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**Constitutional Courts in the Process of Articulating  
Constitutional Rights in the Post-Communist States of  
Central and Eastern Europe**  
**Part II:**  
*Personal, Civil and Political Rights and Liberties*

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# ***Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe (Part II):***

## ***Personal, Civil and Political Rights and Liberties***

Wojciech Sadurski\*

This is the second working paper in a series devoted to the articulation of constitutional rights by the constitutional courts of Central and Eastern Europe (CEE). For a general introduction, see the first working paper in the series.

### ***1. Personal rights***

#### **1.1. Life and dignity**

All CEE constitutions contain provisions on the right to life, with most of them referring also to the right to dignity. Sometimes, these two provisions are spelled out in one breath, as in Hungary, where the Constitution states that “every human being has the inherent right to life and human dignity” (Art. 54(1)). In some of the constitutions, “human dignity” is articulated not as a right but as a meta-value; a source of other rights and liberties. This is so in the case of the Polish Constitution which, in Article 30, states that “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens” and that “Human dignity is inviolable, and the respect and protection thereof shall be the obligation of public authorities”. The wording in the Polish Constitution has its own history; during the long process of constitution drafting, there was a strong (though, in the constitutional commission, clearly minoritarian) pressure to include an invocation to “natural law” and “natural rights” in the Constitution, as a recognition of higher (in particular religious) sources of human rights and freedoms. This pressure was resisted but, in the process, a formulation in terms of “human dignity” was thought to be a compromise which could placate the natural-rights proponents. In fact, many commentators of the Constitution interpret this provision as expressing the acknowledgment of a “jus-naturalistic conception of human rights and liberties”.<sup>1</sup>

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<sup>1</sup> Jerzy Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (Zakamycze: Kraków, 2000), p. 236. According to Catherine Dupré, by “importing” the law developed by German Constitutional Court, the Hungarian CC used

Two main areas in which the right to life has been invoked before constitutional courts are, of course, the issues of the death penalty and of abortion. However, it has also been, occasionally, employed in other contexts. *For example, the Bulgarian Constitutional Court (CC) struck down, in 1997, a number of exceptions to the “excessive self-defence” rule of the Criminal Code, as contrary to the assailant’s constitutional right to life.*<sup>2</sup> *The amendment to the Criminal Code specified a number of circumstances in which self-defence would never be considered excessive, regardless of the nature and danger involved. The Court deemed that most of the following exceptions to the principle of excess of self-defence were contrary to the assailant’s right to life, itself a constitutional right (Art. 4(2)): when there are two or more assailants, when the assailant is armed, when the assault takes place in a vehicle, aircraft, ship or train, and when the assault takes place during the night. In all these cases, if the legislator had its way, the fact that self-defence was excessive would not be capable of being invoked. The only legislative amendment to the law of self-defence that the Court in the end upheld, was the suspension of the usual excess rule when self-defence was against an assailant who had resorted to violence or burglary to get into the home. In this case, the Court invoked the constitutional right to inviolability of the home, and clearly gave precedence to that right over the violent assailant’s right to life.* This seems like a bizarre conclusion, to say the least; when the dilemma is characterized as the conflict between two constitutional rights, to give precedence to inviolability of the home over the protection of human life seems distorted. That this, rather than other personal interests of the attacked person, was decisive for the Court, is evidenced by the fact that, at the same time, it found the suspension of usual excess principles in situations where the assault takes place in a countryside property or business facility, to be unconstitutional. This is because the principle of inviolability of the home does not apply to premises of these two latter types! The balancing implicit in the Court’s decision is almost perverse. There are many different ways of arguing against the penalization of excessive self-defense, but to found an argument on the value of the inviolability of the home as prevailing over the value of life, is probably the least morally appealing of these.

Apart from being invoked (alongside the right to life) in the context of the death penalty, the right to human dignity has also been invoked in some other contexts – although rarely as a single, independent constitutional basis for invalidation of a statute, usually being accompanied by some other constitutional principles or

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the rights and principles associated with human dignity as a "modern substitute for natural law", see Catherine Dupré, "Importing Human Dignity from German Constitutional Case Law", in Gabor Halmai, ed., *The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights* (Indok: Budapest 2000): 215-26 at 220-22.

<sup>2</sup> Decision no. 19/97 of 21 November 1997, summarized in *Bull. Const. Case L. 3* (1997): 357-58.

rights. One interesting example is the invalidation by the Hungarian CC, in 1993, of an old (that is, dating from the era of state socialism) rule of civil procedure, which allowed a public prosecutor to commence a civil suit if the person entitled to do so was unable to defend their rights, or for reasons of important state or social interest. Under the old system, this procedural avenue was a consequence of the role of the public prosecutor as the “general safeguard of legality”.<sup>3</sup> The Court decided that, by denying a person full control over whether to initiate a suit to defend their own interests, this rule violates the autonomy of persons and their right to self-determination, and in constitutional terms, the principle of the rule of law (Art.2) and the right to human dignity (Art.54(1)). This is an interesting use of the general principle of non-paternalism (not expressed in these terms in the Court’s decision) understood as the principle that everyone is the best master of their own interests, and should decide for themselves whether, and when, to defend them.

In Poland, the principle of human dignity (Art.30) has not been articulated in the Constitution as a right, but rather as a source of rights,<sup>4</sup> and therefore cannot be used as an independent basis for invalidation, though it has been occasionally used in conjunction with rights provisions. As the CT explained in one of its decisions: “Art.30 of the Constitution defines the axiological grounds of rights and liberties guaranteed by the constitution” and, as such, “it is of a general nature and its contents have been further concretised in the specific [constitutional] rules regarding specific rights and liberties”.<sup>5</sup> In this decision, the Tribunal considered a constitutional complaint from a citizen, against the law on passports. The complainant thought that the procedure for refusing (or invalidating) a passport was unconstitutional, *inter alia* because it conflicted with human dignity. The Court considered in detail the possible clash of the law with a number of constitutional rules, but Article 30 was considered only very cursorily, and quickly rejected as a possible ground for invalidity. A year earlier, the CT had invoked the same constitutional “human dignity” principle to invalidate a particular law, but again, only as an auxiliary principle, used to

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<sup>3</sup> Decision 8/1993 of 27 February 1993, *E. Europ. Case Rep.* 1 (1994): 243-44.

<sup>4</sup> The distinction is less sharp in case-law practice than in theory. While in the Hungarian constitution “human dignity” is expressly stated as a “right”, one commentator notes that “Hungarian judges are coming round to the widely held view that human dignity, described as ‘source-law’ or ‘parent-law’ in Hungarian case-law, is the source of other constitutional rights, that it is the basis of other rights and, indeed, of the constitutional system itself”, Catherine Dupré, “The Right to Human Dignity in Hungarian Constitutional Case Law”, in *The Principle of Respect for Human Dignity* (Council of Europe Publishing: Strasbourg 1999): 68-79 at 76.

<sup>5</sup> Decision SK 20/98 of 1 June 1999, *Orzecznictwo Trybunału Konstytucyjnego TK w 1999, cz. 1* (Wydawnictwa Trybunału Konstytucyjnego, Warszawa 2000) [hereinafter referred to as OTK 1999], poz. 24, pp. 353-70.

interpret more specific constitutional rights which served as the actual bases for invalidation.<sup>6</sup> This related to the case of a decree by the Minister of Health, which provided for specific forms of medical certification for temporary incapacity to work. The Ombudsman challenged the requirement of including a statistical code which identified the illness in such certificates. The Tribunal agreed that it was contrary to the constitutional right of privacy (Art.47) and the right to protection of personal data (Art.51) and, in the process, referred to Art.30.<sup>7</sup> In the structure of the Tribunal's argument, this appeal to dignity had, however, a purely ornamental function, because the law was invalidated not on its merits, but on the basis that any restrictions of constitutional rights must be (among other things) provided for by a statute and not - as was the case here - by sub-statutory acts.

### 1.1.1. Death penalty

During the Communist era, the death penalty was used widely in the countries of the region, and this applies not only to the Stalinist period, when it was an inherent element of the state terror, but also to the post-Stalinist days. All criminal codes in the region contained broad catalogues of capital crimes, including "anti-state" crimes, but also murder, crimes against property, "speculation", etc.<sup>8</sup> After the fall of Communism, most CEE countries became abolitionist; this tendency was largely driven by their joining of the Council of Europe, which implied also (not as an obvious legal obligation, but as a political consequence) the ratification of the Sixth Protocol to the ECHR, concerning the abolition of the death penalty. Currently, all CEE countries except Belarus<sup>9</sup> and Yugoslavia<sup>10</sup> have signed the Protocol, and all but Bosnia/Herzegovina and Russia have ratified it.<sup>11</sup> It is clear that, in the face of broad societal support for maintaining the death penalty in these countries, the need to comply with Western European norms, especially in the context of accession to the EU, has been a decisive factor in the abolitionist tendency.<sup>12</sup>

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<sup>6</sup> Decision U. 5/97 of 19 May 1998, *Orzecznictwo Trybunału Konstytucyjnego*, Rok 1998 (C.H.Beck, Warszawa 1999), poz. 13, pp. 195-210.

<sup>7</sup> *Id.*, at 204.

<sup>8</sup> For details, see Agata Fijalkowski, "The Abolition of the Death Penalty in Central and Eastern Europe", *Tilburg Foreign Law Review* 9 (2001): 62-83 at 72-73.

<sup>9</sup> Not a member of Council of Europe.

<sup>10</sup> Not a member of Council of Europe but a "Special Guest to the Parliamentary Assembly" of Council of Europe (as on 13 September 2002).

<sup>11</sup> See <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>, visited 7 May 2002.

<sup>12</sup> See Agata Fijalkowski, "The Abolition of the Death Penalty in Central and Eastern Europe", *Tilburg Foreign Law Review* 9 (2001): 62-83 at 63.

Sometimes the death penalty is not mentioned in constitutions but the criminal statutes were purged of this penalty, as is the case of Poland and Bulgaria. In six constitutions<sup>13</sup>, it is expressly permitted, usually as “an exceptional penalty for particularly serious crimes”.<sup>14</sup> Interestingly, two of the constitutions allowing the death penalty in this way (Georgia and Moldova), have ratified Protocol 6 of the ECHR. However, there is no real inconsistency in fact, as both Moldova and Georgia no longer have any crimes in their criminal codes for which the death penalty is a possible punishment. The Amnesty International web-site states that Moldova abolished the death penalty in 1995, and Georgia did so in 1997 (thus, before their ratification of Protocol 6), and yet, appropriate constitutional amendments to this effect have not been made. However, such amendments would not be necessary because these two Constitutions explicitly only allowed for the death penalty until its abolition.<sup>15</sup>

It should be added that the only countries, out of those we are studying here, that *practice* the death penalty *in fact* – rather than simply allowing for it in their laws – are (according to Amnesty International) Belarus, Russia and the Federal Republic of Yugoslavia.<sup>16</sup> None of these countries forbid the death penalty in their Constitution.

Several other constitutions expressly say that the death penalty is forbidden.<sup>17</sup> In turn, constitutional courts brought about the abolition of the death penalty in Lithuania, Albania, Ukraine and Hungary. The latter decision is of particular importance.<sup>18</sup> As the author of the decision, the then Chief Justice Solyom was later to remark, this decision “signaled the real power and significance of the constitutional review and shocked an unprepared Parliament and the general

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<sup>13</sup> Belarus (article 24), Georgia (article 15), Moldova (article 24), Russia (article 20), Montenegro (article 21) and Serbia (article 14) [note that, hereinafter, a name of a country followed by a number of an article refers to the provision of the constitution of that country].

<sup>14</sup> The words in quotation marks are taken from the Constitution of Belarus, art. 24.

<sup>15</sup> Constitution of Georgia: “[C]apital punishment *before its full abrogation* may be envisaged by the organic law...” (art. 15(2), emphasis added); Constitution of Moldova: article: “*Until its final prohibition*, capital punishment may be applied...” (art. 24(3), emphasis added).

<sup>16</sup> <http://www.web.amnesty.org/rmp/dplibrary.nsf/index?openview> (visited 21 February 2002).

<sup>17</sup> Namely, the constitutions of Croatia (art. 21); the Charter of the Czech Republic (art. 6); Macedonia (art. 10); Romania (art. 22); Slovenia (art. 17); Slovakia (art. 15).

<sup>18</sup> Decision No. 23/1990 of 31 October 1990; translated in *East European Case Reporter of Const. Law* 1 (1994): pp. 177-205, and in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press: Ann Arbor, 2000) at 118-138.

public as well”.<sup>19</sup> This latter “shock” was all the more obvious since, at the time, about seventy percent of Hungarians supported keeping the death penalty.<sup>20</sup> I have referred to the peculiar nature of reasoning employed in the Decision elsewhere,<sup>21</sup> so a brief summary here should suffice.

The main dilemma the Court faced was that, on one hand, it was dealing with a constitutional text which strongly implied the permissibility of the death penalty (because only “arbitrary” deprivation of human life was constitutionally prohibited in Art.54(1), thus implying acceptability of non-arbitrary deprivation). On the other hand, the majority of Court was willing to ban the death penalty *malgré tout*. This has been openly admitted, *ex post*, by Chief Justice Solyom, who conceded that “certain general values” upon which the decision rested “were established outside of the Constitution”.<sup>22</sup> It is therefore somewhat ironic that, in his own concurrence in the Decision, Solyom distinguished the role of the Parliament in the abolition of capital punishment (the Parliament being “free to use any arguments” of practical, sociological or political nature), from the role of the Court, which “may only make constitutional arguments to justify its decision”.<sup>23</sup>

The opinion of the Court (as opposed to the more developed concurring opinions of some of the members of the majority, especially Solyom) is very succinct by the standards of that court, and consists of assertion rather than arguments. Its key statement is that the Criminal Code’s provisions on the death penalty violate the “essence” of the right to life and human dignity, hence are contrary to Art.8(2) of the Constitution which proscribes those regulations which restrict the essence (“the basic meaning and contents”) of fundamental rights. If anyone had doubts as to how this opinion might be reconciled with the implicit constitutional mandate allowing the death penalty when used in a non-arbitrary fashion (Art.54(1)), the Court established that these two Articles (8(2) and 54(1)) conflict with each other, and so “[i]t is the responsibility of Parliament to harmonize them”.<sup>24</sup> Of course, the only “harmonization” that the Court had in mind was to amend Art.54(1) so as to remove any doubt as to the

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<sup>19</sup> Solyom & Brunner, *Constitutional Judiciary*, *supra* at 118.

<sup>20</sup> See Anna M. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej w okresie przekształceń demokratycznych* (TNOiK: Toruń 1997) at 129.

<sup>21</sup> Wojciech Sadurski, ‘Rights-Based Constitutional Review in Central and Eastern Europe’, in Tom Campbell, Keith Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press: Oxford 2001): 315-34 at 323-24,

<sup>22</sup> László Sólyom, “Introduction to the Decisions of the Constitutional Court of the Republic of Hungary”, in Sólyom & Brunner, *Constitutional Judiciary*, at 6.

<sup>23</sup> Solyom, P. concurring, see the text of the opinion in Solyom & Brunner at 125.

<sup>24</sup> Section V of the Opinion of the Court, *id.* at 122.



impermissibility of deprivation of life, arbitrary or not. In this context, the Court emphasized that Article 8(2) was enacted after Article 54(1). However, of course, the *opposite* conclusion was also available to the Court on the basis of the precept of interpretation which provides that a more general law should not derogate from a more specific one. The Court, naturally, resisted the latter interpretation, and it established the conflict between the two articles by stating that *any* instances of capital punishment “impose a limitation upon the essential content of the fundamental right to life and human dignity”<sup>25</sup>. It is interesting that even the single dissenter, Justice Schmidt, accepted this proposition about the conflict between the two articles, and only dissented on the basis of the institutional competence argument. Namely, that if a conflict between two constitutional provisions is established, it is up to Parliament to remove it by amending the Constitution.<sup>26</sup> Within the majority, only one judge (Zlinszky J.) argued on the basis of the illusory deterrent effect of the death penalty.<sup>27</sup> The remaining authors of concurring opinions agreed largely with the view of Chief Justice Solyom, that the question of the practical effect of the death penalty is irrelevant, and that as a matter of fundamental moral principle, any exercise of such penalty offends against the right to life and dignity which “is from the outset illimitable”.<sup>28</sup>

### 1.1.2. Abortion

None of the CEE constitutions expressly forbid abortion or family planning; they just say that they protect the life of human beings. However, some constitutions go further, such as the Charter of the Czech Republic, which in Article 6 (1) proclaims: “Everyone has the right to life. Human life is worthy of protection even before birth.”<sup>29</sup> On the other hand, some constitutions specifically provide for family planning.<sup>30</sup> The Slovenian Constitution is unique in explicitly endorsing a “pro-choice” position, by proclaiming the freedom “to decide whether to bear children”.<sup>31</sup>

The question of abortion was prominently dealt with by two constitutional courts in the region: in Hungary and in Poland. The Hungarian Court considered the matter of abortion twice, and in each case its decision was slightly more restrictive – but only just – than the choice of the political branches at the time.

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<sup>25</sup> Section IV of the Opinion of the Court, *id.* at 122.

<sup>26</sup> Dissent by Schmidt, J., *id.* at 123.

<sup>27</sup> *Id.* at 136-8.

<sup>28</sup> *Id.* at 133.

<sup>29</sup> Similarly Slovakia 15 (1).

<sup>30</sup> E.g. Serbia art. 27; Macedonia art. 41.

<sup>31</sup> Art. 55 (1).

As Kim Lane Scheppelle remarked, “Hungary’s adoption of a restrictive abortion law was not initiated in Parliament”.<sup>32</sup> *For the first time it originated from a Constitutional Court decision, in 1991, which restricted the legislature’s discretion over fashioning the abortion law.*<sup>33</sup> *The Court struck down the existing, relatively liberal abortion regime, on the grounds that it should have been regulated by parliamentary statutes rather than – as was the case at the time – by regulations promulgated by the Minister of Health (the Court found that the matter concerned fundamental rights and, as such, should be regulated by statute).*

However, the Court’s intervention did not end there, and it engaged in a lengthy moral and philosophical deliberation which, as Justice Solyom later put it, “radicalized the question [of the link between the fetus maturity and its legal status]: if the fetus is a person, then his/her right to life deserves absolute protection, if not, it enjoys only relative protection”.<sup>34</sup> The Opinion of the Court, penned by Chief Justice Solyom, remarked that the actual status of the fetus cannot be ascertained through the usual means of constitutional interpretation (a point rejected by Justice Labady in his concurring opinion which, in its conclusions, went further towards a restrictive, anti-abortion position than the decision of the Court),<sup>35</sup> and that it is for the legislature to decide.<sup>36</sup> Despite this, denying the fetus legal capacity altogether (or making it conditional upon birth) is not a satisfactory solution since “[t]he fetus’ right to life - in effect its right to be born - cannot be made dependent on the condition of its being born”.<sup>37</sup> Justice Solyom, in the substantive part of the Opinion, clearly hinted at the “pro-life” option, suggesting for instance that “individual human life is a uniform progression from conception, not from birth, to death”,<sup>38</sup> and even that the “extension” of the concept of man [sic] to the pre-birth period, with the concomitant extension of legal capacity to a fetus, “is comparable only to the abolition of slavery, but it surpasses even that event in significance”.<sup>39</sup> Nevertheless he admitted, grudgingly, that one option which is open to the legislature is to decide “that only the fully mature fetus is entitled to legal status”

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<sup>32</sup> Kim Lane Scheppelle, “Women’s Rights in Eastern Europe”, *EECR* 4 (Winter 1995): 66-69 at 68.

