party's popularity seems to be too far-reaching, the first one is quite reasonable and well-founded. When compared to the 2008 elections, the main growth (55%) in the number of voices cumulated in the Vilnius area. The politics of the previous government together with the introduction of

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<sup>174</sup>*Ibidem.*

<sup>175</sup>ODIHR..., *op. cit.*, p. 3.

<sup>176</sup>Związek Polaków na Litwie, *Przestrzeganie praw mniejszości polskiej na Litwie. Raport Stowarzyszenia 'Wspólna Polska' (The observance of the rights of the Polish minority in Lithuania. Report of the Association 'Wspólna Polska')*, May 2009 [at:] <http://www.zpl.lt/przestrzeganie-praw-mniejszosci-polskiej-na-litwie-raport-stowarzyszenia-%E2%80%9Ewspolnota-polska%E2%80%9D/>

<sup>177</sup>*Ibidem.*

quite harmful for the minority groups, amendments in the area of Education Law and numerous attempts of presenting minority representatives working for the Lithuanian parties, discouraged voters from voting on the last election winners<sup>178</sup>. Keeping in mind, that the success and popularity of the Polish Electoral Action could be much more impressive in case of the fair and balanced minority representation structure in the respective constituencies, it is important to highlight the lack of conformity of the national laws with the international legal instruments such as the *Framework Convention for the Protection of National Minorities*<sup>179</sup> or *Treaty on Friendly Relations and Good Neighborly Cooperation of the Republic of Lithuania and Republic of Poland* (Art. 14)<sup>180</sup>. The latter is often called a 'basic treaty' governing the mutual relations of the two states<sup>181</sup>. Nevertheless, the implementation issues related to the bilateral treaties are rather vague or do not exist at all being based rather on the states' goodwill than on the real enforcement mechanisms. Also the provisions on minorities are more of declaratory than legally binding character- enough to invoke Art. 14 of the Treaty which starts with the expression: '*The Contracting Parties declare (...)*' what gives very vague possibility for any speculation about the enforcement-related legal measures and leaves it to the state authorities to implement the provisions. Such non-definite expressions included in the treaties, could disproportionatively hinder the effective application of the treaty norms. Nevertheless, such a hinderence seems to be non-accidental as the great majority of bilateral treaties are aimed mainly at showing the willingness for preserving good relations without introducing measures that would pose even the slightest danger for a country's sovereignty. At

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<sup>178</sup>*Ibidem*.

<sup>179</sup>*Framework Convention for the Protection of National Minorities*, Strasbourg, February 1, 1995; Art. 4 (2): The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

<sup>180</sup>*Treaty on Friendly Relations and Good Neighborly Cooperation of the Republic of Lithuania and Republic of Poland*, Vilnius, April 26, 1994; Art. 14: The Contracting Parties declare that the persons (...) also have the right: (...) to participate in public life directly or through freely elected representatives at the state or local government level, also to serve with equal rights in public service.

<sup>181</sup>K. Gal, *Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?*, ECMI Working Paper no. 4, 1999, p. 7.

the same time, such a 'willingness' could be compared more to the customary law provisions than to the legally-binding measures.

The bilateral treaties in the parts devoted to the minority protection, are usually of soft-law character being greatly dependent on the political will<sup>182</sup> rather on clear formulations of the respective provisions. The bilateral treaties, in general, can be seen from the two-sided perspective: political and legal. Being mainly politically motivated, the 'soft' political factor seems to be prevailing over the binding legal framework.

The territorial division introduced by the authorities was criticized for limiting the protection of the minority inhabited regions in the matters related to election as enshrined by the Venice Commission in the *Code of Good Practice in Electoral Matters*<sup>183</sup>. In its guidelines, the Commission emphasized the need for protection of concentrated minority<sup>184</sup> aimed at providing equal voting power for all of the groups. Thereafter, any redefinition of the constituency boundaries shall be made without detriment to national minorities<sup>185</sup>. The Commission's rules on equality of national minorities, possessing more of recommendation character make it evident that any guarantees prescribing more privileged political accessibility for the minority groups (*eg.* reserved seats, exceptions to the normal seat allocation criteria) do not oppose the general principle of equal suffrage. Nevertheless, the provision, being more of recommendatory character, does not impose any legal obligation on states and makes the decision about any implementation up to their own willingness. As in the case of Lithuania, the state may just neglect the guidelines and, executing its own power over the issues deeply connected to its sovereignty, decide on introducing constituencies that do not overlap with the idea of avoiding detriment to national minorities in the voting process. The lack of legally binding character for the document does not preclude its creative role in

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<sup>182</sup>*Ibidem*, p. 8.

<sup>183</sup>*Code of Good Practice in Electoral Matters* adopted by the Venice Commission at its 51<sup>st</sup> and 52<sup>nd</sup> sessions, Venice 5-6 July and 18-19 October 2002.

