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Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe
Part III:
Equality and Minority Rights

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

Equality and Minority Rights

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This is the third 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 to the series, see the first working paper in the series.

1. Equality and Non Discrimination

1.1. Introduction: Equality and Constitutional Review

The equality and anti-discrimination clauses have been among the most frequently used constitutional provisions in the process of constitutional review in Central and Eastern Europe (CEE). This is understandable. First, those provisions are eminently malleable, "open-ended", and lend themselves to application in virtually all spheres of laws and policies. Second, when constitutional courts are selecting the substantive rights provision under which they will consider a matter they will often have a choice between a socio-economic right and an equality provision. This choice is often open in challenges related to socio-economic rights and the selection of the equality provision as a basis for a review has the advantage of appearing less controversial, less "activist" than if a particular socio-economic right were to be appealed to directly.[1] Further, the rhetoric of equality has been particularly popular in the post-communist states of CEE, due to the emergence of greater inequality associated with the emergence of market economy, coupled with ingrained egalitarian societal attitudes. This explains the inclination of constitutional courts to use the equality provisions generously.

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[1] See, e.g., with reference to Bulgarian Constitutional Court, Venelin Ganev, "Bulgaria: The (Ir)Relevance of Post-communist Constitutionalism", in Jan Zielonka, ed., *Democratic Consolidation in Eastern Europe*, vol. I: *Institutional Engineering* (Oxford University Press: Oxford, 2001): 186-211 at 198.

It is, therefore, useful to give a brief account of the design of equality provisions in the constitutions of the region. Two techniques are used: either a general statement about equality (or prohibition of discrimination, which are treated interchangeably), or a general provision on equality with the list of specific grounds of prohibited discrimination. The first technique is used by a small minority of the constitutions in the region: Poland, Latvia and Belarus belong to this category. As an example, Polish Constitution proclaims: "All persons shall be equal before the law. All shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever".[2] As one may see from this, the prohibition of discrimination is worded more broadly than the right to equal protection (the former being applicable also "horizontally", not only vis-à-vis public authorities) but no grounds for unlawful discrimination are given. In consequence, the reach of the anti-discrimination rule is theoretically unlimited, and therefore its vagueness is obvious: what important phenomena cannot be subsumed under the notions of "political, social or economic life"? Similarly, the Latvian constitution states: "All persons in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind".[3] Again, no hints as to what constitutes "discrimination" are provided but the vagueness of the prohibition is somewhat reduced by applying it only to the protection of "human rights", and not to any legitimate interests of individuals. The broadest formulation is perhaps to be found in the Constitution of Belarus which states: "All shall be equal before the law and entitled, without discrimination, to equal protection of their rights and legitimate interests".[4]

In contrast, a great majority of the CEE constitutions attach a list of specific grounds of prohibited discrimination to the general equality provisions. These characteristics are strikingly similar: out of seventeen constitutions belonging to this category, all prohibit discrimination based on race, gender and religion; all but one mention language, political opinion and social status; and all but two mention nationality. Other frequently listed grounds of prohibited discrimination include nationality (in 15 constitutions), property (13) and ethnic or other origin (11). Less than half of those constitutional provisions mention birth (8) and education (6) as grounds of prohibited discrimination. It is interesting to note that there is one great and obvious absentee, namely, sexual orientation. It is significant that not one of the constitutional charters of rights in CEE which make an effort of listing grounds of prohibited discrimination mentions sexual orientation. This clearly reflects the widespread ambiguity – often, outright

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[2] Art. 32.

[3] Art. 89.

[4] Art. 22.

hostility – in attitudes towards homosexuality in CEE.[5] There were powerful counter-incentives acting to prevent constitution drafters proposing, or supporting, inclusion of the explicit prohibition of discrimination based on sexual orientation: such a proposal was unlikely to find favour among the majority of voters, and certainly would be ridiculed and rejected by powerful traditionalist groups (such as the Catholic church and related political forces). It does not follow that anti-homosexual legislation necessarily passes constitutional muster in those countries: as the Romanian[6] and Hungarian[7] Constitutional Courts' decisions show, this isn't necessarily the case. But in order to find constitutional arguments against such proposed or actual legislation, its opponents must look into the general equality provisions rather than into specific prohibitions of certain grounds as discriminatory.