<sup>33</sup> Decision 64/1991 of 17 December 1991, translation reprinted (excerpts) in Solyom & Brunner, *Constitutional Judiciary* at 178-199.

<sup>34</sup> *Id.* at 178.

<sup>35</sup> *Id.* at 193-95.

<sup>36</sup> *Id.* at 184.

<sup>37</sup> *Id.* at 187.

<sup>38</sup> *Id.* at 187.

<sup>39</sup> *Id.* at 188.

or, alternatively, to “create a special legal status for the fetus within which one can distinguish [different stages] on the basis of age, maturity” etc.<sup>40</sup> At the end of the day, as a result of the substantive guidelines that the Court established (indicating that neither a complete ban nor a full availability of abortion would be constitutional), and on the basis of the timetable set by the Court for the legislature – the end of 1992 – to enact a law, the parliament enacted, in 1992, a law which added certain additional rigors to the pre-existing situation (such as, the woman’s certification that she was in crisis, a mandatory cooling-off period, and mandatory counselling about the risks of abortion).

The Court then revisited the issue of abortion in November 1998, when it reviewed the 1992 law.<sup>41</sup> At issue was one particular provision, namely the one which permitted abortion (within the first 12 weeks of pregnancy) when the woman was in a “crisis” (or “emergency”) situation. Such a situation was defined as one when a pregnant woman is in a desperate mental, physical or social condition, and this would endanger the healthy development of the fetus. The questionable (from the perspective of the Court) aspect of this provision, was that the “crisis” or “emergency” situation was to be evidenced simply by the fact that the woman signed a declaration to that effect. While the Court found that the termination of a pregnancy based on an “emergency situation” was not unconstitutional per se, it objected to the constitutional validity of the regulation of the pregnant woman’s statement about her “emergency situation”. It recognized that the declaration provision was meant to protect the woman’s privacy, but it found that an improper balance had been struck between the protection of privacy and the protection of life (which is also a duty of the State). According to the Court, it would not be a disproportionate burden upon the woman’s privacy (and also her dignity and right to choose) to require her to provide further justification for the abortion.

A second, independent, ground for finding fault with these provisions was the fact that, on the one hand, the abortion protects the woman’s right to choose as against the fetus’ right to life, while on the other hand, the “crisis situation” is defined (at least partly) in terms of the best interests of the fetus. Hence, there is a contradiction (the interests of the fetus are invoked in order to deprive the fetus of its life), and such a contradiction violates (according to the Court) the constitutional principle of legal certainty. In conclusion, the Court declared these provisions of the 1992 law unconstitutional, and instructed Parliament to more clearly specify the criteria of what constitutes “emergency circumstances”, and to require the woman to provide justifications.

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<sup>40</sup> Id. at 188.

<sup>41</sup> Decision 48/1998 of 23 November 1998, described in *Bull. Const. Case Law* 3 (1998): 421-22.

Another, alternative course of action suggested by the Court, would be to counterbalance the law by better protecting the life of fetuses, and in order to achieve this, to provide pregnant women with proper psychological, medical, social and financial assistance. It is easy to see that the latter option effectively reduces the availability of abortion to a few extraordinary cases, such as the threat to the life or health of the mother, etc. The right of choice would be, in fact, fully eroded if this course of legislative action were to be taken. No wonder that legal commentators agreed that this decision would lead to a restriction of the previously liberal practices in this regard.<sup>42</sup> Indeed, in 2000, in response to the Court's decision, the parliament made amendments to the abortion act which included two new requirements: a mandatory waiting period of three days, and rules concerning the contents of counselling to be provided to women seeking abortion.<sup>43</sup> The amendments also included a rather narrow definition of "a severe crisis" which might justify termination of pregnancy on a woman's request. While these amendments, which entered into force in July 2002, restricted the availability of abortion in comparison with the law of 1992, this restriction was not as severe as the Court's decision might have been read to recommend.

In Poland, the Constitutional Tribunal (CT) has also dealt with the issue of abortion more than once. The first time was at the beginning of 1991, when the Ombudsman asked the CT to consider a decree by the Minister of Health, of 30 April 1990, which established the right of a doctor to refuse to administer abortions, and also a doctor's right to refuse to write a health declaration regarding the permissibility of abortion.<sup>44</sup> The Ombudsman questioned this ministerial act, not on its merits, but on the ground that the Minister had no competence to regulate matters which are the subject of statutory regulation (namely, the Statute on Abortion of 27 April 1956), especially since the statute did not include a statutory delegation for the Minister. The statute had not provided for the possibility of a doctor's refusal to administer legally permissible abortion (or to sign a declaration about the medical permissibility of administering abortion).

*In a 2:1 decision, the CT found the ministerial act legal, and consistent with the constitutional freedom of conscience.<sup>45</sup> It announced that there is no legal duty on doctors to write declarations concerning the acceptability of an abortion, or*

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<sup>42</sup> "Constitution Watch", *EECR* (7, no 4) 1998 at 17.

<sup>43</sup> I am grateful to Renata Uitz of Central European University in Budapest for this information.

<sup>44</sup> Decision U.8/90 of 15 January 1991.

<sup>45</sup> The two judges who formed the majority, Professors Andrzej Zoll and (the late) Tomasz Dybowski never made a special secret of their deep religious beliefs.

*to perform abortions. The right of a doctor to refuse to perform such actions may be derived, according to the majority of the Tribunal, from the constitutional right to freedom of conscience, as well as from the doctors' ethical code (incorporated into the legal system at statutory rank), which obliges a doctor to refuse to administer treatment which is, in the doctor's view, harmful or non-ethical. Ominously, the majority rejected the Ombudsman's view that the woman's right to abortion is the rule, and the restrictions are exceptions to the rule. As the Court declared: "The prohibition of abortion is primary, and the statute [of 27 April 1956] only defines the conditions of permissible departures from the prohibition".<sup>46</sup> The single dissenting judge, Czeslaw Bakalarski, objected on the grounds that the Minister of Health exceeded the limits of statutory delegation and established a rule which he had no authority to create.<sup>47</sup>*

In Autumn 1992, the Ombudsman asked the CT to consider the possible inconsistency between the (already mentioned) "Code of Medical Ethics" (incorporated, as it was, into the "system of valid law" by the statute on "medical councils"<sup>48</sup> of 1989), with the Criminal Code and with the (liberal) law on abortion of 1956.<sup>49</sup> The amendments to the Code of Medical Ethics restricted the doctor's right to perform abortion to cases of pregnancy resulting from rape, and where there was a direct threat to the woman's life or health, while the law on abortion provided for the permissibility of abortion also in cases of "difficult life conditions of the pregnant woman". Echoing the earlier judgment, the Tribunal stated that there is no duty incumbent upon doctors to perform abortions, because the law on abortion of 27 April 1956 "does not impose a duty to perform abortions but only withdraws legal liability for performing abortions under the conditions established in the law".<sup>50</sup> Hence, according to the Tribunal, there was no clash between the law on abortion and the rule of the Code of Medical Ethics. Four judges filed dissenting opinions.

Finally, the most momentous decision was on 28 May 1997.<sup>51</sup> In this decision, the Tribunal struck down the provisions permitting abortion in difficult financial and personal circumstances, as included in the law of 30 August 1996. The central constitutional basis for this invalidation was the principle of *Rechtsstaat* (the democratic state ruled by law) which, according to the Court, elevated

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<sup>46</sup> Typed text of the Decision U.8/90, on file with the author, p. 3.

<sup>47</sup> *Id.* pp. 5-6.

<sup>48</sup> In Polish: "*izba lekarska*" corresponds to the doctors' self-regulatory body.

<sup>49</sup> Decision of 7 October 1992, U.1/92.

<sup>50</sup> Typed text of Decision of 7 October 1992, U.1/92, on file with the author, p. 6.

<sup>51</sup> Decision no. K 26/96, reprinted in *East European Case Reporter of Constitutional Law* 6 (1999) 38-129, and in *Polish Law Journal* 6 (2001): 229-329.

human beings and their life to the level of supreme values. This, the majority announced, was negated by the provision which made abortion permissible on the grounds of difficult financial and personal circumstances. I have discussed this decision elsewhere.<sup>52</sup> Here, it will suffice to say that of all the decisions of the Polish CT, or indeed of all constitutional courts in CEE, this has been probably the most outrageous case of judicial usurpation of law-making power. Contrary to the explicit will of the legislative majority at the time, with scarcely no textual constitutional basis (there was no “right to life” in the constitution in force at the time of the decision), and with a clear indication from the constitution-makers that life “from the moment of conception” was not the recognized constitutional understanding of the “right to life” in the new constitution (already adopted but not yet in force),<sup>53</sup> the Tribunal handed down a decision of great social significance which invalidated nearly all<sup>54</sup> categories of abortion. As one critic said: “The Tribunal has elevated its own, rather unclearly articulated axiology to the level of a legal principle. I do not think that it is within its legally defined powers”.<sup>55</sup> What is particularly disappointing is not only the end-result, but also the reasoning; convoluted, muddled and bearing all the marks of rationalization of an indefensible conclusion. The decision met with strong social opposition. For example, according to the Women’s Rights Centre, the decision was “against the dignity, and rights and freedom of women”.<sup>56</sup> One point frequently raised by the critics of the decision was: “It seems no accident that the decision was made a few days before the Pope’s tenth visit to Poland”.<sup>57</sup>

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<sup>52</sup> Wojciech Sadurski, “Rights-Based Constitutional Review in Central and Eastern Europe”, in Tom Campbell, Keith Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press, 2001): 315-34 at 324-25.

<sup>53</sup> The proposals to include the words “from the moment of conception” to a right to life provision have been frequently made in the constitution-drafting process, and ultimately rejected. As one scholarly commentator noted: “We therefore have had access to an authentic interpretation”, Jan Woleński, “Glosa do orzeczenia TK z 28 V 1997, K 26/96”, *Państwo i Prawo* 53 (1998, no. 1): 88-98, at 91.

<sup>54</sup> The only cases where the Tribunal upheld legislatively permitted abortion were those justified on strictly defined medical grounds (because of threat to mother’s health, or the genetic defects of the foetus) or resulting from rape.

<sup>55</sup> Woleński, at 91.

<sup>56</sup> Women’s Rights Centre, “Women’s Rights in the Constitution of Poland”, *Polish Legal Journal* 6 (2001): 87-104 at 101.

<sup>57</sup> *Id.* at 101.

## 1.2. Freedom of religion

The constitutional models of the church-state relationship in post-communist countries locate themselves between the extremes of, on the one end of the spectrum, a system with a formally established state religion and, on the other end, the actively atheistic state. Naturally, no such extreme has been selected. The latter extreme (an atheistic state) was sufficiently discredited under Communism; the closest to the model are those few constitutions which refer to a “secular” state<sup>58</sup> and explicitly renounce the possibility of having a state-sponsored religion.<sup>59</sup> However, strict separation, or “the wall of separation” between state and religion, to use the US parlance – which would preclude any form of state assistance to religious groups, any form of religious teaching in public schools, etc – has not been adopted either. This is in line with the more general European constitutional tradition, with respect to which a legal scholar notes that “the constitutional pattern of cooperation (sometimes also understood as enhancing positive state obligations to support churches) should be considered as the most commonly accepted model”.<sup>60</sup> Even the word “separation” is infrequently used in the constitutional texts to describe the state-church relationship.<sup>61</sup> This is usually explained by “negative historical connotations”<sup>62</sup>, but a more accurate explanation seems to be the influence of churches and their political allies, which resent the very idea of strict separation. This resentment is related usually to such practical matters as the establishment of, and subsidies to, private religious schools – recognized officially as leading to formally recognizable diplomas – or the teaching of religion in public schools.

It should be emphasized that this issue was more delicate in some countries than in others. In some, organized religions have played a relatively insignificant political role (e.g., in Czech Republic) and so finding the right constitutional formula was a reasonably uncontroversial matter. In others (Poland is perhaps the best example), the dominant church has long been a very powerful political agent and, after the fall of Communism, it managed to establish itself in a position permitting it a high degree of control over the political process, including the constitution-making process, both directly and indirectly via the

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<sup>58</sup> Russia art. 14.

<sup>59</sup> Czech Charter art. 2 (1); Lithuania 43 (7).

<sup>60</sup> Leszek Lech Garlicki, “Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts”, *Brigham Young Univ. L. Rev.* (2001): 467-510 at 479.

<sup>61</sup> Hungary art. 60 (3); Slovenia art. 7(1), Russia art. 14 (2); Bulgaria art. 13 (2).

<sup>62</sup> Leszek Lech Garlicki, “Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts”, *Brigham Young Univ. L. Rev.* (2001): 467-510 at 476.

parties which benefited from its support. As a result, constitutional debates about the formula describing the church-state relationship were protracted and difficult in that country. The Catholic Church in Poland resented the very concept of “neutrality” to describe the relationship of the state to religions, fearing that this would in fact mean an ideologically secular state. On the other hand, secular parties and constitutional experts were concerned about the strongly “accommodationist” formulas, discerning in them an attempt by the Church to establish for itself a constitutional ground for demanding various privileges from the state; at the extreme, a spectre of church-state symbiosis and even of the “confessional state”, was flagged up in the political rhetoric in these debates. In the end, a compromise was found which uses the concept of “impartiality”<sup>63</sup> (more palatable to the Church than “neutrality”), and also which refers to the principle of “cooperation [between the State and churches] for the good of the individual and for the common good”.<sup>64</sup>

Below, I will first discuss the interpretations of the principle of the separation of state and religion, and then will move on to the decisions on freedom of religion (with the status of conscientious objection as a special sub-issue). This distinction is based on the view that these two principles are distinguishable from each other and that they raise different dilemmas; indeed, there may be a degree of tension between the two principles. This is because, as I have discussed elsewhere at greater length,<sup>65</sup> the principle of separation of state and religion has a distinctly anti-accommodationist logic built into it; it dictates hostility to any form of legally significant recognition of any particular religion, discerning in it a form of “establishment” of religion. In contrast, the principle of religious freedom gives rise to demands for the recognition of special claims (for exemptions from common duties, or assistance to observe practices) based on religious beliefs, whenever the general legal burdens might have a differential impact upon the adherents to any particular faith. Hence, the dynamics of the two principles place them on a collision course – something not yet fully appreciated in the religious clauses jurisprudence in CEE.

### **1.2.1. Separation of state and religion**

All post-Communist states adopted a form of separation of church and the state, though the specific constitutional formulations vary from country to country. Some constitutions state the principle of separation expressly, purely and simply;<sup>66</sup> others establish separation without using the concept, but by stating

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<sup>63</sup> Art. 25 (2).

<sup>64</sup> Art. 25 (3).

<sup>65</sup> Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Kluwer: Dordrecht, 1990), chap. 7.

<sup>66</sup> Croatia art. 41 (1); Hungary art. 60 (3); Latvia art. 99; Russia art. 14; Slovenia art. 7;



that there shall be no state church or religion;<sup>67</sup> yet others qualify this by adding an element of linkage between the state and the church. Some proclaim, for example, that certain religions are considered to be traditional ones;<sup>68</sup> others impose a duty upon the state to support some of the work of churches, namely promoting their access to prisons, the army, hospitals, etc.;<sup>69</sup> others require<sup>70</sup> or authorize<sup>71</sup> the state to offer financial assistance to churches; yet other constitutions, whilst stating the autonomy of the church vis-à-vis the state, also talk about cooperation between the two.<sup>72</sup>

In studying the ways in which separation provisions have been interpreted by the constitutional courts of the region, a Lithuanian Court's decision of 13 June 2000<sup>73</sup> is particularly interesting. The sheer length of the decision and the in-depth character of the reasoning suggest that the Court considered it to be an important foundational decision. *Under challenge were various provisions of the 1998 amendments to the Law on Education. In particular, Article 10(4) of this Law stated that, at the request of parents, state schools could be co-founded with a state-recognized traditional religious association. Part 2 of Article 32 stated that heads of such schools shall be appointed and dismissed on the recommendation of the religious association, and that the religious association shall set the requirements of the "world outlook formation" (a code word for religious beliefs) for the staff.*

*Both these provisions were found to be unconstitutional. The former provision (Article 10(4)) was found to contradict Article 40(1) of the Constitution, which states that "State and local government educational establishments of teaching and education shall be secular. At the request of parents, they shall offer classes in religious instruction." The Court found that the religious aspect of the provision applied to all school activities, not just its religious teaching; hence, it conflicted with the constitutional requirement of secularity of schools. The "coordination" of state action with the relevant religious institutions, when founding educational institutions in the process provided by Art 10(4), would apply to the secular aspects of these institutions as well as to religious ones.*

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Ukraine art. 35; Yugoslavia art. 18 (1).

<sup>67</sup> Czech Charter art. 2(1); Estonia art. 40 (2); Lithuania art. 43 (7); Slovakia art. 1. One minor departure from the separation principle in the Lithuanian Constitution is the statement that the State shall recognize marriages registered in Church, art. 38 (4).

<sup>68</sup> Bulgaria art. 13 (3); Georgia art. 9.

<sup>69</sup> Moldova art. 31 (4); Romania art. 29 (5).

<sup>70</sup> Montenegro art. 11.

<sup>71</sup> Serbia art. 41.

<sup>72</sup> Albania art. 10 (4); Poland art. 25 (3).

<sup>73</sup> See <http://www.lrkt.lt/2000/r000613.htm>, visited on 15 May 2001.