<sup>184</sup>*Ibidem*.

<sup>185</sup>*Code of Good Practices, op. cit.* Point 2.2 (iv), p. 7.

the state-made decisions on electoral matters. Nevertheless, its efficiency in contributing to the creation of specific factual environment is significantly weaker .

In the October 2012 parliamentary elections, the 5% electoral threshold was surpassed by seven political parties out of which five-six had the potential for the coalition and the real influence on the political process<sup>186</sup>. The Electoral Action of Poles in Lithuania with its number seats could be assigned the role of a weaker partner in whom it is possible to transmit fewer positions and less influence<sup>187</sup>. But this is a speculation more of a political than legal character.

Some concern was expressed by the European Commission against Racism and Intolerance (ECRI) towards the legal regulation on presidential elections in Lithuania. According to the Art. 78 of the Lithuanian Constitution, for being eligible to stand in elections, a person needs to have Lithuanian origin, while Art. 2 of the Law on Presidential Elections poses condition of being a citizen of the Republic of Lithuania by descent<sup>188</sup>.

This concept is further elaborated and defined in the Law on Citizenship where Art. 1 states that a person is considered to be Lithuanian by origin if her parents or grandparents or one of her parents or grandparents is/was Lithuanian and the person considers herself to be Lithuanian. Therefore, the Law poses two conditions- one of them being of objective character and easy to prove while using appropriate documents confirming a person's origin, and the other being more of a subjective nature, dependent on a person's self-determination. Both of these conditions could be perceived as being discriminatory, particularly in the light of the great number of various minority representatives in Lithuania. Such a criteria could be perceived as hindering participation of minority members in presidential elections. This measure is highly discriminatory on one hand, but on the other hand, could be said to be justified as it is up to the state to decide about the issues touching upon its sovereignty.

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<sup>186</sup> M. Jurkynas, *Ibidem*.

<sup>187</sup> *Ibidem*.

<sup>188</sup> ECRI Report on Lithuania, Fourth Monitoring Cycle, 22 June 2011, p. 13.

Nevertheless, from the objective point of view as long as the first 'objective' criteria could be somehow justified, the second one seems to be clearly discriminatory towards the minority group representatives or persons of a mixed origin who perceive themselves as belonging to one of the minority groups and not having the full identification with the Lithuanian majority. The European Commission Against Racism and Intolerance assessed this legal framework as precluding the country citizens of non-Lithuanian descent from taking part in the presidential elections<sup>189</sup>. In its recommendation, the Commission advised that the Lithuanian authorities avoid any distinction based on ethnic origin<sup>190</sup>

## **2.6. Conclusion**

Some of the measures undertaken by the Lithuanian authorities in the fields of minority language use, education or the electoral standards could be assessed, from the minority standpoint, as discriminatory. The elaborated analysis of the criteria brings to the conclusion, that even when assessed in an objective way, the legal framework regulation minority issues in Lithuania could raise some serious doubts. The provisions pertaining to the area of language use or educational rights, as well as quite a high threshold for the entering of Parliament by the minority groups could be assessed as hindering the minority communities from fully participating in the political and social life of the state.

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<sup>189</sup>ECRI, *op. cit.*, p. 14.

<sup>190</sup>*Ibidem*.

## CHAPTER 3: ENSURING OBSERVANCE OF INTERNATIONAL MINORITY RIGHTS PROTECTION PROVISIONS

### 3.1. Introduction

The Chapter is aimed at comparing and contrasting three different systems of compliance with human rights monitoring standards

The first part will provide with the information on the Council of Europe state reporting system working within the *Framework Convention for the Protection of National Minorities*, as well as on the activities of the European Commission against Racism and Intolerance (ECRI) which provides special space for the protection of national minorities within the Member States. Consequently, analysis of the system's effectiveness on the basis of the reports submitted by Lithuania shall be drawn.

The second part will elaborate on the minority rights protection system as guaranteed by the European Union aiming at assessing critically the efficiency of the system both from the formal perspective (focused on the *Treaty of Lisbon* and *Charter of Fundamental Rights*) as well as in the light of the practical application of relevant acts.

Finally, the last part will present the United Nations minority rights protection system with the special emphasis on the monitoring of state compliance under the *International Covenant on Civil and Political Rights*, functioning of the Human Rights Committee and the possibility of individual recourse to the UN bodies by minority representatives.

The Chapter will elaborate only on the state monitoring systems functioning within the three frameworks leaving aside the role of international judicial bodies such as the European Court of Human Right or the European Court of Justice.

### 3.2. Council of Europe

This part is aimed at assessing various legal instruments functioning within the framework of the Council of Europe, starting with the *Framework Convention for the Protection of National Minorities* that places the protection of national minorities as a part of the human rights protection system of the Member States, going through the system of state reports on the progress in implementation of minority protection measures. The latter is to be evaluated in the light of Lithuanian periodic state reports (with the special focus on the last Third Report submitted in September, 2011) and earlier recommendations of the Committee.