*Thus, the powers exercised in the implementation of this provision (founding, reorganisation, closing down etc, of those educational institutions) would depend, partly, on the will of religious institutions. This, the Court explained, was contrary to the principle of separation of state and religion.*

*The provision allowing religious associations to set requirements as to the teachers' convictions and views (Article 32(2) of the Law), was found to contradict Article 25(1) of the Constitution, which says: "Individuals shall have the right to have their own convictions and freely express them". To adopt the rule of Art.32(2) would mean, the Court said, that the religious associations would be able "to interfere with the convictions of the employees [of educational institutions], to exert influence on them, to find out their view on religion, faith, believing or non-believing". This violates the principle of freedom of convictions. It is also contrary to Article 42(1) of the Constitution, which proclaims: "Culture, science, research and teaching shall be unrestricted." In addition, the provision that heads can be appointed and dismissed by the religious association (also forming part of Art.32(2) of the Law) contradicts the constitutional principle of separation of state and religion, because its implementation would mean that "decisions of state and local government institutions [regarding appointment and dismissal of heads of those educational establishments] are dependent on the will of traditional churches and religious organisations".*

*Despite these invalidations, the Court in this decision also upheld a number of the law's provisions against the challenge of unconstitutionality, thus drawing a rather fine balance between the moderately secular reading of the Constitution and the petitioners' (a group of MPs) ideas of strict separation of state and religion. For instance, the petitioners also challenged Art.1(5) of the Law, which provided that one of the goals of the educational system shall be "to guarantee the same rights and conditions for members of traditional religions" as for everyone else, to bring up their children according to their convictions. According to the petitioners, this conflicted with a number of constitutional provisions, including freedom of expression and of conscience (because, they said, the point of these principles is to provide an opportunity "for people holding different views to live in an open and harmonious civil society") and, more importantly perhaps, the constitutional principle of non-establishment of a state religion (Art.43(7)). The Court resisted this interpretation of non-establishment and explained that it basically means that "there shall not be a state religion in Lithuania". More specifically, the Court announced the following implications of the non-establishment clause: churches do not interfere with state activity and with state officials, they do not "form the state policy", the state does not interfere with the internal affairs of churches and religious institutions, the state and its institutions are neutral as regards the matter of religions, and the adherents to religions are not discriminated against*

*on the basis of their convictions. Under these standards, the Court found no violation in Art.1(5) because, according to the Court, the provision simply implemented a constitutional right of parents to bring up their children in accordance with their convictions, including with their religious convictions. However, of course, this is precisely the point at which claims based on religious convictions clash with the principle of separation of state and religion which, as the petitioners correctly observed, requires that people of different convictions meet and live together in common spaces (including public schools) regulated by religion-neutral rules.*

The Polish Constitutional Tribunal considered questions related to the relationship between state and religion (defined by the Constitution as that of "impartiality" of public authorities in matters of personal convictions, "whether religious or philosophical")<sup>74</sup> and more often than not, whenever pressure from the powerful Catholic Church was exerted, it caved in to this pressure. (I should add that I do not imply that there was any *direct* pressure upon the CT, but rather a more general social and political influence exerted by the Church to have its views legally recognized and supported by the force of law). Early in its post-transition activity, in 1990, the Tribunal considered the constitutionality (under the so-called "Little Constitution") of religion classes in schools. The *CT upheld the decree of the Minister of Education, bringing back the teaching of religion in public schools.*<sup>75</sup> *The ministerial regulation to that effect was made under strong pressure from the Church. The decision of the Tribunal considered both procedural (can the ministerial decree be the source of such a regulation?)<sup>76</sup> and substantive matters. The Ombudsman challenged the regulation on several grounds: that the teaching of religion in schools was contrary to the principle of secularity of public education; that this was also violated by putting grades for religious courses in the school report cards; that the right of schools to hang crosses in classrooms offend the religious feelings of non-Christians and of non-believers, etc. All these objections were rejected by the Tribunal.*

*The CT offered an interpretation of two constitutional provisions: the separation of state and church (Art.82(2) of the then Constitution) and freedom of conscience and religion (Art.82(1)). It announced that the former has to be understood in the light of the principle of "secularity and neutrality" of the*

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<sup>74</sup> Art. 25 (2).

<sup>75</sup> Decision K11/90 of 30 January 1991, discussed in Leszek Garlicki, "Przegląd orzecznictwa Trybunału Konstytucyjnego w 1991 roku", *Przegląd Sądowy* (1991, no. 11-12): 43-63 at 59-60.

<sup>76</sup> The separate opinion by Judge Działocha concluded that the regulation would be constitutional but only if decided in a statutory form by the Parliament, K 11/90, typed decision on filed with the author, at 62.

*state. This means that churches cannot be subsidized, but it does not preclude making public school premises available for the teaching of religion, nor paying the salaries of religion teachers. The Tribunal also said that the principle of secularity and neutrality would prohibit the compulsory teaching of religion in public schools or including religious tenets in the public school curricula, but it does not prohibit teaching religion on a voluntary basis. Rejecting the objections to the introduction of declarations by parents as expressions of their will regarding their children's participation in those courses, the CT said that the declarations of will of parents are not seen as a violation of the right to silence on the matters of religion because "the right to silence is not a duty of silence".<sup>77</sup> This argument of the Tribunal relies upon a highly questionable distinction between "negative" and "positive" declarations (the parents were expected, under this law, to declare that they wanted their children to attend religion classes, not that they did not want them to attend the classes). What is ignored by the Tribunal is that the absence of a positive declaration amounts effectively to a negative one, and so the duty to announce one's religious conviction is in fact introduced, albeit indirectly.*

This was not the last word of the Polish CT on the matter. In 1992, the Minister of Education issued a new decree on various details of religious teaching in public schools (and related matters, including religious symbols in schools), and the Ombudsman challenged both the constitutionality and the consistency of numerous provisions, with the statutes.<sup>78</sup> *The only point conceded by the Tribunal was about the "declarations of will" by parents regarding their children's (non-) attendance in religion classes. The Ombudsman accepted that "a right to silence" is not equivalent to a "duty of silence", as established in the decision discussed above, but nevertheless proposed that no public body or institution may demand any declaration from citizens regarding their personal religious convictions. The declarations by parents regarding whether they want their children to attend religious classes or not, amount to just such statements, and they are discriminatory, according to the Ombudsman. However, the Tribunal explicitly resisted the invitation to engage in reasoning at this level, and struck down this particular provision on the narrowest of grounds. Namely, it held the law unconstitutional on the ground that the statute upon which the ministerial decree was based had not contained "the delegation" to the Minister to establish a procedure for the parents to "resign" from the religious classes for their children; the statute merely provided for the declaration about "the wish" to have one's children participate in those classes. In other words, the Tribunal stood by its formalistic and highly illusory distinction between "positive" and "negative" declarations of will by parents, and failed to use this*

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<sup>77</sup> K 11/90 at 38.

<sup>78</sup> Decision U. 12/92 of 20 April 1993 (the text in Polish on file with the author).

*opportunity to restate the principle that the duty to make any declarations whatsoever which can identify citizens' religious convictions have no place in a secular state.*

*The remaining parts of this decision are an unmitigated disaster, from the point of view of the principle of neutrality of the state towards religion. First, the Tribunal rejected the challenge to the provisions regarding the employment of religion teachers (appointed by churches) in schools and paying them salaries from public funds. The Ombudsman argued that it was a form of subsidy to churches, and therefore was both unconstitutional and explicitly prohibited by a statute on religious freedom. To this, the Tribunal replied that salaries paid to teachers cannot be seen as a grant to churches, because "the teacher of religion cannot be viewed as a church or a religious organisation". This, obviously, simply avoids the issue whether a payment to a church official or to a priest nominated to teach religion by a church, is or is not a form of subsidizing the church, and the argument that the "teacher" (even a priest-teacher) is not "a church", is formalistic in the extreme. Second, the Tribunal rejected the challenge to the provision that compels schools to include the grades obtained by a student in religion classes (if taken) on school certificates. The Tribunal thought that including such grades is a simple consequence of having non-compulsory religion classes in schools, because the law on education provides that school certificates should record all school teaching activities – both compulsory and optional. Third, the Tribunal rejected the Ombudsman's challenge to the provision that religion teachers (nominated by churches) shall become members of "teachers' councils" in schools (a body partly deciding, and partly advising the school principal, on pedagogical matters). Again, the Tribunal's response was that such presence of religion teachers on school bodies is a consequence of the school's legal duty "to organize teaching of religion" should parents want it.*

*Additionally, the Tribunal used the occasion to announce its more general views on religious freedom and separation of state and religion. It said that these principles mean that both the state and the church should be "autonomous" in their activities, but this does not mean isolation from each other; "just to the contrary, it should mean the possibility of collaboration in those areas which serve common good and the development of human personality". Thus understood, secularity and neutrality are not inconsistent, according to the Tribunal, with religious teaching in public schools, especially since this teaching occurs only at the request of parents and/or students. The Tribunal also announced that schools should play a role in "maintenance of the religious identity" of students, as proclaimed in the law on education, and "the possibilities to place crosses [in the classrooms] and to hold prayers are among the ways to achieve this maintenance of religious identity". All in all, the Tribunal established standards of religious freedom and separation of state and*

*religion which pay lip service to the principle of neutrality of state towards religion but, in all practical respects, deny the spirit of such neutrality.*

### **1.2.2. Free exercise of religion**

All CEE constitutions, without exception, contain clauses guaranteeing the freedom of religion, in most cases<sup>79</sup> describing this freedom as the right of citizens to manifest, profess, worship etc. their religion. Beyond that, some of these constitutions also contain an express right to educate one's children in accordance with one's own religious convictions;<sup>80</sup> to religious privacy, meaning that persons need not state their official affiliation to organs of the State;<sup>81</sup> as well as provisions asserting the right not to have a religious belief or be coerced into having one.<sup>82</sup> In addition to those individual rights (although a number of constitutions state that the rights to manifest one's religious beliefs may be exercised individually or in a group<sup>83</sup>), some of the constitutions also proclaim group religious rights, such as the rights of religious groups and bodies to organise themselves,<sup>84</sup> or to maintain schools and charitable institutions.<sup>85</sup> With the exception of three constitutions,<sup>86</sup> all the statements of freedom of religion are accompanied by clauses limiting that right (either directly accompanying the statement of the right, or in general provisos concerning the limitations of any constitutional right).<sup>87</sup> Almost all constitutions envisage restrictions of religious freedom, based on public order and public health and morals,<sup>88</sup> and also on the rights of others.<sup>89</sup> Some constitutions restrict the right to freedom of religion

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<sup>79</sup> But see Constitutions of Georgia (art. 19), Latvia (art. 99) and Romania (art. 29) where the right is formulated in a fairly basic form.

<sup>80</sup> Lithuania art. 26(5); Moldova art. 35 (9); Poland art. 48; Romania art. 29 (6); Slovenia art. 41.

<sup>81</sup> Albania art. 24 (3); Estonia art. 42; Poland art. 53 (7); Slovenia art. 41; Montenegro art. 34; Yugoslavia art. 43 (2).

<sup>82</sup> Ten Constitutions containing such an article are constitutions of Albania art. 24 (3); Belarus art. (31); Bulgaria (art. 37); Czech Republic (art. 15 (1)); Lithuania art. 26(3); Poland art. 53(6); Romania (art. 29); Russia art. 28; Ukraine art. 35.

<sup>83</sup> See, e.g. Czech Republic art. 16 (1); Hungary art. 33 (2); Poland art. 53 (2).

<sup>84</sup> Albania art. 10(6); Czech Republic art. 16(2); Lithuania art. 43(3); Moldova art. 31(2); Romania art. 29(3); Slovakia art. 24(3); Montenegro art. 11; Serbia art. 41; Yugoslavia art. 18(2).

<sup>85</sup> Croatia art. 41(2); Lithuania art. 43(3); Macedonia art. 19(3); Serbia art. 41.

<sup>86</sup> Hungary, Macedonia and Montenegro.

<sup>87</sup> See working paper no. 4 in this series.

<sup>88</sup> With the exception of Georgia, Moldova, Romania, Serbia and Yugoslavia.

<sup>89</sup> With the exception of Moldova and Romania.

when this could threaten national security,<sup>90</sup> and some contain a restriction relating to any incitement or expression of hatred or enmity.<sup>91</sup>

Moving now to the jurisprudence of the constitutional courts, the Croatian Constitutional Court, in 1994, declared unconstitutional a provision of the statute on family law, which prohibited the performance of a religious matrimonial ceremony prior to a civil marriage. This prohibition, the Court said, was inconsistent with freedom of religion (Art.40 of the Constitution), and did not fall into any of the constitutionally permissible restrictions on rights, such as those aimed at protection of the freedoms and rights of others, of public order, morality and health.<sup>92</sup>

A case regarding the establishment of public holidays arose before the Hungarian CC in 1994. Representatives of the Jewish community complained that they were treated unequally because the important Jewish holidays were not public holidays, whereas those of the Christian religion were.<sup>93</sup> However, the Court held that such laws were not unconstitutional, because public holidays, even if on the days of great Christian holidays, actually had become secularised and had lost their religious significance. These are holidays due to economic considerations, and they are held on these particular days because the society has become used to it, the Court said.

*In a 1999 decision,<sup>94</sup> the Polish Constitutional Tribunal displayed a degree of insensitivity to the religion-based complaint of a professional soldier-student of a military technical academy who, as a Jehovah's Witness, decided to abandon the army on religious grounds.<sup>95</sup> He lodged a constitutional complaint against a ministerial regulation which required persons in such a situation to repay the costs of training and education incurred by the state so far. The complaint was based on equality grounds (and, in this respect, he was successful) and also on the grounds of constitutional freedom of religion, arguing that such a heavy burden renders it excessively difficult for him to reconcile this duty to repay with his religious convictions. The Tribunal did not accept this last claim, basically arguing that the duty to repay had nothing to do with the religious convictions of the soldier: "The burdens resulting from the provision which is under challenge*

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<sup>90</sup> Belarus, Bulgaria, Lithuania, Poland and Russia.

<sup>91</sup> Moldova and Romania.

<sup>92</sup> Decision U-I-231/1990, of 16 February 1994, *Bull. Const. Case Law* \*\*\* [Special Edition on Freedom of Religion] at 17-18, CRO-1994-1-006.

<sup>93</sup> Decision 10/1993 of 27 February 1993, translated in *East Europ. Case Reporter* 1 (1994) 237.

<sup>94</sup> Decision of 16 February 1999, SK 11/98, in OTK 1999, part I, poz. 5, at 81-96.

<sup>95</sup> The text of the decision does not make it clear but it seems that this was a case of religious conversion that occurred after the commencement of professional military service.

*here and which are related to a particular way of executing the debt towards the State, apply to every professional soldier who is in the same situation, and religious beliefs are not a criterion which defines this category of persons”.*<sup>96</sup> *The Tribunal observed also, in this context, that the special status of soldiers affected a number of their constitutional rights, including privacy, the right to travel freely, the right to a free choice of occupation, etc. Hence, there is no reason to analyze the provision in question “from the angle of freedom of religion”.*<sup>97</sup> *This is true insofar as we limit our vision (as the Tribunal did) to the direct, intentional impact of a regulation upon the free exercise of religion. If, however, we include within the ambit of our concerns the case of indirect effects upon the right to free exercise of religious freedom, the decision of the Tribunal appears to be much more problematic. In the end, regulations which restrict the capacity of various people to avoid religion-burdening measures may have a different impact upon believers and non-believers (or upon adherents to different religious faith, depending on their attitudes to military service); a matter conveniently overlooked by the Tribunal.*

Finally, two decisions by the Macedonian CC regarding freedom of religion can be mentioned. In the first, the Court struck down the law on religious communities and religious groups.<sup>98</sup> The law stated that only registered religious groups could conduct religious activities. To be registered, there had to be at least fifty founders of the group, who had to provide numerous personal details about themselves, the seat and scope of activities of the group, where it met and information about persons in charge of the work of the group. The Court found these registration requirements violated the constitutional guarantee of freedom of religious convictions, in that they enabled the punishment of persons who perform religious activities outside of a registered religious community or group. Also, the requirements of a minimum number of founders, and the information that they must provide, was found to be unconstitutional because such requirements do not apply to the setting up of other associations. Therefore, the law was also in conflict with the constitutional right of freedom of association, since it restricted the right to form associations of religious character.

A second decision, handed down a year later, struck down certain requirements regarding public religious ceremonies.<sup>99</sup> The provision under challenge stated

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<sup>96</sup> Id. at 93.

<sup>97</sup> Id. at 93.

<sup>98</sup> Decision U.br.223/97, of 24 December 1998, *Bull. Const. Case Law* 1998 (3): 487-88, MKD-1998-3-009.

<sup>99</sup> Decision U.br.114/99, of 10 November 1999, *Bull. Const. Case Law* 1999 (3): 464-65, MKD-1999-3-010.



that “non-traditional” religious actions could only be performed in public places (that is, not in churches, mosques and other temples, their gardens and graveyards, and believers’ homes) upon prior authorisation by the Ministry of the Interior. In addition, a cumbersome procedure for applying for such authorization had been set up, including a notice period of at least fifteen days, a description of the type of ritual, disclosure of the identity of those who would perform it, its aim, and when and where it would take place. In contrast, for “traditional” rituals and religious activities, only prior notification to the state administrative body was necessary. The Court found the authorisation requirement to be contrary to the principle of free religious expression (Art.19(2)), though it did not choose to declare the law unconstitutional on the basis of another ground cited by petitioners, namely, that the law treated traditional and non-traditional churches unequally.

### **1.2.3. Conscientious objection**

An overwhelming majority of the CEE constitutions mention the duty to perform military service, and slightly less than a half of these include an explicit guarantee allowing for exemption from such service on the basis of conscientious objection, usually formulated as based on “religious convictions or moral principles”<sup>100</sup> or one’s “conscience or religious faith or conviction”.<sup>101</sup> In addition, two constitutions proclaim a citizen’s duty to perform military service or an alternative service, without however articulating explicitly the latter possibility as a citizen’s right based on their conscientious objection.<sup>102</sup> Further, some constitutions mention the possibility of being exempted from military service, whilst saying that when this shall occur will be regulated by law.<sup>103</sup>

Both the Czech and Slovak Constitutional Courts have dealt with the issue of conscientious objection. The matter appeared, although not as a central issue, in the Czech Court’s decision<sup>104</sup> arising out of a constitutional complaint against a criminal court decision which sentenced a man to imprisonment for refusing to begin his military service. The basis upon which the court’s decision was held

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<sup>100</sup> Poland, art. 85.

<sup>101</sup> Slovakia art. 25. See also Croatia art. 47, Czech Charter art. 15 (3), Estonia Art. 47, Russia Art. 59, Slovenia Art. 123.

<sup>102</sup> Hungary, Art. 70H, Lithuania Art. 139.

<sup>103</sup> Belarus Art. 57, Bulgaria Art. 59. This is indirectly stated also in three constitutions which mention that service alternative to military service (thus noting such a possibility) shall not be considered to be forced labor: Romania Art. 39, Moldova Art. 44 (2), Ukraine Art. 43.

<sup>104</sup> Decision IV.US 81/95 of 18 September 1995, [http://www.concourt.cz/angl\\_verze/doc/4-81-95.html](http://www.concourt.cz/angl_verze/doc/4-81-95.html), visited 8 March 2001.

unconstitutional by the CC was the constitutional principle of ‘ne bis in idem’.<sup>105</sup> The same person had been already sentenced before for the same offence, and the only difference between the two offences was that, the second time, he was asked to join the regiment in a different town. The second conviction was, therefore, overturned by the CC, who also examined a second basis upon which the complaint of unconstitutionality was made, namely, the petitioner’s constitutional freedom of conscience. On this, the Court was less favorable towards the complaint. It established that the complainant, a Jehovah’s Witness, rejected not only military service but also the alternative civilian service that was offered. The constitutional Charter provides for a right not to be forced to perform military service against one’s conscience, and it delegates to statutes the task of implementing this guarantee.<sup>106</sup> The Court held that the legal duty to perform either military or civilian service, as established in the Act on Civilian Service, is not antithetical to the constitutional freedom of conscience. This is because allowing people to avoid both these burdens violates the principle of equality because such a person would gain an unjustified advantage over others. As the Court said: “If the Act on Civilian Service provides that, by performing it, a citizen may not obtain any unjustified advantage over him who performed basic or substitute military service or training, then it must follow logically that if we were to tolerate conduct leading to the avoidance of any sort of service whatsoever, then this would result in the violation of the principle of equality”.<sup>107</sup> This equality-based argument was not, in the Court’s reasoning, supported by any reference to a specific equality provision of the Charter, but instead, a broad intuitive moral notion of equality seemed to be at work here.

The Czech Court considered the matter of conscientious objection twice more. In a 1999 decision, it upheld the time limit for lodging a declaration of refusal to perform military service, but struck down, as disproportionate and negating the essence of the right, a strict rule that after the deadline no requests of conversion of military service to an alternative service, would be considered.<sup>108</sup> (This decision will be discussed separately).<sup>109</sup> It also considered the constitutionality of the article of the Criminal Code which provides for the offence of refusing to perform military service if a person has not requested alternative service.<sup>110</sup> The

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<sup>105</sup> Art. 31 (2): "No one may again be tried for an act for which he was already sentenced and for which a final court judgment was passed".

<sup>106</sup> Czech Charter, art. 15 (3).

<sup>107</sup> Decision IV.US 81/95 of 18 September 1995.

<sup>108</sup> Decision Pl.US 18/98, of 2 June 1999, see *Bull. Const. Case Law* 1999 (1): 44-45, CZE-1999-007.

<sup>109</sup> Working Paper no.4 in this series.

<sup>110</sup> Decision Pl.US 19/98, *Bull. Const. Case Law* 1999 (1): 39-40, CZE-1999-1-003.

Supreme Court found the article unconstitutional for contradicting the principle of *ne bis in idem*. This is because the defence authorities are obliged to keep calling up a person until he has performed military service, which makes him vulnerable to consecutive criminal punishments in response to what is, essentially, one and the same crime. In this case, the Constitutional Court applied the technique of interpreting the law in such a way as to be consistent with the Constitution, whenever possible. In this case, the Court found that a constitutionally permissible interpretation of the Criminal Code provisions was possible, and that both the military authorities and the courts should find a way of carrying out their respective legal duties in a way other than conscripting the person (or convicting a person) who has already been convicted.

The Slovak Constitutional Court considered a case on conscientious objection, in 1995.<sup>111</sup> It was asked to examine the constitutionality of a provision of the 1992 Statute on Civilian Service, which established some conditions under which a person could be exempted from military service. *Under challenge was a time-limit for the filing of an application not to perform military service, on the grounds of conscience. The argument was made that this effectively precluded persons from changing their mind once already having begun their military service. The petitioners claimed that this was contrary to the constitutional provision on exemptions.*<sup>112</sup> *The Constitutional Court considered the conscience-based exemption from military service to be just a specific case of the more general right to freedom of religion.*<sup>113</sup> *Indeed, it said, the refusal to carry out military service due to the person's conscience or religious faith, is essentially an external expression of thought, conscience, religion and faith. Hence, the constitutionally approved limitations upon the general right to freedom of religion (in order to "protect public order, health, morality, or the rights and liberties of others") apply also to the exemption from military service. Applying this test to the provision under challenge, the Court acknowledged that the time limits for making the exemption application do act as a limitation on the right to freedom of conscience. However, an important public interest is at stake; the government needs to know the correct number of persons carrying out their military service, and this knowledge is needed by a certain point in time. Such a limit aimed at the protection of public order is, according to the Court, "necessary in a democratic society", and so meets the constitutional criteria of acceptable limits on constitutional rights.*

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<sup>111</sup> Decision Pl.US 18/95 of 24 May 1995, the original text in [http://www.concourt.sk/S/nal\\_uzn/1995/15\\_95s.htm](http://www.concourt.sk/S/nal_uzn/1995/15_95s.htm), visited 8 March 2002.

<sup>112</sup> Article 25(2) of the Slovak Constitution: "No one must be forced to perform military service if this runs counter to his conscience or religious belief. The details will be specified in a law."

<sup>113</sup> Art. 24.

### 1.3. Privacy

Most of the CEE constitutions include general privacy clauses,<sup>114</sup> typical examples being: “Inviolability of the person and of privacy is guaranteed”,<sup>115</sup> or “The State shall respect and protect private and family life”.<sup>116</sup> However, an even higher number of constitutions include more specific protection for the privacy of communication,<sup>117</sup> of which this provision from the Czech Charter is a typical example: “No one may violate the confidentiality of letters or other papers or records, whether privately kept or sent by post or by some other means, except in the cases and in the manner designated by law. The confidentiality of communications sent by telephone, telegraph, or by any other similar devices is guaranteed in the same way.”<sup>118</sup> Most of the constitutions of the region phrase the right in this negative way. However, in some cases a greater, positive-action guarantee, is envisaged, such as: “The *State shall ensure* the privacy of letters, telegrams, other postal dispatches, of telephone conversations and of using other means of communication.”<sup>119</sup>

The guarantee of data integrity listed in a handful of the constitutions<sup>120</sup> can be subsumed within this category of privacy rights. As an example of that right, consider this article from the Croatian Constitution: “Everyone is guaranteed the safety and secrecy of personal data. Without consent from the person concerned, personal data may be collected, processed, and used only under conditions specified by law”.<sup>121</sup> Also, the right not to have to state one’s ethnic

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<sup>114</sup> This is the case of 17 out of 22 constitutions of the region, namely: Bosnia and Herzegovina (art 8 European Charter); Bulgaria (art. 32; the Czech Republic's Charter on Fundamental Rights (art. 7; Estonia (art. 26); Latvia (art. 96); Macedonia (art. 25); Moldova (art. 28); Poland (art. 47); Romania (art. 26); Russia (art. 23); Slovakia (art. 19); Slovenia (art. 35); the Ukraine (art. 32); Yugoslavia (art. 22); Montenegro (article 20) and Serbia (art. 18).

<sup>115</sup> Czech Charter Art. 7 (1).

<sup>116</sup> Moldova (art. 28).

<sup>117</sup> Albania- article 36; Bosnia and Herzegovina (art 8 European Charter); Belarus- article 28; Bulgaria- article 34; Croatia- article 36; the Czech republic's Charter on Fundamental Rights- article 13; Estonia- article 43; Georgia- article 20; Latvia- article 96; Macedonia- article 17; Moldova- article 30; Poland- article 49; Romania- article 28; Russia- article 23; Slovakia- article 22; Slovenia- article 37; the Ukraine- article 31; the Federal Republic of Yugoslavia- article 31; Montenegro- article 30; and Serbia- article 19.

<sup>118</sup> Charter of rights of the Czech Republic- article 13.

<sup>119</sup> Constitution of Moldova (article 30), emphasis added.

<sup>120</sup> Croatia- article 37; the Charter of rights of the Czech Republic- article 10; Macedonia- article 18; Slovenia- article 38 and Serbia- article 20.

<sup>121</sup> Art. 37 (1).

affiliation,<sup>122</sup> or national affiliation,<sup>123</sup> could perhaps be placed within this category of right. Finally, the privacy of religion guarantee present in some constitutions, could likewise be included here.<sup>124</sup>

In the jurisprudence of the constitutional courts of the region, the concept of privacy appeared most often in the context of the inviolability of the home, and the courts invariably took a pro-privacy stance in those cases. One example is the Bulgarian decision, discussed more specifically above,<sup>125</sup> where the court struck down most of the clauses of a criminal code which would exculpate the self-defender from the use of excessive force against an assailant but, characteristically, not when the assault took place in the attacked person's home.<sup>126</sup> In other words, the fact that the inviolability of the home was at stake in this particular case of self-defense, rendered the CC tolerant of any excessive force used against the assailant!

Some provisions of tax law have been invalidated by the Constitutional Review Chamber in Estonia, on the basis of an unconstitutional violation of the inviolability of the home.<sup>127</sup> The 1993 Taxation Act authorized tax inspectors to "inspect the property, buildings, enterprises etc" without prior warning, to measure and seal containers and equipment, and to place cameras in enterprises. The Chamber determined that the entry into another person's property without their consent, was unconstitutional; the same applies to placing of cameras, insofar as the surveillance is secret. The purpose of tax collection was not found to be among the permissible constitutional grounds for restriction of the inviolability of the home, namely the protection of public order or health, the rights and liberties of others, or the prevention of criminal acts.<sup>128</sup> A very similar result was reached by the CC of Macedonia; the law provided that a tax official could enter into a taxpayer's house against his will, if the taxpayer refused to let him in.<sup>129</sup> The Court found this inconsistent with the constitutional inviolability

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<sup>122</sup> Belarus- article 50 (1) "Everyone shall have the right to preserve his ethnic affiliation, and equally, no one may be compelled to define or indicate his ethnic affiliation."

<sup>123</sup> Article 45 (2) of the Federal Republic of Yugoslavia: "No one shall be obliged to declare his nationality." Also present in the constitutions of: Russia (art 26), as well as Montenegro (art 34) and Serbia (art 49).

<sup>124</sup> Namely, in the constitutions of Estonia (art 42) and Poland (art 53 (7) and the Federal Republic of Yugoslavia- (art 43 (2)) and Montenegro (art 34).

<sup>125</sup> In the part of this paper dealing with right to life and dignity.

<sup>126</sup> Decision 19/97, of 21 November 1997, summarized in Bull. Const. Case Law 1997 (3): 357-358, BUL-1997-3-004.

<sup>127</sup> Decision no. 4 of 4 November 1993, translated in *East Europ. Case Rep.* 2 (1995): 141-47.

<sup>128</sup> Art. 33 of the Constitution.

<sup>129</sup> Decision 27/96 of 27 June 1996,

of the home, which can only be restricted for the prevention of crime or the protection of people's health.

The Slovenian Constitutional Court recently dealt twice with a privacy-based challenge to laws related to crime control and, more specifically, to the surveillance of suspected criminals. It twice struck down the central provisions of these laws, on privacy grounds. In 1997, it invalidated the provisions of the Code of Criminal Procedure, which would allow the secret bugging of people, in order to catch criminals.<sup>130</sup> While the court order authorizing such bugging would have to show the necessity of the measures, the CC concluded that the law did not differentiate between different methods of bugging and surveillance, some of which are much more intrusive than others. For example, the Court found it improper to apply the same standards of necessity to means as intrusive as "listening in premises" as, on the other hand, to "secret observation and following, in which infringement of the communication part of privacy is essentially less intensive, or is entirely non-existent".<sup>131</sup> According to the Court, the lack of a clear differentiation of different measures and of clear definitions of various surveillance measures, leads to a lack of legal certainty. For instance, the Court distinguished between "reasons for suspicion", "sound reasons for suspicion" and "well-founded suspicion", and noted that the statute did not contain any definitions of these terms, thus allowing for surveillance based upon the weakest of these grounds.<sup>132</sup>

The law was found to violate three constitutional rights: the right to privacy, the right to inviolability of dwellings, and the right to the protection of personal data. It is important to state that the Court relied strongly in its opinion upon the rhetoric of breaking with the 'bad old days', when constitutional restrictions upon individual rights were broadly permitted, and when the state and the League of Communists of Yugoslavia extensively used means such as "listening, secret control of telephone and other telecommunication means, secret control of written and other consignments, secret recording and documenting" etc.<sup>133</sup> No doubt, the evocation of this recent history, from before the collapse of Yugoslavia, added a powerful persuasive force to the Court's

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[http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/FYROM/Jur\\_fyrom.htm](http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/FYROM/Jur_fyrom.htm), visited on 1 March 2002, also summarized in *Bull. Const. Case Law* 1996 (2) at 286-87, MKD-96-2-005.

<sup>130</sup> Decision U-I-25/95, of 27 November 1997, at <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001.

<sup>131</sup> *Id.*, para. 57.

<sup>132</sup> *Id.*, paras. 53-54.

<sup>133</sup> *Id.* para. 83.

hostility towards using such secretive means, even for the perfectly justifiable ends of fighting crime, and especially organized crime.

A year later, the same Court struck down certain provisions of the Internal Affairs Act, which actually did what the Court had asked for in this earlier case. That is, the latter Act distinguished the two types of measures (those more and those less intrusive) which could be used to aid the police in catching suspected criminals, and it provided for the different levels of “need” required to be shown, to use these measures.<sup>134</sup> However, the Court decided that, within these categories, there were only very general and vague provisions about the specific procedures to be followed, and therefore they were not sufficient to prevent arbitrariness and abuse. For example, any acceptable law would have to prescribe the procedure by which the recorded conversations etc would be dealt with, and more importantly, it would have to explain exactly what degree of suspicion would be required in order to justify the use of any such measure.

In addition to these cases, two privacy-related decisions of the Hungarian CC are worth mentioning. *On 13 April 1991, the Court declared that uncontrolled collection of personal data was unconstitutional, and it struck down a law introducing personal identification numbers.*<sup>135</sup> *The rejection by the Court of the statute which contained the PIN provisions but whose broader goal was to set up a population register, was based not only on (as defined by the Constitutional Court) the “right to informational self-determination” (deduced from Art.59 of the Constitution, which proclaims, inter alia, “the protection of secrecy in private affairs and personal data”), but also on the right to dignity, because “a data user with an undefined scope for data collecting” could become acquainted with the totality of data about a person and thus create a “personality profile”.*<sup>136</sup> *More specifically, the rejection of the PIN provisions was based on the argument that the law did not contain any clear limitations as to the uses of PINs, and the universal use of such numbers was contrary to “informational self-determination”.*<sup>137</sup> *Compliance with this decision was only partial; in fact, the tax and social security institutions continued to use PINs, and the government resorted to them in its fight against tax fraud and corruption.*<sup>138</sup> *Eventually, the government decided to restore the system of PINs (or, more precisely, to extend the deadline for a temporary use of identification numbers) as part of the “Bokros package” of austerity measures hoping to reduce tax*

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<sup>134</sup> Decision U-I-158/95 and U-I-144/96, joined to it, of 2 April 1998, at <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001.

<sup>135</sup> Decision 15/1991 of 13 April 1991, reprinted in Solyom & Brunner at 139-50

<sup>136</sup> *Id.* at 140.

<sup>137</sup> *Id.* at 149.

<sup>138</sup> Solyom, "Introduction", *supra* at 9.

*fraud. This law has been invalidated by the Court again.*<sup>139</sup> A year earlier, the CC held that government regulations compelling the Hungarians to declare their assets, contravened the right to individual privacy and to the protection of personal information. Also in this case, the government hoped to use compulsory property declarations as a means of combating tax evasion, but the Court found that this measure did not meet the test of being unavoidable and proportionate to the achievable aim.<sup>140</sup>

The decisions discussed above concerned privacy in the narrow sense of the word, as a “territorial” or “spatial” control by people, over their living and working environment (home, workplace), and also over the data and information concerning them. This was therefore privacy in the sense of intrusion upon a person’s seclusion, solitude or private affairs – the first of four meanings of the tort of “privacy” distinguished in the classic article by William Prosser (the other three being public disclosure of embarrassing private facts, false light publicity, and appropriation of a person’s name or likeness).<sup>141</sup> However, “privacy” is sometimes understood in a much broader way, as being almost synonymous with a person’s control over their life (and not just over the information about the person). Hence, it becomes synonymous with individual liberty and is used as an anti-paternalistic ideal.

This is how the privacy issue can be understood in a decision of the Slovak Constitutional Court, which struck down provisions of the Code of Civil Procedure which allowed the attorney-general to step, on demand from the court or a party to the dispute, into civil proceedings.<sup>142</sup> It was the possibility of the public authority’s interference in a civil dispute, regardless of the wish and consent of a party to the dispute, which the CC found inconsistent with the right to privacy, defined in the Slovak Constitution as “the right to protection against unwarranted interference in [a person’s] private and family life”.<sup>143</sup> Clearly, the concept of privacy which is at work here goes much further than just protecting a person’s “territorial” control over his or her house, office or over private information; it is a right of non-interference, even if the interference might be motivated by the best interests of that person. This shows that the concept of

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<sup>139</sup> Decision no. 46/1995, see "Constitution Watch", *EECR* 4 (Summer 1995), at 12.

<sup>140</sup> *EECR* 2 (Spring 1993), at 8.

<sup>141</sup> William J. Prosser, "Privacy [a legal analysis]", in Ferdinand D. Schoeman (ed.) *Philosophical Dimensions of Privacy* (Cambridge University Press: Cambridge 1984): 104-55.

<sup>142</sup> Decision PL.US43/95, of 10 September 1996, summarized in *Bull. Const. Case Law* 1996 (3): 404-405, SVK-96-3-006. It should be mentioned that the right to privacy is one of three independent grounds of the Court's decision, the other two being the right to equality before the law and the principle of independence of the judiciary.

<sup>143</sup> Art. 19(2).



“privacy” sometimes plays an anti-paternalistic function, and is equivalent to individual autonomy from unjustified interference.