Another working mechanism of the Council of Europe is the European Commission against Racism and Intolerance (ECRI). ECRI, is a body of a monitoring character being in charge of combating racism, xenophobia, antisemitism and intolerance in the Member States. The main areas of ECRI's activity is opposing any discriminatory treatment arising on the basis of race, color, nationality, language, religion, national or ethnic origin. To achieve its goal, the body covers three statutory activities: 1) country-by-country monitoring; 2) general policy recommendations; 3) information and communication activities<sup>191</sup>. For the use of the present thesis, the effectiveness of the first activity shall be assessed. The country monitoring starts with preparation of a report after a visit to a given country during which a dialogue with the authorities is held. Subsequently, the findings made by the Commission during the visit are published in the report together with appropriate recommendations to be implemented by a state<sup>192</sup>. So far, there have been published four reports on Lithuania (Report of 1997, 2003, 2006 and 2011). The first report, published shortly after the regaining of independence by Lithuania in March 1990, emphasized that the country being a young democracy in the process of social cultural and economic transition needed more enhanced development. The report praised the 1989 Law on Minorities signaling at the same time that, even though the

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<sup>191</sup> European Commission against Racism and Intolerance, *ECRI in Brief* [at:] [http://www.coe.int/t/dghl/monitoring/ecri/activities/Ecri\\_inbrief\\_en.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/Ecri_inbrief_en.pdf)

<sup>192</sup> *Ibidem*.

country was aware of the needs of its minority groups, there was still needed political will to introduce any further changes<sup>193</sup>. The 2003 Report emphasized positive changes especially in the light of adopting by Lithuania international legal instruments for combating racism and intolerance such as CERD or FCNM. At the same time, the Commission stated that the existing laws are not adequate as an instrument for combating discrimination and prejudice arising in the country and that the new comprehensive legislation in the area of anti-discrimination is required<sup>194</sup>. The next Report of 2006 revealed quite a significant progress in the anti-discrimination area with the emphasis on the newly adopted Law on Equal Opportunities extending and strengthening competence of the Equal Opportunity Ombudsman to cover gender, ethnic origin and religion. Thereafter, ECRI noticed and adequately appreciated positive changes evolving within the Lithuanian system but was still based, in the assessment of reforms, on the submissions of adequate data by the government. In this light the most valuable seem to be on-spot visits held to the country being reported and the impartial assessment made by international experts visiting respective authorities. The third Report, apart from expressing appreciation for the improvements made in the system, criticized the country for the lack of implementation of the recommendations as made in the second Report in relation to the racial hatred or social awareness of discrimination<sup>195</sup>. Finally, the recently adopted fourth Report on Lithuania stressed positive legal changes (*in. a.* Law on Citizenship, Law on Equal Treatment or Law on the Status of Aliens) but expressed deep concern on the electoral legal framework according to which citizens of non-Lithuanian ethnic origin are not able to start in presidential elections or the lack of adoption of the new Law on Minorities<sup>196</sup>.

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<sup>193</sup> European Commission against Racism and Intolerance, *ECRI's country-by-country approach: Report on Lithuania*, September 1997, p. 5.

<sup>194</sup> European Commission against Racism and Intolerance, *ECRI's Second Report on Lithuania*, June 2002, p. 6.

<sup>195</sup> European Commission against Racism and Intolerance, *ECRI's Third Report on Lithuania*, February 2006, p. 6.

<sup>196</sup> European Commission against Racism and Intolerance, *ECRI's Fourth Report on Lithuania*, September 2011, p. 6.

The strengths of the ECRI system are, without doubt, the on-site expert visits to the monitored countries, as well as specialized focused recommendations related to the narrow group of themes being addressed by the Commission. An undeniably weak point is the reliability on the data and documents submitted by the governments what could prevent ECRI from providing an objective assessment.

One of the most complicated mechanisms present within the Council of Europe is undoubtedly, the monitoring procedure functioning within the *Framework Convention on the Protection of National Minorities*. The process involves preparation of a report by a state followed by a one-week visit of the Advisory Committee working group during which the Council of Europe experts meet representatives of national minorities, government officials and review of reports submitted by other third parties. The Committee presents its Opinion on the state's implementation of the Convention which is further circulated among other signatories who are entitled to make a Comment on the Opinion. The final step is the adoption of resolution by the Committee of Ministers<sup>197</sup>. The most crucial within the said procedure seems to be 'Commentary-making' stage involving various groups of persons including minority representatives which are asked to present their standpoint in respective area covered by the Convention. Such an effective participation enhances reports' transparency<sup>198</sup>. The commentary procedure enables the parties to established a well-balanced approach encompassing both minority and majority standpoints, as well as encourages consultation approach making it possible for different groups to get into intercourse exchanging views and ideas about the necessary changes to be introduced. The reporting procedure working under the FCNM is also aimed at going behind the generalizations related to the minority groups

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<sup>197</sup> A. Philips, *Contribution of the Council of Europe Framework Convention for the Protection of National Minorities and its Advisory Committee to the Effective Participation Rights of National Minorities*, International Journal on Minority and Group Rights, no. 16, 2009, p. 528.