#### 1.4. Freedom of movement and the right to choice of residence

All of the CEE constitutions have a provision guaranteeing freedom of movement and the right to choose one’s place of residence. The right is phrased in a very similar way within all the constitutions- for example, the Constitution of Russia: “(1) Everyone who is lawfully staying on the territory of the Russian Federation shall have the right to freedom of movement and to choose the place to stay and reside”.<sup>144</sup> In some of the constitutions, this right is conferred upon everyone;<sup>145</sup> to all persons staying lawfully in the territory of the State<sup>146</sup> or, in some, only to citizens of the State.<sup>147</sup> Typical permissible limitations of the right include national security, public health, rights of other persons and facilitation of criminal investigations. Almost all of these constitutions contain a provision guaranteeing the right to freely leave and (re)enter the country.<sup>148</sup> As far as the beneficiaries of this right are concerned, in some constitutions *citizens* have the right to leave and *citizens* have the right to enter the country,<sup>149</sup> whereas in others *everyone* has the right to leave but only *citizens* have the right to enter the country.<sup>150</sup>

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<sup>144</sup> Art. 27 (1).

<sup>145</sup> Albania (art. 38), Bosnia and Herzegovina para. 3, Bulgaria (art. 35 (1)), Poland (art. 52 (1)) and Slovenia (art. 32). In addition, whilst not expressly stated in the provision enshrining the right to freedom of movement and residence, the Constitutions of the Czech Republic (Art. 42 (2)) and Slovakia (Art. 52 ((2)) grant all rights to foreigners, unless this is expressly excluded (which was not done here).

<sup>146</sup> Croatia art. 32 (1); Estonia art. 34; Georgia art. 22(1); Hungary art. 58 (1); Latvia art. 97; Russia art. 27 (1), and the Ukraine art. 33.

<sup>147</sup> Belarus art. 30, Lithuania art. 32 (1), Macedonia art. 27 (1), Moldova art. 27 (1), Montenegro art. 28, Romania art. 25, Serbia art. 17 and Yugoslavia art. 30 (1).

<sup>148</sup> The exception is the Constitution of Montenegro, and note that the Constitution of Albania only contains the right to leave the country.

<sup>149</sup> The Constitutions of Belarus (art. 30), Croatia (art. 32), Lithuania (art. 32), Macedonia (art. 27), Moldova (art. 27), Romania (art. 25(2)), Serbia (art. 17), and F.R. Yugoslavia (art. 30).

<sup>150</sup> The Constitutions of Bosnia and Herzegovina (Art 2 and 3 of the 4<sup>th</sup> Protocol to ECHR), Bulgaria (art. 35), Czech Rep (art. 14), Estonia (art. 35), Georgia (art. 22), Hungary (art. 58(1) and 69(2)), Latvia (art. 98), Poland (art. 52), Russia (art. 27(2)), Slovakia (art. 23), and Ukraine (art. 33). The Constitution of Slovenia (art. 32) is phrased somewhat differently in that it states that everyone may leave and everyone may return. However, it fits more into this category (everyone may leave but only citizens may enter) because it allows for entry by aliens to be limited by law without putting any restrictions on when or how the law may do this. Thus, it seems that the Constitutional right of entry for aliens is

In an important decision about freedom of movement and residence, the Czech CC made it clear that the second aspect of the right (freedom of residence)<sup>151</sup> applies also to non-citizens, and that its restrictions must meet the standards of proportionality.<sup>152</sup> *It considered a provision of the law<sup>153</sup> which provided that a foreign national who has violated any duties laid down by law, can be forbidden to reside in the Czech Republic. This law was challenged by foreign nationals who were ordered not to reside in the Czech Republic for three years after they had been convicted of selling unmarked goods and impeding customs inspection. In striking down this provision, the CC announced that freedom of movement and residence is guaranteed also to foreign nationals, if they have a residence permit. While this right can be limited by statute in the interest of, amongst other things, public order, in this case the restriction of the right was disproportionate. The negative impact of the restriction on the constitutional right outweighed the benefit to the public interest. In addition, the restriction was, according to the Court, impermissibly vague, and the explanation by the Parliament's representatives, that the vagueness in this legal provision could be reduced by the administrative bodies that apply the law, was not accepted. The specific limitations must be precisely established in the statute itself, in order to make its legal consequences foreseeable to people.*

One of the few decisions in which the Romanian Constitutional Court struck down a parliamentary bill, was based upon the constitutional right to freedom of movement.<sup>154</sup> *This was related to the parliamentary approval of a government ordinance<sup>155</sup> on the imposition of a tax for passing the frontier, with a view to generating some resources which would be destined for social protection. As the Court noted, the law clearly created an impediment to the exercise of the constitutional right of free movement.<sup>156</sup> Thus, the restriction must conform to*

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very weak.

<sup>151</sup> Art. 14 of the Czech Charter.

<sup>152</sup> Decision no. Pl.US 25/97 of 13 May 1998, summarized in *Bull. Const. Case Law* 1998 (2): 213-14, CZE-1998-2-007.

<sup>153</sup> Act no.123/1992 on the Residence of Foreign Nationals. Apart from the prohibition of residence provision, the Court was also asked to examine, and eventually struck down, another provision of the same law, namely that the filing of an appeal against the ban on residence does not have a suspensive effect on the decision that had been made. This was found to be contrary to various constitutional principles of fair trial.

<sup>154</sup> Decision no. 139 of 14 December 1994, [http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/romania/Jur\\_romania.htm](http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/romania/Jur_romania.htm), visited 7 March 2002.

<sup>155</sup> No. 50 of 12<sup>th</sup> August 1994.

<sup>156</sup> Article 25 (1) of the Constitution: "The right of free movement within the national territory and abroad is guaranteed. The law shall lay down the conditions for the exercise of this right".

*the constitutional principles controlling the acceptability of limitations on rights.*<sup>157</sup> This was not the first time the Constitutional Court had faced a similar issue. An earlier Court decision relating to the constitutionality of a tax for passing the frontier with a view to funding tenement heating assistance, during November 1993 – April 1994, was deemed to conform to the Constitution.<sup>158</sup> This was based on the exceptional character of the situation: as a lawyer working for the government at the time the case went before the Constitutional Court explains, the government had been desperately searching for any sources of budgetary income, in order to subsidize heating for the poorest in what turned out to be the particularly harsh Winter of 1994.<sup>159</sup> At this time the tax, which was expected to be in operation for only two months, seemed to be a good idea and met with hardly any protest. This encouraged the government to try to win parliamentary endorsement of a more permanent rule which would permit the government, in the case of harsh Winter conditions, to enforce a similar taxation measure. This quasi-permanent arrangement was rejected by the Court.

*In the process of quashing this bill, the Constitutional Court established a test for when such a tax would be constitutionally acceptable. To pass constitutional muster, it must be done only: (a) exceptionally, and (b) if it is imposed “to protect a certain right of social protection belonging to citizens”. It must be the case that, without this restriction of one constitutional right, the other would be gravely restricted. In other words, it cannot be a generic protection; it must be very specific, such as to provide heating in tenements at a certain specified time. Only then would it comply with the constitutional demand that “The restriction [on a constitutional right] shall be proportional to the extent of the situation that determined it and may not infringe upon the existence of the respective right or freedom”.*<sup>160</sup> Using this test, the Court found the law in question to be constitutionally defective. It was not specific at all. It simply claimed to enhance “social protection rights” generally. Thus, there could be no evaluation of what particular right this measure would aid, or to what extent the restriction of freedom of movement would be proportional to the protection aim.

The Constitutional Court of Russia also dealt with the issue of freedom of movement. In its 1998 decision, the Court deemed unconstitutional the provision

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<sup>157</sup> Article 49 of the Constitution states that law may restrict rights "only if absolutely unavoidable, as the case may be, for: the defence of national security, public order, health, or morals, or the citizens' rights and freedoms. As required for conducting a criminal investigation; and for the prevention of the consequences of a natural calamity or extremely grave disaster."

<sup>158</sup> Decision No 47 of 1993.

<sup>159</sup> Conversation with Mr Horatiu Dumitru (a private lawyer at the time of the interview), Bucharest, 10 March 2001.

<sup>160</sup> Art. 49 (2) of the Constitution.

which stated that passports can only be issued at the place in which an applicant is registered as having their place of residence.<sup>161</sup> *The proceedings in this case were initiated by a Russian citizen who had been registered in Tbilisi, Georgia and who had no place of permanent residence in Moscow, where he applied for a passport. He argued that he had been discriminated against, and prevented from enjoying the constitutional right to freedom of movement. The Court agreed with this point of view; it argued that, if the procedure of applying in one's place of permanent residence cannot be followed for whatever reason, as in the case of forced migrants and persons with no officially registered address, then their right to obtain a passport – and, in consequence, to travel – is violated. The law was therefore struck down, based both on the constitutional right to equality (Art.19) and the right to leave the country (Art.27).*

Perhaps in this context, the battle of the Constitutional Court of Russia against the infamous system of “propiska” should also be mentioned. This had been the old Soviet system of residence registration, which effectively rendered it impossible or extremely difficult for citizens to move to the place of their choice. A person without a “propiska” could not find accommodation or a job, and could be arrested by the police and fined. This remained one of the most invidious legacies of the old Soviet days, particularly immune to change, perhaps because it is such a convenient device of corruption and the abuse of power. As a Russian scholar recently observed: “The fact that propiska still exists and is protected by the Russian government and regional leaders starkly reveals the disturbing reality behind its legal reforms – Russia with its new Constitution has once again created an elaborately decorated showcase for rights and freedoms which is empty inside”.<sup>162</sup> While in its most drastic form the “propiska” had been abolished, its remnants persisted in the form of high registration fees in the capital, for out-of-Moscow residents (for example, in 1996 Moscow Duma set the fee for registration at 300 times the minimum monthly wage!). Propiska no longer remained as a privilege which the authorities could confer or refuse to citizens at their own discretion, but was transformed into an instrument of economic discrimination against out-of-towners. The Constitutional Court found the registration laws unconstitutional several times,<sup>163</sup> and in these cases met with non-compliance, most recently by

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<sup>161</sup> Decision of 15 January 1998, see <http://ks.rfnet.ru/english/codicese.htm> visited 7 March 2002.

<sup>162</sup> Suren Avanesyan, “Constitutional Protection for Human Rights in the Russian Federation”, *Journal of East European Law* 6 (1999): 437-68 at 452.

<sup>163</sup> Decisions of 25 April 1995, of 4 April 1996, see Jean-Piere Massias, *Droit constitutionnel des États d'Europe de l'Est* (Presses Universitaires de France: Paris, 1999) at 387 and Konstantin Katanian, “The Propiska and the Constitutional Court”, *East European Constitutional Review* 7 no. 2 (Spring 1998): 52-57, and of 2 February 1998, the Russian text of the decision on file with the author.

Moscow authorities. While the Moscow Duma's law had been declared unconstitutional by the Court on 2 February 1998, it remained unchanged until at least late 2001.<sup>164</sup>

## 2. *Civil and Political rights*

### 2.1. **Citizenship**

Almost all constitutions of CEE contain some provisions which seem to guarantee the equality of constitutional rights and freedoms to citizens and non-citizens alike, thus putting in question the importance of citizenship status for the enjoyment of constitutional rights and freedoms.<sup>165</sup> However, I have deliberately used the words: “*seem to guarantee*”, as this guarantee is often undermined by allowing statutory exceptions to this principle of rights applying to all human beings. As an example, consider the Constitution of Poland, which states: “Anyone being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution”<sup>166</sup> but adds immediately that “[e]xemptions from this principle with respect to foreigners shall be specified by statute”.<sup>167</sup> While the generality of rights as applying to everyone clearly has the status of a baseline rule, and the restrictions of certain rights only to citizens is an exception, the fact that the ordinary laws can establish such exceptions is a potentially dangerous *carte blanche* given to the legislator. In a number of other constitutions which have such a general proviso, the authority to restrict a specific right to citizens is vested with the Constitution and statutes.<sup>168</sup>

A different construction has been adopted in those constitutions which do not contain a general proviso of the sort mentioned in the previous paragraph, but which instead frame some rights generally, and others more restrictively in reference only to citizens. Thus, it should be assumed (in the absence of an article such as that in the constitutions already described above) that the more general rights must therefore apply to all people on the state's territory, and that statutes cannot restrict the applicability of a more general right to citizens alone. This is, for instance, the case of the Lithuanian Constitution, which makes no

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<sup>164</sup> Interview with Ms Ekaterina Gezenkhadze, counsellor at the Constitutional Court of Russian Federation, 19 November 2001.

<sup>165</sup> The only exception is Romania which confines the general applicability of constitutional rights and freedoms to "all citizens" only (art. 15 (1)) and in a separate article promises to aliens and stateless persons living in Romania a "general protection of person and assets, as guaranteed by the Constitution and other laws", it then goes on to spell out whether particular constitutional rights are granted to "all persons" or to "every citizen".

<sup>166</sup> Art.37(1).

<sup>167</sup> Art.37(2). Similarly Moldova 19 (1), Russia 62 (3),

<sup>168</sup> Bulgaria art. 26 (2), Belarus art. 11, Macedonia art. 29 (1), Slovenia art. 13, Ukraine art. 26

mention at all of who is the subject of the rights. They phrase some provisions generally (e.g. “The right to life of individuals shall be protected by law”)<sup>169</sup> and others as pertaining only to citizens (“Citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania at their own will”).<sup>170</sup> Finally, there is a group of constitutions which frame the equality of rights of citizens and non-citizens explicitly, without any authorization of statutory exceptions.<sup>171</sup> They therefore, on the face of it, are the most rights-protective for non-citizens: it is clear that only those specific constitutional rights which are explicitly confined to citizens have a limited applicability, and that statutes cannot make any inroads into any other rights.

It is interesting to consider *what* rights are generally considered as being confined to citizens only, as opposed to those of universal applicability. Naturally, in all the constitutions, the right to vote is given to citizens only. Whenever there is an explicit right to free entry into the state,<sup>172</sup> and also a right granting protection from expulsion or extradition, it is without exception restricted to citizens. Two other rights are uniformly confined to citizens whenever they appear in constitutions: the right to publicly criticize state authorities,<sup>173</sup> and the right to provision, by the state, of adequate housing.<sup>174</sup> In addition, in relation to duties, all those constitutions which proclaim the duty to perform military service, understandably restrict this solely to citizens.

Beyond these most obvious cases where there is a uniform attribution of a right (whenever such a right is mentioned) to citizens, there is a certain variability of the range of people to whom the other rights are attributed. For example, among those constitutions which mention the right to political participation, some restrict this to citizens<sup>175</sup>, while others do not.<sup>176</sup> Similarly, other traditional

<sup>169</sup> Article 19.

<sup>170</sup> Article 32 (1). Similarly: Latvia, Czech Charter, Slovakia, Hungary,

<sup>171</sup> Estonia art. 9(1), Yugoslavia art. 66 (1), Croatia art. 15 (1).

<sup>172</sup> A representative example of such a provision being that of the constitution of Lithuania (Article 33 (3) "A citizen may not be prohibited from returning to Lithuania. (4) Every Lithuanian person may settle in Lithuania". The other examples are: Croatia (art. 32(2)); the Czech Republic (art. 14); Estonia (art. 36); Georgia (art. 22); Hungary (art. 69); Latvia (art. 98); Lithuania (art. 32); Romania (art. 25); Slovakia (art. 23(4)); Federal Republic of Yugoslavia (art. 30); and Serbia (art. 17).

<sup>173</sup> Lithuania 33 (2); Yugoslavia 44; Serbia 48.

<sup>174</sup> Albania art. 59 (1) (but note that this "right" is formulated as a goal of state policy in the Albanian constitution) and Russia 40 (3). The Russian constitution, to be sure, formulates a "right to a home" as a right of "everyone" (art. 40 (1)) but the goes on to specify the right of "low income citizens" to state provided free or low-rent accommodation, art. 40 (3).

<sup>175</sup> Croatia art. 44, Czech Charter 21, Georgia 29, Latvia 101, Lithuania 33, Slovakia 30.

<sup>176</sup> Albania, Hungary, Romania and Serbia.

political rights, such as the right of assembly and of association, are so restricted in roughly half of the constitutions which list them.<sup>177</sup> Also, the right to property and the right of freedom of movement<sup>178</sup> are citizen-only rights in roughly half of the constitutions which mention them.

There is no uniformity among socio-economic rights. Generally, provisions for aid to the weak in society (such as the old, families where the bread-winner has died, those unable to work, those unemployed through no fault of their own etc.) provide, in ten of the twelve states granting this, that it is reserved only for citizens.<sup>179</sup> It is more common to find that provisions which give the right to insurance schemes, cover all people, not just citizens.<sup>180</sup> Health care provided by the state is likewise, though less often, restricted to citizens; five of the eleven constitutions granting this right apply it specifically to citizens.<sup>181</sup> Also, five of the thirteen restrict free education in this way.<sup>182</sup> Some give no right to education at all to non-citizens,<sup>183</sup> others give a general right to education, but only guarantee free education to citizens.<sup>184</sup> The right to own land is a special case, considering the widespread fear of a 'sell-out of the country', so deeply ingrained in many CEE states. Hence, a number of the constitutions explicitly exclude foreigners from the right to acquire land.<sup>185</sup>

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<sup>177</sup> The right to assembly is limited to citizens in the constitutions of Croatia (art. 42); Lithuania (art. 36); the Federal republic of Yugoslavia (art. 40); Montenegro (art. 39) and Serbia (art. 43). The right of association restricted to citizens: Croatia (art.) 43; Lithuania (art. 35); Romania (art. 37); Montenegro (art. 40).

<sup>178</sup> A typical example is that in the constitution of the Federal Republic of Yugoslavia (mirrored in that of Serbia) in art. 30, stating that "Citizens shall be guaranteed the freedom of movement and residence and the right to leave and return to the Federal Republic of Yugoslavia." The others are those in the constitutions of Latvia (art. 97); Lithuania (art.) 32; Federal Republic of Yugoslavia (art. 30); Montenegro (art. 28) and Serbia (art. 17).

<sup>179</sup> Croatia (art. 57); the Czech Republic- article 30; Estonia- article 28; Hungary- article 70 E; Lithuania- article 52; Romania- article 43; Slovakia-article 39; Federal Republic of Yugoslavia- article 58; Montenegro-article 55; and Serbia-article 39. Albania (in article 52) and Latvia (in article 109) do, however, extend this protection to *all* people.

<sup>180</sup> E.g., the constitution of the Federal Republic of Yugoslavia- article 58

<sup>181</sup> Albania- article 55; Croatia- article 58; the Czech Republic- article 31; Lithuania- article 53; Slovakia- article 40.

<sup>182</sup> The Czech Republic- article 33; Georgia- article 35; Hungary- article 70 F; Serbia-article 32; and, in relation to higher education- Lithuania-article 41.

<sup>183</sup> For example, article 35(1) of Georgia's constitution: "Each citizen has the right to education. Freedom of choice in education is guaranteed".

<sup>184</sup> For example, article 33 of the Czech Republic's Charter, states: "(1) Everyone has the right to education. School attendance shall be obligatory for the period specified by law. (2) *Citizens* have the right to free elementary and secondary school education ... " [my italics].

<sup>185</sup> Bulgaria art. 22; Lithuania 47 art. 1; Romania art. 41; Russia art. 36; Slovenia art. 68 (2);

If one were to draw up a continuum of constitutions, ranging from those which are the most, to those which are the least “generous” in conferring rights on non-citizens, then probably nearest the most generous end of the spectrum would come the Albanian and Hungarian Constitutions, which only reserve the rights to vote, to non-expulsion and some forms of social security, to their citizens. The spectrum moves on, to include a broader selection of rights just for citizens, with many countries adding their own, idiosyncratic ideas. Thus, the Croatian Constitution, with a higher number of such restrictions adds, somewhat bizarrely that “The Republic ensures *citizens* the right to a healthy environment.”<sup>186</sup> The Montenegrin Constitution includes an unusual right and therefore an unusual restriction: “*Citizens* shall have the right to participate in regional and international non-governmental organisations. *Citizens* shall have the right to address international institutions for the purpose of protection of their freedoms and rights guaranteed under the Constitution.”<sup>187</sup>

## 2.2. Voting rights

The right to vote is phrased very similarly in all<sup>188</sup> of the constitutions. It generally proclaims: “Citizens . . . shall have the right to vote freely and to be elected to state bodies on the basis of universal, equal and direct suffrage by secret ballot”.<sup>189</sup> There is very little variation in this right, as between the different constitutions. Admittedly, some offer minor exceptions, such as for those “placed under judicial interdiction or serving a prison sentence”<sup>190</sup>, or those “declared legally incapable by court”.<sup>191</sup> Apart from these exceptions, however, the right remains similar in all constitutions of the region.

The right to vote, and the accompanying principles regarding democratic elections, triggered a number of CC cases in which the Courts had an opportunity to spell out their visions of democracy and, in some cases, replace the legislative visions by their own substantive conception. Perhaps the most striking examples of such a displacement of a legislative choice regarding a very fundamental feature of the democratic system, was the decision of the Slovak Constitution Court (discussed elsewhere in this series):<sup>192</sup> the Court rendered

Croatia art. 48 (3); Estonia art. 32 (3); Macedonia art. 31.

<sup>186</sup> Art. 69 (2), emphasis added.

<sup>187</sup> Art. 44, both emphases added.

<sup>188</sup> There is no right to vote guaranteed in the sparse constitution of Bosnia and Herzegovina.

<sup>189</sup> This wording is taken from the Constitution of Belarus, Art. 38.

<sup>190</sup> Bulgaria art. 42(1).

<sup>191</sup> This example is from article 34(3) Lithuanian constitution.

<sup>192</sup> Working Paper no. 3 in this series.



impossible the introduction of a quota system, whereby ethnic minorities would have guaranteed representation in local self-government authorities.<sup>193</sup> The Court found such a system of representation, which would mirror the ethnic composition of a local community, to be contrary to the principle of equal rights to elect one's representatives. The Court's individualist interpretation of political equality is one, certainly respectable, understanding of the democratic one-person-one-vote principle but, crucially, it is not the only one. Conflicting interpretations of this principle may be espoused by reasonable persons, and the fact that the Court made its own vision prevail over that of the legislator, raises some thorny questions about its democratic legitimacy in shaping the instruments of democracy itself.

Other decisions in the region cover a broad range of aspects of the electoral system which gave rise to challenges based on democratic principles, differently understood and interpreted. One issue which raised its head in the constitutional courts, was that of the setting up of a threshold for a political party, before it could gain seats in parliament. *In a case before the Czech CC<sup>194</sup>, it was claimed that a 5 percent threshold violates two constitutional principles. Firstly, that of proportional representation, as it disturbs the correspondence between the number of votes given for particular parties, and the allocation of seats in the parliament. Secondly, the rule that all have equal access to electoral office, because some votes, those which were given for under-5 percent parties, would benefit candidates for whom they were not given. The Court rejected both these arguments. In reference to the principle of proportionality, it explained that certain measures (such as thresholds) are introduced in many countries, in order to prevent splintering, and cannot be seen as contradicting the principle of proportional representation. As to the equality of each vote, the Court said that as long as voters know in advance who may be allocated the seats should their preferred parties not meet the five-percent requirement, the principle of the equal power of every vote and the principle of direct voting, are not contradicted. However, the bottom-line argument was that of political expediency, which requires some departures from the principles of proportionality and equality understood strictly; whilst voting aims to express voters' preferences as accurately as possible, it also has the aim of creating a parliament that has the capacity to adopt decisions. Strict proportional representation would lead to over-fragmentation, and perhaps the impossibility of forming a majority. Therefore, the Court concluded, it was reasonable to incorporate integrative factors. It shared the law-makers' view about the right*

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<sup>193</sup> Decision 18/98 of 15 October 1998, summarised in *Bull. Constit. Case Law* 3 (1998): 460-62, SVK-1998-3-010.

<sup>194</sup> Decision Pl. US 25/96, translated in *E.Eur. Case Reporter* 5 (1998): 159-75, see also [http://www.concourt.cz/angl\\_verze/doc/p-25-96.html](http://www.concourt.cz/angl_verze/doc/p-25-96.html).

*balance between the principle of proportionality and that of cohesion of the parliament. It added that any increase in the threshold may not be unlimited, but five percent was considered reasonable.*<sup>195</sup>

Various legislative limitations upon passive electoral rights –the right to stand in elections– have been subject to the scrutiny of CCs in the region. *In 1994, the Hungarian CC struck down the proposed amendment to the electoral law which stated that elected representatives of the so-called “social security self-governments” could not be put forward as candidates at the parliamentary elections.*<sup>196</sup> *As this particular dual office-holding was not listed in the Constitution as being incompatible, the amendment was considered to be contrary to the right of all citizens to be elected. Similarly, the Macedonian CC invalidated an analogous exclusion from election to local councils or mayoral office, addressed to members of the armed forces, police officers and the officers of the ministry of internal affairs and the intelligence agency.*<sup>197</sup> *In addition, the Ukrainian CC, in a wide-reaching decision which struck down a number of other provisions of the 1997 election law, invalidated the exclusion of a number of categories of people (judges, public prosecutors and state employees, etc) from running in elections. According to the statute, they could register as candidates only under the condition that they promised to terminate their employment whilst campaigning.*<sup>198</sup> *This decision also struck down the exclusion of the active electoral right –the right to vote –from those incarcerated in prisons. As the CC said, the Constitution envisaged that only those declared by a court to be incompetent may not vote, but this does not automatically encompass those sentenced to imprisonment.*

The relationship between direct and indirect democracy emerged as an issue, when certain rules regarding referenda became subject to constitutional scrutiny. *In Lithuania, in 1994, the Court considered –on the initiative of a group of MPs– an amendment to the law on referenda. This law would, in practice, make it much more difficult to adopt laws on economic issues through a referendum; they could be adopted only after economic examination of the possible*

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<sup>195</sup> Similarly, an electoral threshold (of three percent for a political party, with a variable, sliding-scale threshold for coalitions) was upheld against constitutional challenge in Romania, Decision 2/1992 of 30 June 1992, translated in *E. Europ. Case Reporter* 2 (1995): 229-36.

<sup>196</sup> Decision no. 16/1994 of 25 March 1994, *East Europ. Case Rep.* 1 (1994): 245-46.

<sup>197</sup> Decision no. 2/97 of 12 March 1997, [http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/jurisprudence\\_main.htm](http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/jurisprudence_main.htm), visited 10 May 2001.

<sup>198</sup> Decision numbers 03/3600-97, 03-3808-97, 1-12/98 of 26 January 1998, summarised in *Bull. Constit. Case Law* 1998 (1): 146-48.

consequences.<sup>199</sup> *The motive behind this constraint was understandable; as was argued before the Court, the measure would constitute only “an extra measure helping a citizen to make a decision” and “in practice, this [would be] no obstacle for the announcement of a referendum”.*<sup>200</sup> *However, the Court held that the law was contrary to Article 9 of the Constitution which stipulates that, in cases specified by law, referenda shall be announced, (it contains no provision for the possibility of additional conditions being attached, as was done in the law discussed here). Also, the Court saw this as contrary to Article 3 of the Constitution, which states : “(1) No one may limit or restrict the sovereignty of the People or make claims to the sovereign power of the people.” As the Court explained: “Without denying the citizens their right to be informed about economic and other consequences of the laws . . . adopted by referendum, various interpretations of issues submitted for referendum may be given during election campaigns, however, these may not predetermine the announcement and execution of a referendum”.*<sup>201</sup>

The acceptable subject-matter of referenda, and the relationship between different types of referenda (and between referenda and representative democracy) were the subjects of two Hungarian CC decisions, both issued in the process of providing abstract interpretations of the law. *In the first case, the Court was asked to issue an opinion about whether the dissolution of the Parliament could be decided by referendum. An initiative to that effect had already been taken by one of the political parties, which managed to collect 100,000 signatures, the number required by the Constitution for the mandatory declaration of a referendum by the Parliament.*<sup>202</sup> *The Court decided that such a referendum would be unconstitutional, as the criteria for dissolution of the Parliament are exhaustively listed in the Constitution, and a referendum does not figure among them. In the process, the Court expressed its generally hostile view as to the possible primacy of direct democracy over the representative one: “in the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is by representation”.*<sup>203</sup> *This may be explained, partly, by the extremely pro-referendum nature of the law on referenda at that time. The Act on Popular Initiatives and Referenda, of 15 June 1989, (hence, one of the first “transition laws”, even preceding constitutional changes which were made in October 1989) provided for an extraordinarily low quorum for an*

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<sup>199</sup> Decision of 22 July 1994, <http://www.lrkt.lt/1994/n4a0722a.htm>, visited 10 May 2001. There have been a number of other, less important, provisions under scrutiny regarding this amendment, some of which were upheld and other invalidated.

<sup>200</sup> Section 4.2 of the Decision.

<sup>201</sup> Section 3 of the ruling.

<sup>202</sup> Decision 2/1993 (I.22) AB discussed by Sólyom, "Introduction", at 43.

<sup>203</sup> Quoted id. at 43.

*obligatory (in the sense that the Parliament was obliged to declare it) referendum (100, 000 signatures), and a very short list of subjects exempt from referenda (tax laws, national budget etc). Indeed, it is understandable that, in June 1989, at a time when trust in parliaments was not a common emotion, the law was so referenda-friendly.*

The second important CC decision on direct democracy<sup>204</sup> was handed down in totally changed political and legal circumstances. *It took place in October 1997, after seven years of experience with an unquestionably democratically elected parliament, and against the background of the law on referenda (of 1997) which significantly tightened up, and rendered stricter, the rules for declaring referenda. ‘Obligatory referenda’ (also where the Parliament had no power to alter the wording of the question(s)) could now only occur on the initiative of 200, 000 voters. The other procedures for initiating a referendum, needing 100, 000 signatures, or the President’s, government’s or 1/3 MPs backing, left the discretion to the Parliament as to whether to call it or not.*<sup>205</sup> *In the context of the “political turmoil created by two competing initiatives for national referenda on the same question (one initiated by voters, which the Government tried to overtake with “its” referendum)”*<sup>206</sup>, *the Court established rules of precedence; an obligatory referendum (viewed as “an exceptional form of the exercise of the sovereignty of the people”)*<sup>207</sup> *takes precedence over all other types of referendum, and over acts of representative democracy. Against this background of much harsher referendum rules, and in marked contrast to the tone of its earlier decision on referenda, the Court declared that “the right to a referendum was a fundamental political right” which “was not only to be protected but the State was also obliged to provide the preconditions for its exercise”.*<sup>208</sup>

### **2.3. Freedom of petition, assembly and association**

The right of petition is present in all but four of the constitutions of the region.<sup>209</sup> It is formulated in a number of different ways. At one end of the scale is the bare right to simply be able to lodge a petition.<sup>210</sup> Others then expand this to include

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<sup>204</sup> Decision 52/1997 of 14 October 1997, excerpts in Sólyom & Brunner, *Constitutional Judiciary*, at 371-78.

<sup>205</sup> *Id.* at 43.

<sup>206</sup> Sólyom's explanatory note *id.* at 371.

<sup>207</sup> Decision 52/1974, *id.* at 371-72.

<sup>208</sup> *Id.* at 372.

<sup>209</sup> The exceptions being the constitutions of Albania, Belarus, Bosnia and Herzegovina, and Georgia.

<sup>210</sup> For example, art. 45 of the Bulgarian constitution states: “Citizens have the right to lodge

the right to receive an answer<sup>211</sup> or, more frequently, both this and the right not to suffer negative repercussions from having put forward a petition, especially when the contents of the petition are explicitly linked to criticism of the State or its agencies.<sup>212</sup> The Romanian Constitution makes more detailed provision for petition rights, saying that not only can one petition and have the right to an answer, but also that “Legally established organisations have the right to forward petitions, exclusively on behalf of the collective body they represent<sup>213</sup> and also that “The exercise of the right to petition shall be tax-exempted”<sup>214</sup> In turn, the Czech and Slovak Constitutions limit the right to petition, by saying that such petitions “must not be used to call for the violation of basic rights and liberties”<sup>215</sup> and “must not interfere with the independence of a court.”<sup>216</sup>

The right to assembly is also proclaimed in all of the constitutions. Its basic component is phrased in almost the same way everywhere: “All citizens are granted the right to peaceful assembly and protest.”<sup>217</sup> After this, the constitutions differ in the way in which this right is to be put into practice. Some state that no prior permission is required by the authorities for assemblies,<sup>218</sup> whereas others assert that at least there must be a prior notification to the authorities, of any public meetings.<sup>219</sup> A big distinction in the effect and scope of the right exists due to the exceptions that are given to it. This extends from mild limitations, such as restrictions during a state emergency or

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complaints, proposals, and petitions with the state authorities.” Similar examples are also present in the constitutions of Estonia (art. 46); Hungary (art. 64); Lithuania (art. 33); Poland (art. 63); and Russia (art. 33).

<sup>211</sup> For example, the constitution of Croatia states at art. 46: “All citizens have the right to submit petitions and complaints, to make proposals to government and other public bodies, *and to receive answers from them.*”[my italics] The other constitution that follows this model is that of Latvia (art. 104)

<sup>212</sup> See, e.g., Serbia Art. 48.

<sup>213</sup> Art. 47 (2). The Moldova constitution has a similar provision (article 52).

<sup>214</sup> Art. 47 (3).

<sup>215</sup> Slovakia Art. 27 (2), Czech Charter Art. 18 (3).

<sup>216</sup> Slovakia Art. 27 (3), Czech Charter Art. 18 (2).

<sup>217</sup> Croatia (article 42) The other examples of constitutions that contain only such a stark, basic, provision, are those of Bosnia and Herzegovina (art. 11 European Charter), Hungary (art. 62), Moldova (article 40), Lithuania (article 36); Romania (article 36); Russia (article 31) and Slovenia (article 42).

<sup>218</sup> Estonia art. 47, Bulgaria art. 43 (3) (this requirement applies in Bulgaria only to the meetings held indoors).

<sup>219</sup> Latvia (art. 103), Georgia (article 25), Ukraine (article 39), Federal Republic of Yugoslavia (article 40), Montenegro (article 39) and Serbia (article 43).

war,<sup>220</sup> to very broad limitation clauses, permitting statutory restrictions “that are necessary in a democratic society for the protection of the rights and freedoms of others, public order, health, morals, property, or the security of the state”.<sup>221</sup>

Likewise, the general right to association exists in basically the same form in all the constitutions. Two constitutions seem to depart from the general wording, by proclaiming the right to associate for certain stated purposes only.<sup>222</sup> However, this is only a semantic difference, the reasons are stated so broadly and vaguely as to cover anything. The only real additions to this basic right are that one cannot be forced to join an association<sup>223</sup>, and that the state will provide positive assistance to certain types of associations.<sup>224</sup> Once again, the difference comes with the way in which exceptions to the right are phrased. Some limit the right should it threaten the constitutional order, be promoting an unconstitutional aim, or threatening the sovereignty of the state.<sup>225</sup> Others preclude associations which attempt to induce national and ethnic hatred or unrest,<sup>226</sup> or those which establish clandestine or paramilitary structures.<sup>227</sup> Perhaps the broadest mandate for restricting the right to association is in the Polish Constitution, which provides simply: “Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited”<sup>228</sup>.

The right to association was subject to interpretation by the Estonian Constitutional Review Chamber in 1996, as a result of a petition by the President, whose initial veto to the law had been overridden by the Parliament. *The Chamber struck down as unconstitutional the Non-Profit Associations Act of 1996.*<sup>229</sup> *One ground of invalidation was the right of children to associate.*

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<sup>220</sup> Macedonia art. 21(2).

<sup>221</sup> Czech Republic art. 19 (2).

<sup>222</sup> Thus, the constitution of Croatia states, at article 43(1), that: “Citizens are guaranteed the right to free association for the purposes of protection of their interests or promotion of social, economic, political, national, cultural, and other convictions and objectives.” See also Ukraine, art. 36.

<sup>223</sup> Lithuania Art. 35(2), Russia (art. 30) and the Ukraine (art. 36).

<sup>224</sup> The constitution of Montenegro, at article 40, states: “The state shall offer assistance to political, trade union and other associations whenever there is a public interest thereof.”

<sup>225</sup> The constitutions of Albania (art. 46); Bulgaria (art. 44) Croatia (art. 43); Georgia (art. 26); and Macedonia (article 20).

<sup>226</sup> Georgia art. 26 (3), Bulgaria art. 44 (2).

<sup>227</sup> Bulgaria art. 44 (2).

<sup>228</sup> Poland art. 58(2).