<sup>198</sup> *Ibidem*, p. 529.

and at reaching the threshold of the diversity present within the said communities<sup>199</sup>. Importantly, minorities are not treated as objects of the reporting procedure, they are rather the actors in the process of shaping the final outcome<sup>200</sup>.

Nevertheless, the monitoring mechanism established by the FCNM is quite often criticized for its significant reliability on the reports submitted by states which constitute the starting point for the further elaboration of Opinion and Commentary, as well as for the political control which is said to be held over the monitoring body<sup>201</sup>. The Advisory Committee is somehow limited in its fact-finding function by the visits which take place only during the 'Opinion-Making' proceedings what significantly limits its ability in drawing an elaborated and well-founded assessment of the minority group situation in a given country.

After having ratified in 1995 the Framework Convention, Lithuania submitted its first cycle report in 2001 stressing the phase of national rebirth after 1990 with the Law on National Minorities or the Law on Citizenship according to which any person of Lithuanian origin, having resided or lived abroad, after the arrival to the home country could apply and be granted citizenship. The government also claimed that the country recognizes its ethnic diversity fostering their national and cultural identity, as well as the civic awareness<sup>202</sup>. The Advisory Committee's Comment released in response to Lithuania's 2001 Report welcomed the government's flexibility in declaring openness for the adoption of new national legal instruments for the national minority protection but criticized it for significant drawbacks in the areas of minority language use, political participation and lack of intercultural dialogue<sup>203</sup>. Finally, the Resolution addressed the same issues adding the recommendation for the to-be-

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<sup>199</sup> *Ibidem*, p. 532.

<sup>200</sup> G. Alfredsson *A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures*, *International Journal on Minority and Group Rights*, No. 7, 2000, p. 300.

<sup>201</sup> *Ibidem*, p. 292.

<sup>202</sup> Council of Europe, *Report Submitted by Lithuania Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*, 2001, p. 3.

<sup>203</sup> Council of Europe, *Advisory Committee on the Framework Convention for the Protection of National Minorities. Opinion on Lithuania*, 21 February, 2003, p. 2

adopted legislation not to lower the minority group rights protection standards already enjoyed by the communities, stressed the role of minority languages in education and highlighted socio-economic problems faced by minorities (particularly Roma minority)<sup>204</sup>. The first cycle is the only full and completed monitoring cycle held in the case of Lithuania under the FCNM. The monitoring cycles are considerably lengthy what, in the case of Lithuania, results in having conducted only one full procedure since the ratification of the Convention in 1995. Such a long-lasting procedure could be perceived as, on the one hand not able to adequately address the most pressing issues arising in the country while, on the other hand, could be said to be more detailed and done in a manner which enabled the Council of Europe's experts collect all the relevant materials and testimonies which could be subsequently used in the drawing of Opinion and final Resolution.

The second monitoring cycle of 2004, still being incomplete because of the lacking of the Resolution brings some new light on the minority situation in the country. The Advisory Committee criticizes Lithuania for the significant drawbacks in the implementation of the FCNM especially in relation to the Law on National Minorities which was assessed to be a regulation of a quite vague character as far as the effectiveness of its provisions is concerned, as well as the Law on State Language being a reflection of still existing conflicts between minority and majority groups<sup>205</sup>.

The latest- third monitoring cycle consists currently only of the State Report<sup>206</sup> which still reflects serious shortcomings in the area of minority language use and the, continuously lacking, the Law on National Minorities<sup>207</sup>.

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<sup>204</sup> Council of Europe, *Committee of Ministers Resolution on the Implementation of the Framework Convention for the Protection of National Minorities by Lithuania*, 10 December, 2003.

<sup>205</sup> Council of Europe, *Advisory Committee on the Framework Convention for the Protection of National Minorities. Second Opinion on Lithuania*, 28 February, 2008, p. 1.

<sup>206</sup> Some of its findings have already been invoked in the Second Chapter.

<sup>207</sup> Council of Europe, *Third Report Submitted by Lithuania Pursuant to Article 25 of the Framework Convention for the Protection of National Minorities*, 21 September, 2011, p. 5-6.

The Council of Europe's system is quite time-consuming and does not provide minority groups with the full access to the monitoring bodies. At the same time, the regular reporting enhances states' conformity with the provisions of respective minority right protection instruments

### **3.3. European Union**

Being initially a structure of an economic character based mainly on the cooperation of the Member States, the European Union decided on gradual extension of its activity scope developing *ie.* its own human rights protection framework. The adoption of new legal instruments (*eg.* the Charter of Fundamental Rights of the EU, the Lisbon Treaty) entrusted new rights into the EU citizens. Nevertheless, the said instruments still lacked full clarity, as well as really working implementation mechanisms. Thereafter, the vagueness of relevant provisions enshrining minority rights shall be discussed by making reference to the Art. 21 of the Charter, relevant provisions of the Lisbon Treaty, as well as to the so-called '*Copenhagen criteria*' that contain a passage concerning the minority protection and since 1993 their acceptance have been conditioning the accession of the new member states of Central and Eastern Europe. This part is aimed at presenting the EU as an organization engaged in the minority rights protection, to a much lower extent than the Council of Europe. The critical analysis of the measures to be taken by the European Union against member states is to be carried from the perspective of the lack of legally binding force of the said provisions and their protective dimension.

The instruments working within the European Union legal framework not only lack a definition of the notion of minority group which would be binding upon the Member States. Apart from the lack of clarity within the conceptual sphere of the EU minority rights protection, the Union lacks coherent minority rights policy encompassing too many different

regional approaches to the minority groups' rights issue. The main problem of the Charter of Fundamental Rights and the Lisbon Treaty is the lack of sufficient provisions conditioning and providing their enforcement leading to the practical application. The Treaty of Lisbon placed minority rights within the framework of the EU primary sources of law making reference to them in the Art. 1a and therefore providing with the fundamental right status<sup>208</sup>. The Treaty leaves a very wide margin for the states to decide about granting minority status to the groups that they are inhabited by not providing with any detailed definition. At the same time, the Treaty does not offer any monitoring mechanism similar to the ones prescribed within the Council of Europe system.

The Charter of Fundamental Rights, which is said to be an important development, accompanied the Lisbon Treaty on the basis of which it was placed within the framework of the EU primary sources of law<sup>209</sup>. The text of the Charter deals with minority rights on the general non-discrimination background without making any literal reference to these rights in the Preamble or in the Art. 21 invoking diversity protection in Europe in terms of religious, cultural and linguistic variety. But the main weakness of the Charter is that it could serve more as a basis for making legal interpretation than for taking up a real action<sup>210</sup>. Also the content of the provisions is too general what, on one hand, enhances accommodation of differences arising within Europe but, on the other, makes out of it a document more of a political than legal character.

Lack of casuistic character of the Charter's provisions could be also assessed as a very progressive one especially because of leaving some space both for the accommodation by the Member States, as well as giving chance for arguing in favor of more extensive minority

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<sup>208</sup> Minority Rights Protection in the EU: Contradictions and Problems". *European Alternatives* [at:] <http://www.euroalter.com/2009/minority-rights-protection-in-the-eu-contradictions-and-problems/>

<sup>209</sup> D. Kochenov, *EU Minority Rights Protection: a Modest Case for a Synergetic Approach*, Amsterdam Law Forum, 2011, p. 15.

<sup>210</sup> Thornberry, Patrick, María Amor Martín Estébanez, Council of Europe. *Minority Rights in Europe: a Review of the Work and Standards of the Council of Europe*. Council of Europe, 2004, p. 20.

rights protection standards<sup>211</sup>. But such a wide lack of determined standards could also be perceived as preventing citizens from claiming their rights arising from the said instruments. The vagueness of the right makes it difficult to determine to what extent one can make use of the provisions. The Charter seems not able to meet the high expectations that were posed before it in the moment of joint ratification with the Lisbon Treaty. It is also greatly dependent on the Treaty which enjoys primacy over it.

One of the apparatus for the implementation of the EU human rights protection system is the Fundamental Rights Agency, with its siege in Vienna, being a specialized unit aimed at providing expert advice to the Member States<sup>212</sup>. The Agency plays a role of an advisory body competent in providing Member States with expertise related to the areas covered by its mandate what corresponds to the rights enshrined in the *Charter of Fundamental Rights of the EU*. The Agency releases a number of publications: country thematic studies on topics such as homophobia, discrimination, access to justice; country reports (*eg.* thematic reports on the Racial Equality Directive) but does not follow the reports with any substantial reaction which could improve situation in the respective countries. The specific feature of the FRA system is that the reports are focused on some key areas such as access to justice, housing or education. In the context of the thesis, the Lithuania's Report on Education<sup>213</sup> is substantial. The analysis of the aforementioned Report gives the feeling that it is more about presenting of a standpoint by the governments than about investigating the real situation in the country by the Agency. Additionally, no other stakeholders are invited to come up with submissions on their part. Without a wide range of different sources of information, the report does not seem to be fully efficient in bringing any change within the system of the state.