<sup>229</sup> Decision No. 20 of 10 May 1996, reprinted in *East European Case Reporter of Constitutional Law* 4 (1997) 57-63, see also <http://www.nc.ee/english/const/96/4a9601i.html> visited 15 May 2001. The quotations in

*The Act confined this right to associate to “capable natural or legal persons only”, which excluded minors, while the Constitution gives this right to “everyone”, hence, the Chamber concluded, also to minors.<sup>230</sup> The second questionable provision of the Act was a provision which stated that a member may be excluded from the association, regardless of what has been provided in the statutes of that association, if he failed to comply with the rules of the association, caused substantive damage to the association, or “upon other weighty reasons”. The Chamber determined that this contravened Art.14 of the Constitution, which provides that it is the duty of the legislative to guarantee rights and freedoms. Under the Act, the legislature could not discharge this duty, because the regulation about the possibility of exclusion was “inconsistent with the nature of the right [to association] in a democratic society”.*

*In addition, the Chamber found one other faulty provision, even though it had not been challenged in the presidential petition to the Chamber. The Act provided that an association which possesses arms or performs military exercises, may be formed only on the basis of law; however, the Constitution provided that the conditions for the establishment of such association shall be provided by law (Art.48(2)). In other words, according to the Constitution, all that is necessary to form such an association is a single administrative act, while the statute implies that, e.g., each sports association practising target shooting should be authorised by Parliament with a pertinent law. As the CRC declared: “A law as a legal act of general character can not replace a permission as a single administrative act”. It is interesting that the CRC preceded this section of its scrutiny by stating that it found it necessary to go beyond the bounds of the petition on the following grounds: its own function “as the executive of the judicial power”; the public-law nature of constitutional review; the principle of autonomy of administration of justice; and the requirement of the integrity of legal analysis.*

A case on the right *not* to associate, as a corollary of freedom of association, was considered by the Constitutional Court of Lithuania, in 2000.<sup>231</sup> *Under challenge were the provisions of the Law on Associations of Apartment House Owners,*

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the main text are from the translation in that Internet site.

<sup>230</sup> Similarly, the Slovenian CC found unconstitutional a provision of the law on association which required a parent's permission for minors to join an association, Decision U-I-391/96 of 11 June 1998, translation in <http://www.us-rs.si/en/casefr.html>. In this decision, the Court did not annul the provision (because such an annulment would leave a legal gap as far as minors' enrolment in association is concerned) but ordered the legislature to remove this unconstitutionality. In the same decision, the Court (out of its own initiative) invalidated a provision, in the same statute, establishing a minimum of ten members to form an association; the Court decided that three was enough.

<sup>231</sup> Decision of 21 December 2000, see <http://www.lrkt.lt/2000/r001221.htm> visited 15 May 2001.

*which said that all persons who become owners of a house shall enter the association of apartment house owners, and this membership shall terminate when they lose their ownership rights. The Constitutional Court held these provisions to be contrary to the constitutional right to freedom of association, which proclaims also that no-one can be forced to belong to any society or association.<sup>232</sup> The provision under challenge does not give owners a free choice about entry into the association, therefore clearly contradicts this constitutional provision. As the Court stated, “the Constitution guarantees the right to decide, of one’s own free will, whether to belong or not to belong to a certain society, political party or association”.*<sup>233</sup>

It should be added, however, that the Court’s decision is remarkable in that it considered very seriously the arguments of the defenders of the statute, even though, at first blush, the conflict between the automatic membership rule and the constitutional principle of free association seems evident. Despite this, the statutory rule was defended (by the representative of Parliament) on the basis that ownership in apartment blocks gives rise to a number of obligations (for example, to take care of the communal spaces), and that the execution of these obligations is best implemented by an association of all the owners. As to free will, the representative of the Parliament argued that “a person has the right to choose as to what real property to acquire”,<sup>234</sup> once this choice has been freely made, certain consequences simply follow. In its Opinion, the Court put quite a strong emphasis on the obligations following from “the social function[s] of ownership”, and conceded that public interest dictates that certain obligations stemming from common ownership of communal spaces must be regulated. It conceded also that “[t]he establishment of the association of owners is one of possible ways to implement the right of common shared ownership”.<sup>235</sup> However, the principle of the voluntariness of joining (and leaving) associations need not be compromised in order to attain this goal. The point is to not allow the unwillingness of an individual owner to join an association to hinder the implementation of common obligations.<sup>236</sup> The Court implied that this could be done without forced membership in an association of owners.

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<sup>232</sup> Art. 35 (2).

<sup>233</sup> Part II.2 of the Decision of 21 December 2000.

<sup>234</sup> Part III of the Decision. The same argument was raised by the representative of the government, see Part IV of the Decision.

<sup>235</sup> Part II.3.1 of the Decision.

<sup>236</sup> Part II.3.3 and II.3.4 of the decision.



## 2.4. Freedom of expression

Even though Communist constitutions in CEE paid lip service to freedom of speech and freedom of the press,<sup>237</sup> it is self-evident that these rights were among those most widely abused. The Communist parties exercised their control over the societies, largely through their tight grip on what could be said, read, listened to and taught. No wonder that the demands for guarantees of freedom of expression – especially freedom of the media – were amongst the main themes of the democratic groups and movements in the region, and that these rights have been given special prominence in new constitutional charters of rights.

In all the CEE constitutions, there are extensive provisions on freedom of expression. Often freedom of the press is proclaimed separately; either as a separate right to that of freedom of expression,<sup>238</sup> or as a general principle underlying the political system.<sup>239</sup> In some constitutions, the restrictions on freedom of expression are closely modelled on Art.10 of the ECHR.<sup>240</sup> Often there are express prohibitions of censorship,<sup>241</sup> which is understandable, taking into account the bad memories of state socialism. Constitutional provisions on freedom of expression and freedom of the press differ in various CEE states when it comes to the extent of “positive” provisions about the right of access to the media, and the constitutional guarantees for media pluralism. In some constitutions, there are express provisions for free access to the media. For example, the Romanian Constitution promises that “Freedom of the press also involves the free setting up of publications” (Art.30(3)), and also provides that public broadcasters “must guarantee for any important social and political group, the exercise of the right to be on the air...” (Art.31(5)). In turn, the Georgian Constitution expressly prohibits “monopolisation of the mass media or the means of dissemination of information” (Art.24). These types of provision (free access, prohibition of monopoly) are rather exceptional. However, even if they are not textually present in other constitutions, they have, at times, been established by constitutional courts. For instance, the Lithuanian Constitutional Court, in its decision (described below) on the powers of the Board of state radio and TV to confirm the allocation of private broadcasting facilities, emphasized that it was not only freedom of information but also freedom and diversity of mass media, which needed protection. Hence, it demanded institutional

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<sup>237</sup> See, e.g., the Constitution of the People’s Republic of Poland of 1952, Art. 83.

<sup>238</sup> E.g. in Bulgaria (art. 39: freedom of expression, art. 40: freedom of the press and other media)

<sup>239</sup> E.g. in Poland, freedom of the press is included outside the constitutional charter of rights, in the first chapter of the Constitution (chapter entitled "The Republic", art. 14). Freedom of expression is proclaimed in art. 54.

<sup>240</sup> See Czech Charter, Art. 17(4).

<sup>241</sup> E.g. Bulgaria Art. 40 (1), Czech Charter Art. 17 (3), Poland Art. 54 (2)

guarantees for pluralism by prohibiting “monopolisation of means of mass media”.<sup>242</sup>

Perhaps the most significant interpretation of the general right to freedom of expression given so far in the CEE constitutional jurisprudence, was in the ruling of the Bulgarian Constitutional Court, issued as a response to a request by President Zhelev in 1996. It concerned the binding interpretation of three related constitutional provisions: on freedom of expression (Art.39), freedom of the press (Art.40), and freedom of access to information (Art.41).<sup>243</sup> The Court declared that these three rights are systematically and functionally related, and that they can only be restricted in exceptional circumstances, as stated in the Constitution. These circumstances include the cases when expression is used to the detriment of the rights and reputation of others, for the incitement of a forcible change of the constitutional order, for the perpetration of crime, or for the incitement of hostility or violence against others. The Court further explained that, of these categories of legitimate grounds for restriction, the most important is the protection of the rights, reputation and dignity of other persons, but this must not be construed so as to restrict public (as opposed to personal) criticism of politicians, public officials and governmental institutions.

As far as the restriction of speech instigating hostility is concerned, this ruling of the Bulgarian Constitutional Court stated that they are based on the values of mutual respect, but must not deny the possibility of expressing diverse and opposing opinions, which is the essence of the notion of freedom of expression. When it comes to freedom of the press, the Court explained that the express constitutional prohibition of censorship includes both formal and informal means of governmental interference with the media. While various organisational and financial aspects of broadcast media can be regulated by law, these regulations must guarantee the independence of the media. Therefore, the supervisory and governing bodies of public media must be set up in a way which frustrates any attempts at undue interference by governmental institutions. The only acceptable way of direct interference in media activities is through the judicial system, which may act only in order to protect the restricting goals set up by the Constitution. Overall, this is a very libertarian position and while, since it is an abstract interpretation of the law, its specific implications are yet to be discovered, it certainly lays out a libertarian philosophy of freedom of speech, in an enlightened and helpful way.

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<sup>242</sup> Case No. 19/94, 20 April 1995, reprinted in *East European Case Reporter of Constit. Law* 3 (1996) 61-79, <http://www.lrkt.lt/angdoc.htm> visited 15 May 2001.

<sup>243</sup> Decision 7/96 of 4 June 1996, *Bull. Const. Case L.* 1996 (2): 187-89, see also, for a discussion, Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press: Chicago, 2000) at 182-83.

### 2.4.1. Hate speech

All CEE legal systems contain restrictions upon, variously defined, incitement to hatred on racial and ethnic grounds. In this willingness to control racist or other hateful speech, CEE countries are consistent with the European tradition (contrasting with that of the United States) of willingness to restrict speech in the interests of social peace, or of the protection of the dignity of the victims of racism. This is congruent with the International Convention on the Elimination of all Forms of Racial Discrimination of 1969, to which all the CEE countries are party, and none of which made any reservation regarding its Art.4(a), which obliges States to declare, as an offense punishable by law, all dissemination of hatred and incitement to racial discrimination.<sup>244</sup> In some countries, such restrictions on freedom of speech are pronounced constitutionally. For example, the Romanian Constitution prohibits, amongst other things, “instigation of ... national ... hatred” and any “incitement to discrimination, territorial separatism...” etc<sup>245</sup>, and the Bulgarian Constitution provides that freedom of expression cannot be used for “the incitement of enmity or violence against anyone”,<sup>246</sup> etc. Significantly, the basic propriety of such restrictions, whether constitutional or statutory, has never been subject to any fundamental challenge in CEE, and the responses of constitutional courts in those cases when such laws *have* been questioned, have been by and large supportive of the idea of such restrictions.

As an example, consider the 1992 decision of the Czech Constitutional Court, which examined the Criminal Code’s prohibitions of hate speech.<sup>247</sup> *At issue were two articles: one prohibiting support for a political or social movement aimed at the suppression of the rights and freedoms of citizens, or a movement declaring national, racial, class or religious hatred (Art.260), and the other prohibiting public expressions of sympathy for the movements described in Art.260 (Art.261). In principle, the Court found no conflict between these criminal prohibitions and the constitutional principle of freedom of expression (Art.17). This was because they complied with the constitutional grounds for restrictions of the freedom of expression, being necessary for the protection of the rights and freedoms of others, for the security of the state, and for public safety. In particular, the Court rejected the argument that, by prohibiting propaganda for these movements, the State commits itself to an official ideological orthodoxy: “By no means is it the case that only a certain ‘exclusive’ ideology remains permitted merely due to the fact that the law*

<sup>244</sup> See [http://www.unhchr.ch/html/menu3/b/treaty2\\_esp.htm](http://www.unhchr.ch/html/menu3/b/treaty2_esp.htm).

<sup>245</sup> Art. 30 (7).

<sup>246</sup> Art. 39 (2); see also Art. 40 (2) (the same restriction applied to freedom of the press).

<sup>247</sup> Decision 5/92, reprinted in *E.Europ. Const. Case Rep.* 6 (1999): 1-17; see also [http://www.concourt.cz/angl\\_verze/doc/p-5-92.html](http://www.concourt.cz/angl_verze/doc/p-5-92.html), visited 7 March 2002.

*criminalizes the support for and propagation of ideologies . . . demonstrably directed at the suppression of civil rights”.*<sup>248</sup>

*The only constitutional defect that the Court found was in the second of the challenged articles. Namely, that in a newly amended version of the criminal prohibition, there was a bracketed mention of “fascist or communist movements” included. The Court said that it could have been interpreted in two ways. The first, unobjectionable, interpretation would be that these two types of movements were just examples of some, among presumably many other, movements for which expressions of sympathy were illegal, insofar as these movements met the substantive criteria listed in Art.260 (the movement being aimed at a suppression of the rights and freedoms of others, declaring racial hatred, etc). However, the bracketed mention is open also to a second interpretation; that a public expression of sympathy for communism or fascism is illegal, regardless of whether a movement supported by the person propagates racial and other hatred. The second interpretation runs counter to the constitutional protection of freedom of expression. For instance, teaching about the ideal of a classless society (as long as no violent means for bringing it about are propagated) is not criminal. As such an ambiguity of interpretation is inconsistent with the principle of legal certainty, which the Court reads into the general constitutional proclamation that the Republic is a law-based state, the bracketed mention of “fascist or communist movements” was deemed unconstitutional by the Court.*

The prohibition of incitement to hatred was the basis of the first important freedom-of-expression decision of the Hungarian CC; the one which, as Chief Justice Solyom later boasted, “opened the ‘Hungarian First Amendment jurisdiction’ [sic] of the Constitutional Court, laying down at the start a liberal, extensive interpretation of the right to the freedom of expression”.<sup>249</sup> *In this decision, the Court struck down Article 269(2) of the Penal Code (the offence of denigration of the Hungarian nation), while upholding the constitutionality of Art.269(1) (the offence of incitement to hatred).*<sup>250</sup> *As to the former, we are told by a critical commentator of the Court, that the invalidation met with criticism in some circles and “remains highly controversial both in the legal-political community and in society at large. . . . Public criticism of the [invalidation of Article 269 (2)] is based on the assumption that democracy is not yet well enough developed and that extremist speech may therefore have real consequences and even endanger the democratic order”.*<sup>251</sup> *The Court stated,*

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<sup>248</sup> Id.

<sup>249</sup> Solyom & Brunner, *Constitutional Judiciary*, supra at 229.

<sup>250</sup> Decision no. 30/1992 (V.18) AB, of 18 May 1992, reprinted in *E.Europ. Const. Case Rep* 2 (1995): 8-26.

<sup>251</sup> Andras Sajo, "Hate Speech for Hostile Hungarians", *EECR* 3 (Spring 1994): 82-87 at 84.

among other things, that “[f]or the maintenance of public peace the application of penal sanctions for the public utterance, or similar conduct, offending, disparaging or denigrating the Hungarian nation, other nationalities, peoples, creed or race is not unavoidably necessary”.<sup>252</sup> However, on a closer reading, the decision is overall more libertarian in its rhetoric than in its actual argument, as far as the reasoning concerning incitement to hatred is concerned.

At the level of rhetoric, the Court (in the opinion written by Solyom, P., and Szabo, J.) presented an impressive array of constructions supporting a very robust conception of freedom of expression: it is granted “a special place among the constitutional rights”,<sup>253</sup> it is described as a condition “of a truly vibrant society capable of development”,<sup>254</sup> the laws restricting that right must be strictly construed,<sup>255</sup> and it should be interpreted in a content-neutral manner, the right protecting opinions “irrespective of the value or veracity of [their] content”.<sup>256</sup> This is an expansive, strongly libertarian theoretical construction. Yet, in the part of the decision which supports the constitutionality of a prohibition of incitement to hatred, one is struck by how one-sided, pro-restrictive the argument is. Obviously, the incitement to hate is an extremely controversial matter, which generates a strong clash of values; the value of freedom of public speech (including speech hurtful to some groups, and having a potential to promote hostility to those groups) and the value of maintaining equal dignity and social peace among the members of different groups. The opinion by Solyom and Szabo emphasizes the latter, but gives very short shrift to the former value. While the opinion expressly cites the “clear and present danger” test for such restrictable incitement,<sup>257</sup> the test merely plays an ornamental role, because there is no hint that the prohibition in Art.269(1) is activated only when the incitement to hatred is likely to lead to violence or discrimination. Rather, the very fact of such incitement is seen as violating the rights of the victims of such speech, whether the actual consequences in the form of violence or discrimination are likely to follow or not. As some commentators have noted, under the provision upheld by the Court “[i]t is not necessary . . . that the incitement to racial hatred result in any clear and present danger”.<sup>258</sup> It is one thing to incite to “hatred”, and another to incite to

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<sup>252</sup> Decision 30/1992, *E.Europ. Const. Case Rep* 2 (1995): 8-26 at 25.

<sup>253</sup> *Id.* at 12.

<sup>254</sup> *Id.* at 13.

<sup>255</sup> *Id.* at 22.

<sup>256</sup> *Id.* at 23.

<sup>257</sup> *Id.* at 23

<sup>258</sup> Sajo, "Hate Speech", *supra* at 84; Gábor Halmai, “Criminal Law as Means Against Racist Speech? The Hungarian Legal Approach”, *Journal of Constitutional Law in Eastern and Central Europe* 4 (1997): 41-52, at 45.

“violence”, and the distinction marks an important point at which the speech ceases being merely a carrier of ideas and becomes dangerous conduct. However, this distinction is not evident in the judgment; indeed, incitement to hatred is characterized as “the emotional preparation for the use of violence” and, as such, “an abuse of the freedom of expression”.<sup>259</sup>

This was not the end of the judicial history of anti-hate speech prohibition in Hungary. After Art. 269 (2) was declared invalid by the Court as described above, the parliament “enhanced” the surviving art. 269 (1), that is, the incitement to hatred provision, by adding a provision prohibiting any act “capable of triggering incitement to hatred”. The Court invalidated this enhancement<sup>260</sup> and, in effect, art. 269 (1) was reduced to a prohibition on incitement to hatred against the Hungarian nation or against any national, ethnic, racial or religious group, taking place in front of a large audience. Following this decision, there was no attempt, on the part of the parliament, to reintroduce a wider prohibition, perhaps because it was not in the interest of the then ruling Young Democrats to alienate the extreme right-wing, xenophobic Hungarian Justice and Life Party, which had made it to the parliament in 1998. While this party was not formally a member of the governing coalition, they supported the government in most cases.<sup>261</sup>

*In May 2000, the Hungarian Court considered a challenge to Art.269(B) of the Criminal Code, which punished the public display of a swastika, an Arrow Cross (the symbol of the Hungarian fascists during World War Two), or of traditional Communist symbols (a hammer and sickle, or a red star).<sup>262</sup> The use of these symbols for educational, scientific, artistic, historical, or informational purposes was specifically exempted from the ban. The petitioners argued that the provision violated freedom of speech (Art.61(1) of the Constitution) and that the list of symbols was arbitrary and, therefore, violated the prohibition against discrimination (Art.70(A) of the Constitution). The Court placed these provisions within the framework of crimes against public peace, and argued that these symbols can induce fear in those who have suffered under past authoritarian regimes. A prohibition on such symbols is, therefore, a necessary and proportionate limitation on freedom of speech. As for the charge of the discriminatory nature of these prohibitions, the Court retorted that the list of prohibited symbols was not discriminatory, since the law did not discriminate against any persons on any grounds, it was merely concerned with the symbols. As one can see, the Court took a different approach from that of the U.S.*

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<sup>259</sup> Decision 30/1992, at 16.