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<sup>211</sup> G. Schwellnuss, „*Much ado about nothing?*” *Minority Protection and the EU Charter of Fundamental Rights*, Constitutionalism Web-Papers, ConWEB, No. 5/2001, p. 19.

<sup>212</sup> Fundamental Rights Agency, *About the FRA* [at:] <http://fra.europa.eu/en/about-fra>

<sup>213</sup> Fundamental Rights Agency, *Analytical Report. Education of National Minorities In Lithuania*, Vienna 2004.

Another mechanism available within the European Union structure, is the right to fill in a petition with the European Parliament. This right was quite often used by the representatives of the Polish national minority in Lithuania. The right to fill in petition has everyone being a EU citizen (both natural and legal persons) and inhabiting within one of the EU Member States. After the petition has been assessed as admissible by the Commission of Petitions, the said body may address the European Commission with the request to hold initial inquiry and presenting information concerning the conformity with the EU law, it may proceed with the petition to other commissions working within the European Parliament to get the information or take up further actions, in exceptional cases it may provide the Parliament with a full report which shall be presented during one of its plenary sessions or take up any other action appropriate for solving of the issue<sup>214</sup>.

The right to fill in petition within the European Parliament has been used in 2011 by the Association of Poles in Lithuania which opposed the imposition of fines on minority group representatives for the use of Polish language in public places. The Association assessed the aforementioned practices as constituting a shaming precedent within the European Union<sup>215</sup>. In response to the petition, the European Parliament passed a resolution calling on Lithuania to put the actions undertaken in conformity with the EU legal framework and asking the Commission for launching proceedings against the country<sup>216</sup>. The proceedings stopped in that very moment as no further steps were taken by the EU in the present case. Some further petitions related to the topic of the Polish minority were addressed to the European Parliament by individuals (eg. petition filled in by Tomasz Snarski in relation to the language right of the Poles in Lithuania which was admitted by the Parliament and accepted

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<sup>214</sup> European Parliament, *Petitions* [at:]

<http://www.europarl.europa.eu/aboutparliament/pl/00533cec74/Petitions.html>.

<sup>215</sup> Echoes of discrimination of Polish minority in Lithuania, 24 August, 2010 [at:]

[http://www.polskiekresy.info/index.php?option=com\\_content&view=article&id=1123:echoes-of-discrimination-of-polish-minority-in-lithuania&catid=123:litwa&Itemid=499](http://www.polskiekresy.info/index.php?option=com_content&view=article&id=1123:echoes-of-discrimination-of-polish-minority-in-lithuania&catid=123:litwa&Itemid=499).

<sup>216</sup> *Ibidem*.

for the further analysis<sup>217</sup>), organizations (eg. the petition filled in by the European Foundation of Human Rights in relation to the educational rights of Poles in Lithuania<sup>218</sup>). Nevertheless, none of the above-mentioned petitions contributed to any substantial changes related to the situation of the Polish community in Lithuania. This is mainly due to the fact that the petition procedure is of an advisory character and does not bring enough legal instruments which could contribute to the introduction of tangible changes within the countries. Any possible steps which could be taken by the EU in response to the petition are of quite a limited character as they are determined mainly by the political will and political sensitiveness, as well as the interests of the EU Member States community.

The European Union's human rights protection system gives rise to serious doubts as far as the effectiveness of the measures provided is concerned. Quite a visible discrepancy between the rights attributed and the legal measures conditioning their enforcement prevents system from being fully effective. Even though the majority of the provisions are sufficiently expressed, there is still no efficient implementation instrument which would enable full enjoyment of the rights in practice. It is also quite visible that, when compared to the more independent in application, monitoring system of the Council of Europe, the EU seems to be too politically motivated in the implementation of necessary measures. This renders the human rights law as covered by the said legal framework, more of a soft law character than a hard law that could put some of the measures into practice.

### **3.4. *The United Nations minority rights protection system***

This part is aimed at analyzing the United Nations minority rights protection system in the light of the monitoring system regulation provided on the basis of the ICCPR through the Human Rights Committee being a body of independent experts monitoring the

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<sup>217</sup> T. Snarski, *op. cit.*

<sup>218</sup> European Foundation of Human Rights, Petition to the European Parliament of 2 September, 2011.

implementation of the relevant ICCPR's provisions by the states. The ICCPR as an international instrument ensuring minority rights observance (Article 27 of the ICCPR) shall be assessed together with the state reports on the measures taken by the states parties, concerning the implementation of the Convention provisions.