<sup>260</sup> Decision 12/199.

<sup>261</sup> I am grateful to Professor Renata Uitz for this insight.

<sup>262</sup> Decision 14/2000, discussed in "Constitution Watch", *EECR* 9 (Summer 2000): 20-21.

Supreme Court's ruling on a similar subject. In a 1992 decision, the Supreme Court struck down a city ordinance that made it a misdemeanour for anyone to place on public or private property, a symbol which might arouse anger or alarm and, in example, a number of such prohibited symbols were listed, including the burning cross and swastikas.<sup>263</sup> The reason for the invalidation was that the prohibition was found "viewpoint based", in that it selected some grounds for "anger or alarm" for special protection: race, colour, creed, religion and gender. The Court found that the ordinance picked for special (and thus, discriminatory) treatment only some "distinctive ideas", conveyed by "distinctive messages".

*In a separate decision, the Hungarian Court also upheld the criminalisation of the desecration of national symbols (the national anthem, flag and coat-of-arms of Hungary), as provided for in Art.269(A) of the Criminal Code.<sup>264</sup> In its decision, the Court stated that the legal protection of national symbols was the general practice in Europe, and that it may be particularly necessary in states undergoing the transition to democracy. These national symbols, the Court emphasized, are linked in Hungary to the achievements of democratic transition, and embody the departure from communism. The protection of national symbols cannot be achieved in any other way. Hence, the restrictions meet the requirements of constitutionality.* However, it is clear that the relationship between the means and the purpose of protecting constitutional values is illusory here. If the value lies in the communicative nature of a symbol, then a ban on desecration of the symbol is, by definition, a necessary means of protecting this value. The real question should be, whether the state should protect the values of symbols which hinge upon their purely communicative impact, and prohibit behaviour which has exclusively, or predominantly, expressive character. Again, this decision shows the difference between the European approach (which the Hungarian Court evidently adopted as its own) and the US approach, where any statutory attempts to punish the desecration of the flag have so far been found unconstitutional<sup>265</sup>. This is precisely because any negative impact of desecration is deemed in the US to be attached to the expressive aspect of the conduct in question, and this places such conduct at a very high level of constitutional protection, under the First Amendment.

#### **2.4.2. Political defamation**

In the Czech Republic, President Vaclav Havel brought, in 1993, a constitutional challenge against the criminal prohibition of disparagement of the Republic, the Parliament, the government and the Constitutional Court (Art.102 of the Criminal Code). He did so on the grounds of vagueness and conflict with the

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<sup>263</sup> R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

<sup>264</sup> Decision 13/2000, discussed in "Constitution Watch", *EECR*. 9 (Summer 2000): 20-21.

<sup>265</sup> Texas v. Johnson, 491 U.S. 397 (1989), United States v. Eichman, 496 U.S. 310 (1990).

constitutional freedom of expression.<sup>266</sup> As, more recently, a judge of the Constitutional Court commented, such a prohibition could be seen as a remnant of the old Austro-Hungarian period ban on criticism of the Emperor, and as he added, “the Communists [after the Second World War] loved it”.<sup>267</sup> *In its decision, the Court adopted a Salomonic approach, drawing a line between disparagement of “the Republic” (as an abstract concept, symbolizing the State) on the one hand, and disparagement of specific state bodies protected in this provision, on the other. The Court found the former prohibition reasonable, and not lending itself to any indeterminacy. When it comes, however, to the protection of the Parliament, the government and the Constitutional Court, against “disparagement”, the Court found that this was contrary to Art.17 of the Charter of Fundamental Rights and Basic Freedoms (freedom of speech). This is because the prohibition is vague and indeterminate; it is unclear where criticism ends and disparagement begins.*<sup>268</sup> *Such a prohibition is also disproportionate to acceptable limitations to rights defined by Art.17(4) of the Charter (protecting the rights and freedoms of others, the security of the state, public safety, public health or morals), and the European Convention of Human Rights, Art.10.*<sup>269</sup> *The Court noted that “Article 10(2) of the [European] Convention allows for the protection of third persons’ reputation, and politicians enjoy this protection as well, but in such a case, the demands of protection must be moderated by the interest in the free discussion of political issues”.*<sup>270</sup>

*Much more recently, in January 2002, the Slovak CC considered a challenge against similar provisions of the Criminal Code, namely Articles 102 and 103, which penalized the defamation of the Republic, public officials or institutions.*<sup>271</sup> *The urgency of the challenge was all the more evident, since Art.103 explicitly referred to the defamation of the president of the Republic in matters related to the discharge of his official duties, and at the same time President Schuster was suing a journalist in connection with a satirical article. The Court invalidated both these provisions as threatening freedom of speech, thus making the prosecution of the journalist involved, impossible. However, as one of the MPs instrumental in bringing this petition to the Court observed, it still left another article in the Code (Art.156), which “contained similar*

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<sup>266</sup> Decision Pl. US 43/93, of 12 April 1994, in *East European Case Reporter of Constitutional Law* 5 (1998): 33-46.

<sup>267</sup> Interview with Professor Vojtech Cepl, Justice of the Constitutional Court of Czech Republic, Prague, 21 March 2002.

<sup>268</sup> Decision Pl. US 43/93 at 41-42

<sup>269</sup> *Id.* at 42-44.

<sup>270</sup> *Id.* at 44.

<sup>271</sup> "Constitution Watch", *EECR* 11 (Winter/Spring 2002), at 45-46.



language pertaining to speech directed against the country or its public officials”.<sup>272</sup>

In 1994, the Hungarian Constitutional Court handed down an important and highly libertarian decision regarding protection of public officials against defamation.<sup>273</sup> The CC struck down Article 232 of the Criminal Code (modified in 1993, hence with an already post-communist pedigree), which criminalized the defamation of public officials. Invoking the equal protection standard, the CC determined that Article 232 was unconstitutional, because it granted more protection from defamation to public officials than to private officials. In fact, the Court said that the sphere of allowable criticism must be wider for politicians (especially for the government and its officials) than it is for others. This is because the activity of government has to be examined carefully, not only by the legislative and judicial branches, but also by the press and the public. Therefore, the Constitution assumes that public officials must endure possible indignity in the interest of democratic deliberation, while at the same time keeping their right to sue in their private capacity. Further, the Court noted that the article under challenge resulted in someone committing a criminal offence even if the statement made was true. Also, if the statement was false, it was irrelevant under Art.232 whether it was made in good faith or negligently, rather than in bad faith, an observation clearly resonant of *New York Times v. Sullivan*<sup>274</sup> with its “actual malice” test for the defamation of public figures. (The impact of this US case upon that particular decision was to be later explicitly acknowledged by Justice Solyom).<sup>275</sup> Neither was the public interest in the information relevant. For all these reasons, the Court found that the article did not pass the “test of necessity”, and that it unnecessarily and disproportionately restricted the right to freedom of expression.

### 2.4.3. Freedom of the media

Specifically in relation to freedom of expression via the media, the Hungarian Court struck down, in 1992, a provision of the decree on the Hungarian Radio and TV, which aimed to subject public radio and TV to the supervision of the Council of Ministers.<sup>276</sup> The decision, as Justice Solyom later explained, “was born out of the ‘media war’ concerning the Government’s influence on the state-

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<sup>272</sup> Id. at 46.

<sup>273</sup> Decision 36/1994, of 24 June 1994, reprinted in *East European Case Reporter of Constitutional Law* 3 (1996): 148-62

<sup>274</sup> 376 U.S. 254 (1964).

<sup>275</sup> Solyom & Brunner, *Constitutional Judiciary*, supra at 12.

<sup>276</sup> Decision no. 37/1992 (VI.8) AB of 8 June 1992, reprinted in *East European Case Reporter of Constitutional Law* 2 (1995) at 27-35.

run nationwide radio and television".<sup>277</sup> The issue of control over public media was all the more important, since commercial electronic media did not exist at the time, so the governments of the day kept arguing with the opposition about which political group was favored by the public broadcasters, who enjoyed a virtual monopoly on the airwaves.

*The CC based its decision on formal and substantive grounds. Formally speaking, the amended provision of the governmental decree (Art.6 of the Decree on radio and TV) was issued after the entry into force of the Act of 1987 on Legislation, which provided that, starting from 1988, regulation of the press must be made by statute. In addition, the decree was also found inconsistent with Art 61(4) of the Constitution, which provides that the supervision of public media may only be regulated by a two-thirds majority Act. When it comes to the substance of the law, it was found contrary to the right to freedom of expression (Art.61(1) and (2) of the Constitution), the more specific right of freedom of the press and, even more specifically, the need to secure "a comprehensive, balanced and accurate reporting" by national public radio and TV.<sup>278</sup> The Court also linked the issue of the composition of the public broadcast supervisory body, to journalistic independence and freedom of expression. A quasi-consensus developed at that time, that such a body must reflect the parliamentary composition, and that the appointment and dismissal of chairpersons of public radio and TV must be backed by a consensus of the parliamentary parties, including the opposition. The Court rejected this opinion, shared at the time both by the President and by the parliamentary opposition.<sup>279</sup> As the Court explained, the creation of a joint, parliamentary/governmental board to oversee radio and TV is not acceptable, because political parties' consensus is not sufficient to guarantee the constitutional protection of freedom of opinion. Rather, freedom from the state demands that neither Parliament nor government nor political parties can exert influence over the media's programme content.*

The Bulgarian Constitutional Court handed down a number of decisions aimed at protecting the independence of the media. One of the most important was a decision which struck down new procedures for selecting a Media Council, on the basis that they tended to constitute partisan interference with national media.<sup>280</sup> This law was adopted by the Bulgarian Socialist Party legislative majority, and immediately challenged by the Union of Democratic Forces opposition. Most of the articles were struck down by the Court, including

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<sup>277</sup> Solyom & Brunner, *Constitutional Judiciary* at 239.

<sup>278</sup> *East European Case Reporter of Constitutional Law* 2 (1995) at 31.

<sup>279</sup> See Solyom, "Introduction" in Solyom & Brunner, *Constitutional Judiciary* at 14.

<sup>280</sup> Decision no. 21/1996, of 14 November 1996.

Art.25(2), which required that, in comments appearing on TV and radio, the facts “cannot be presented one-sidedly”. The importance of this decision was additionally underlined by the fact that this was the first case where proceedings were open, not in camera. The majority opinion was drafted by Justice Todorov, who was rapporteur in this case. As Justice Todorov later told me: “What guided me when I was writing a draft was the practice of the European Court of Human Rights. I argued [in the text of the decision] that you cannot prevent a journalist to make his own selection of the facts to be communicated to the audience, and that in every case you have to make a distinction between facts and the personal opinion of the journalist”.<sup>281</sup>

In 1994, the Lithuanian CC struck down some articles of the Statute of Radio and TV.<sup>282</sup> *The statute provided for a competition to lease broadcasting facilities to private broadcasters, and conferred (in Art.9(3)) upon the Board of the State Television (LRTV), the power to confirm the decision of a special commission regarding the result of such a competition. The Constitutional Court examined the role of this board, and compared its powers to those of broadcasting boards in other countries. It then stated that Art.9(3) of the statute contradicted Article 25(2) of the Constitution (the right to obtain, seek and disseminate information and ideas). The provision envisaged that the Board could veto the commission’s decision, yet the Board was not bound by any of the legal conditions in the Statute, nor were the criteria for its decision set out. This meant the board could hinder the activity of the private media and, through procrastinating over making a decision, could thus prevent the disseminating of information and ideas. Art 9(3) of the law was thus held to be unconstitutional.*

As one can see, nearly all the CC decisions on the media concerned the degree and the forms of control by the State, of the public and private media. Press law, sensu stricto, rarely reached the CCs. *One exception was a recent decision of the Hungarian CC, which found unconstitutional a provision on the right of reply in a proposed amendment to the Civil Code.*<sup>283</sup> *Under the proposed amendment, anyone could demand the publication of their opinions in the press, if they felt their rights had been infringed by a publication. The law envisaged sanctions, including court-imposed fines, against the media in the case of refusal to publish the reply. The Court, which considered the case further to a referral by the President, found the provisions for the right of reply unconstitutional; not because they violated freedom of the press per se, but rather because “the*

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<sup>281</sup> Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia 11 May 2001

<sup>282</sup> Case No. 19/94, 20 April 1995, reprinted in East European Case Reporter of Constitutional Law 3 (1996) 61-79, <http://www.lrkt.lt/angdoc.htm> visited 15 May 2001.

<sup>283</sup> Decision 57/2001 (XII. 5) of December 2001, described in "Constitution Watch", *EECR* 11 (Winter/Spring 2002): 23-24.

*language of the amendment might give rise to uncertainties and unforeseeable circumstances*".<sup>284</sup> Considering the very contingent nature of the justification, the fact that the Court was split (four justices dissented), and that the judgment was subject to strong criticism,<sup>285</sup> this is probably not the last word of the Hungarian law on this matter.

#### **2.4.4. Protecting religious sensibilities**

Mixing the issues of freedom of expression in the media with religion, one of the most controversial decisions of the Polish CT was handed down on 7 June 1994,<sup>286</sup> upholding a law of 29 December 1992 requiring respect for "Christian values" in broadcasting.<sup>287</sup> The challengers (a group of Left-wing deputies) argued that the provisions were inconsistent with freedom of expression (at the time, this freedom was deduced from Art.1 of the "Little Constitution", which proclaimed the principle of a "democratic state based on law", in connection with international human rights laws) and also with the principle of equality before the law (by privileging a particular system of religious values). Two provisions of the broadcasting law were subject to challenge: a ban (applying to all electronic media) on violating the "religious feelings" of the viewers and listeners (Art.18(2)), and a requirement (applying only to public radio and TV) to respect "those Christian values which coincide with universal moral principles" (Art.21(2)). As one sees, the latter rule, potentially much more questionable because formulated as a positive requirement, has been quite ingeniously worded so as to dispel the charge of discrimination; the mention of "coinciding with universal principles" was meant to inject a non-discriminatory and non-religious character into this provision. However, one should then ask oneself, why mention "Christian values" in the first place, if their ambit is relevant to the provision only insofar as they overlap with "universal" values? The only reason one could find for it was that the "universality" clause was a fig leaf to disguise the really pro-Christian edge of the provision.

In trying to diffuse the objection to this use of 'Christian values' terminology, the Tribunal accepted that "[t]he order to 'respect' [Christian values] cannot ... be interpreted as an order to propagate the Christian value system. The directive [in the statute] identifies the sphere of values which should not be omitted in the program of public radio and television treated in its entirety".<sup>288</sup> This must be

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<sup>284</sup> Not the Court's words but a summary in "Constitution Watch", id. at 22.

<sup>285</sup> Id. at 22

<sup>286</sup> Decision K. 17/93, reprinted in *East European Case Reporter of Constitutional Law* 5 (1998) 55-66.

<sup>287</sup> For a critique of the law, see Irena Grudzinska Gross, "Broadcasting Values", *EECR* 2 (Summer 1993): 51-53.

<sup>288</sup> Decision K. 17/93 at 61.

seen as an attempt to restrict the impact of the provision, especially since earlier, the Catholic Church's Conference of Bishops issued its own authoritative interpretation of "Christian values" (explicitly for the purpose of the interpretation of this law), in which it attacked such phenomena as homosexuality, divorce, abortion etc. as inconsistent with "Christian values".<sup>289</sup> The Tribunal explicitly referred to the principle of "religious neutrality" and, on this basis, announced that the Art.21(2) requirement was meant to identify "those values belonging to the realm of Christian culture which are at the same time fundamental, universal moral principles".

As far as the other, less problematic provision was concerned, the Tribunal announced that the prohibition against violating religious sensitivities is related to the constitutional principle of freedom of religion, and that "religious feelings, due to their nature, are subject to special legal protection". As far as objections as to any discriminatory nature of this special protection for Christian values, the Tribunal defended the law by saying that the law did not "differentiate" between the protection of religious feelings depending on what religion it is, and that the mention of Christian values plays the role only of an example. The Tribunal reinterpreted the law in a way which injected it with a non-discriminatory character as between various religions. However, in the context of Poland, with its very strong domination by Roman Catholicism, this is perhaps not as important as is the broader question of the problems related to the elevation of religion as such, as an object of special protection in the media. This, as was argued in the Polish press at the time, might have a chilling effect on any public debates which touch upon religious issues. The argument was made also, that an undue protection of religious sensitivities (any religious sensitivities) may have an unfortunate effect upon, not just freedom of expression, but also in its promoting of an attitude of undue sensitivity in response to any public statements which clash with our deep convictions, it might lead to attitudes and behavior inconsistent with a liberal-democratic society. However, with the benefit of hindsight one should say, in all fairness, that these provisions have turned out to be relatively toothless, so far. Nevertheless, the "chilling" potential of the statute cannot be totally disregarded.<sup>290</sup>

It should also be noted that, even before the June 1994 decision, the same law had been subject to an "interpretative decision" handed down as a response to

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<sup>289</sup> See Grudzinska Gross, "Broadcasting", *supra* at 53.

<sup>290</sup> The law was criticized by Helsinki Watch, an international human rights NGO, which said that the provisions would "chill legitimate speech as broadcasters are forced to censor themselves to fit within the undefined boundaries of the law", quoted in Mark F. Brzezinski, "Constitutionalism and Post-Communist Polish Politics", *Loy. L.A. Int'l & Comp. L.J.* 20 (1998): 433-53 at 445 n. 38.

the request (but not challenge) by the Chief Justice of the Supreme Court. In a decision handed down on 2 March 1994,<sup>291</sup> the Constitutional Tribunal explained that the provisions of Art.21 cannot be understood as mandating prior restraint, because this would amount to an impermissible restriction of freedom of speech. Also, further limiting the possible negative impact of the law, the Constitutional Tribunal explained that the programs broadcast by public radio and TV (to which Art.21 applied) should be considered in their “entirety”, and so whether they properly respect religious sensibilities and, in particular, the “Christian system of values”, is not a matter which can be ascertained with respect to any particular broadcast taken in isolation from others. In conclusion, while the Constitutional Tribunal abstained from striking down the law, which is extremely problematic from the point of view of freedom of expression, one should acknowledge that in its two decisions on the matter, the Tribunal went a long way towards disarming its chilling effects.

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<sup>291</sup> Decision W. 3/93.