The United Nations minority rights monitoring system is praised for placing upon states the requirement of providing national remedies and international complaints procedures available for the individuals<sup>219</sup>. The UN system, when compared to the system of the Council of Europe or the EU, offers significantly more efficient and direct complaint procedure passing the floor, in the assessment-making process, both to the states and individuals. Individual access to the UN organs is guaranteed on the basis of the First Optional Protocol to the ICCPR<sup>220</sup>. The ICCPR complaint system is similar in its admissibility requirement to the ECtHR, namely: the complaints can be filled after the exhaustion of all the national remedies by individuals or groups and shall not be anonymous<sup>221</sup>. At the same time, the admissibility threshold posed by the Protocol seems to be adequate, well-justified and reasonable so that individuals are able to face it and come up with a complaint towards a state. Nevertheless, in the case of Lithuania, the complaint procedure enshrined within the ICCPR is not '*popular*' enough to make the citizens claim their rights under the said regulation. Thereafter, the individuals are more likely to use the EU petition procedure, fill a case within the ECJ or turn to the ECtHR with the issues arising in the context of discrimination.

Apart from the individual complaint procedure, the ICCPR system comes up with general comments being one of its main instruments enabling regular monitoring of the situation in a given country. Starting with the structure of the General Comments, consisting of a part devoted to the presentation of state under review with the emphasis on the

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<sup>219</sup> *op. cit.*, p. 292.

<sup>220</sup> United Nations General Assembly resolution 2200A (XXI), *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966.

<sup>221</sup> *Ibidem*, Art. 2 and Art. 3.

implementation of appropriate measures, existing instruments and special programs aimed at the enhancement of the Covenant's practical application. The aforementioned part is followed by the interactive dialogue between delegations of other Member States to the Covenant. The comments made by fellow-states could highlight some insufficiencies in the structure of the state under review by asking specific questions or simply pointing on the issues requiring some improvements. Comments made by international community are adequately addressed by the delegation of the state concerned. Finally, the last part includes recommendations being subject to the support of the country submitting report.

On this theoretical background the 2011 Universal Periodic Review on Lithuania<sup>222</sup> shall be presented in relation to the minority rights protection. In the part devoted to the country description, Lithuania addressed the issues of education (mainly the requirement concerning taking of state exams in the official state language, the number of schools attended by minority groups' representatives)<sup>223</sup>, language (the necessity of using Lithuanian when contacting national authorities, the official names of places in state language)<sup>224</sup>. The description of the country was followed by adequate recommendations towards the minority situation, made by Turkey (praising Lithuania for its great achievements in the field of minority protection), Poland (making recommendations towards the spelling of the names) or the Netherlands (suggesting improvements in the area of minority integration)<sup>225</sup>. Finally, the Committee recommended Lithuania to make further developments in combating discrimination, fostering integration but also in deciding on ratification of the instruments such as the European Charter for the European or Minority Languages or introducing changes in spelling of the names<sup>226</sup>.

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<sup>223</sup> *Ibidem*, par. 42.

<sup>224</sup> *Ibidem*, paras. 45, 46.

<sup>225</sup> *Ibidem*, paras. 56, 58, 69.

<sup>226</sup> *Ibidem*, paras. 88.23, 90.4, 90.9.

The Universal Periodic Report system is quite efficient and does not give impression of a very biased one. Firstly, providing individuals with the right for the recourse to the monitoring body. Secondly, the Universal Periodic Review mechanism seems to be well-balanced giving the possibility of making use not only of the state testimony, but also of the suggestions for improvement made by other states and finalizing the document with recommendations aimed at improving situation in the country. The UN systems, when compared to the EU and CoE, seems to be the most efficient one when it comes to its theoretical framework. But its full effectiveness is often limited by a relatively low degree of individual awareness of the rights stemming from the ICCPR and its First Optional Protocol.

### **3.5. Conclusion**

The three monitoring systems functioning within different legal and organizational framework provide with quite a vast comparative perspective.

The Council of Europe comes up with its strengths reflected in the functioning of the ECRI providing with an instrument for the on-site expert visits to the monitored countries, as well as specialized focused recommendations related to the narrow group of themes being addressed by the Commission. An undeniably weak point is the reliability on the data and documents submitted by the governments what could prevent ECRI from providing an objective assessment. Going further to the monitoring mechanism elaborated for the FCNM the commentary procedure enables the parties to established a well-balanced approach encompassing both minority and majority standpoints, as well as encourages consultation approach making it possible for different groups to get into intercourse exchanging views and ideas about the necessary changes to be introduced. At the same time, the monitoring mechanism established by the FCNM is quite often criticized for its significant reliability on the reports submitted by states which constitute the starting point for the further elaboration of

Opinion and Commentary, as well as for the political control which is said to be held over the monitoring body.

When compared to the system of the Council of Europe, the European Union's human rights protection mechanism gives rise to serious doubts as far as the effectiveness of the measures provided is concerned. There is present visible discrepancy between the rights attributed and the legal measures conditioning their enforcement prevents system from being fully effective. Even though the majority of the provisions are sufficiently expressed, there is still no efficient implementation instrument which would enable full enjoyment of the rights in practice. The political motivation of the EU system is also evident in the light of making comparison to the UN or the CoE systems.

When compared to the EU and CoE, the UN system providing with the mechanism of the Universal Periodic Review or individual complaints, seems to be the most efficient one. But its full effectiveness is often limited by a relatively low degree of individual awareness of the rights stemming from the ICCPR and its First Optional Protocol.

## **Conclusion**

Protection granted to minorities on the ground of the Lithuanian law is rather weak. Starting with the issue of the language, Lithuanian is the official language of the Republic of Lithuania according to the Article 14 of the Constitution. This provision constitutes the excuse for the increasingly frequent violations in the field as the authorities often apply interpretation which enables them to impose some restrictions on the use of minority languages. What is more, the Law on the Minority Protection is not in force since the beginning of 2010. Therefore, there are very limited measures of protection available for minorities and no basis for implementation of the provisions stemming both from the Lithuanian Constitution as well as from the international human rights protection instruments.

The 1994 *Treaty on friendly relations and good neighborly cooperation* concluded between Poland and Lithuania defines term ‘national minority’ and puts on the states parties to it, the legal obligations of compliance with certain minority rights. Article 14 of the Treaty gives to the minority members among others: right to use freely the national minority language in personal and public life, right to be taught in the national minority language and to study the national minority language, right to use the names and surnames according to the sound of the national minority language.

As far as the use of minority language is concerned, Poles are denied to use the standards of the Polish orthography in the official documents, they are also denied the Polish road signs in the areas that are inhabited by a great number of them. As it was stated in the Lithuanian Constitutional Court’s ruling - *Vilnius* – the Polish spelling of the names can be used only on the secondary pages of the Lithuanian passports. The use of the Polish spelling of the names in passport is possible only after payment of a stamp duty fee and after presenting a relevant proof justifying the need of the introduction of such spelling. The prohibition of using the minority language spelling in the official documents violates the right to cultivate the traditions. Moreover, the official use of the minority language is forbidden

even in the areas where Poles constitute 80% of the population. Administrative fines are imposed for using the bilingual street tables even in the areas with a great density of Polish population<sup>227</sup>.

As far as education is concerned, the Lithuanian Education Law which provisions which are in force since July 2011, limits the number of Polish schools by closing these school in small towns, by introducing the unification of Lithuanian language exams for Lithuanian and minority schools and by providing obligatory classes in geography, history taught in Lithuanian even for pupils attending minority schools<sup>228</sup>. The new Education Law systematically increases the number of classes taught in Lithuanian eliminating courses taught in the language of national minority. Moreover, the said law introduced the requirement of reducing the number of minority language schools in the case when the number of students decreases below the required to continue education in the secondary school.

On the background of the Polish minority situation in Lithuania, a conclusion could be drawn that law can and often constitutes an instrument of discriminatory treatment. Law, may be an institution that leads to actions of a discriminatory nature. Even an act which aim is to protect may be regarded as discriminatory from the standpoint of the minority. What is good and right for the majority, may be unfair for minority. That is why we should examine each case separately and individually as even human rights can turn out to be discriminatory for the minorities. Even the legal acts aimed at being non-discriminatory, may turn out to be discriminatory in relation to certain minority. While analyzing respective cases from the standpoint of the potential discrimination, it is indispensable to look at them not from the point of view of the rule of law but from the perspective of minority upon which the rule of law is imposed. Thereafter, the so-called *Radbruch Formula* emerges constituting an exemption from the obligation of obedience towards the laws enacted by the states authorities

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<sup>227</sup> European Foundation for Human Rights, Alternative report prepared for the Committee on Elimination of Racial Discrimination [at:] <http://www.efhr.eu/wp-content/uploads/2011/03/AR-PL-2011-04-03.pdf>.

<sup>228</sup> Polskie Kresy Info, *op. cit.*

in accordance with the national legislative procedure. In the moment of its elaboration the *Formula* was mainly referred to the cruelty of the Nazi times. But taking into account the continuously changing conditions and the development within the international law framework, it seems to be actual also contemporarily. Mainly in the context of the discriminatory treatment. This background enables adjustment of the *Radbruch Formula* to the contemporary conditions. The ‘unjust law’ test introduced by Radbruch can be used as a basis for assessment of internal legal system especially in the lack of ratification by a state of respective international acts. The law which reaches the border of being extremely unjust ceases to be perceived as law and loses its whole legal value. Not every law is law what clearly contradicts the positivist theory. In this light, more important than the legal certainty is the value of justice included in the legal norm. Therefore, *Radbruch Formula* is often referred to as a validity test for the legal enactments. The Formula draws a line between the statutory non-law which is unjust to such an extent that it cannot be accepted as a part of legal system and statutory law which is unjust but to an extent which can be accepted by the society subject to this legal provision and does not violate the basic values established in the law of the nature. The Formula, in the time of being introduced by Gustav Radbruch was aimed mainly at preventing laws from the state of ‘extreme injustice’

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