In fact, this omission is not surprising, given that a number of the constitutions which do list specific grounds of prohibited discrimination provide also, at the end of these lists, that "any other reasons" for discrimination are also prohibited, thus making the list explicitly non-exhaustive.[8] Anti-discrimination provisions in these constitutions are therefore "open" in two ways. First, by allowing any other, unspecified reasons, to count as impermissible grounds for discrimination. Second, by attaching the lists of specific grounds for prohibited discriminations to the more general equality statements and prohibitions of discrimination: since equality is violated by any classification which relates a specific treatment to personal characteristics which are irrelevant to that treatment, or where they may be relevant but there is no proportionality between the characteristic and the different treatment,[9] the lists of prohibited grounds for discrimination may be

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[5] For statistics about anti-homosexual attitudes in Poland, see e.g. Helsinki Committee for Human Rights, "Gender Equality: Legal and Institutional Framework On Women's Rights and Equal Opportunities; De Jure And De Facto Discrimination In Poland", *Polish Law Journal* 6 (2001): 149-228 at 216 (for instance, according to a 1996 survey, only 25 percent of respondents said that homosexuals should be allowed to hold high public offices while as many as 63 percent would not accept homosexuals in high public positions. 71 percent of respondents would not permit homosexuals to be teachers; 71 percent excluded the possibility of a homosexual marriage, and 88 percent would not permit adoption by same-sex couples, id. at 216-17).

[6] Decision no. 81 of 15 July 1994, striking down the Criminal Code's prohibition of homosexual intercourse.

[7] Decision 14/1995 of 15 March 1995, striking down a rule of the civil code which defined "domestic partnership" as a woman and a man living together in a common household outside marriage.

[8] This is the case of seven constitutions in the region: Bosnia Herzegovina (in the European Convention), Croatia, the Czech Republic, Estonia, Hungary, Russia and Slovakia. In addition, three other constitutions (those of Slovenia, Serbia and Yugoslavia) state that "any other *personal* reasons" are also impermissible grounds for discrimination.

[9] See, generally, Wojciech Sadurski, "The Concept of Legal Equality and an Underlying

seen as redundant. Hence, what role do they actually play? One can venture two hypotheses. One, that notwithstanding the open character of the prohibition of discrimination, some discriminations are viewed as being worse than others, and that those which treat people unfairly on those enumerated grounds belong to particularly egregious kinds of discrimination. Such an explanation would make sense provided that there was a clear and obvious common denominator between those grounds of prohibited discrimination which would point at the common rationale for our hostility towards classifications based on that rationale. But there is none. Clearly, the immutability of personal characteristics which form a basis for discrimination is not such a common denominator: among the three universally listed grounds for prohibited discrimination, two are immutable (race and gender) and the third is not (religion; the same applies to political opinion which is listed quasi-universally). The second hypothesis is perhaps more cynical but likely to be realistic: the catalogues of prohibited grounds serve a rhetorical purpose of symbolically conveying a message to the population that constitutional drafters are not misogynist, not racist, not religious bigots etc. This is harmless enough; however, it shows that the actual constitutional value of those lists is extremely limited.

Polish Constitutional Tribunal (CT) worked out a relatively elaborate theory of equality-based scrutiny, focusing on the point that equality before the law is compatible with the fact of legal differentiation as long as the differences in treatment are related to the relevant differences of the subjects. Already in its early judgments it had adopted the idea that equality before the law does not imply that all rights must be equal for everyone, and that "for the law to be just, it cannot avoid making certain differentiations in the form of particular rules addressed to some groups and class of citizens. . . . The reasoning about equality in law therefore collapses into the evaluation of adopting a particular classificatory criterion as justified and as just".[10] Perhaps the most developed definition that it has given is: "If the different treatment of similar subjects introduced by a regulation is one of the purposes pursued by the legislator; if the implementation of these purposes finds its justification in other [than equality] constitutional rules, principles or values (and in particular, in the principle of social justice); and if the departure from the principle of equality is proportionate to the importance of this purpose, then a different treatment of similar situations cannot be viewed as discriminatory (or privileging)".[11] As is clear, the

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Theory of Discrimination", *Saint Louis-Warsaw Transatlantic Law Journal* (1998): 63-104.

[10] Decision K. 6/89 of 24 October 1989 (the text on file with the author) at 6. I should add that, in this context, the CT is referring to my own book, *Teoria sprawiedliwości* (PWN: Warszawa 1988) at 94.

[11] Decision U. 1/96 of 16 December 1996, discussed in Aldona Domańska, "Analiza treści konstytucyjnej zasady równości w oparciu o wybrane orzeczenia Trybunału Konstytucyjnego", *Studia Prawno-Ekonomiczne* 62 (2000): 47-58 at 51.

identification of the "relevance" of a subject's characteristic to the goal pursued is the cornerstone of this analysis, but as the question of what characteristics are relevant to particular purposes is essentially an open-ended one, implicating as it does either moral or policy issues, the equality scrutiny opens up a broad field for discretion by a court exercising judicial review of statutes. From this respect, it is significant that the CT described the principle of equality as derivative from the principle of social justice.[12] It shows that, since views about social justice are essentially contestable and largely indeterminate, so are conclusions about whether a given regulation complies with the constitutional principle of equality. CT used this conceptual device to strike down a number of socio-economic regulations, such as the laws about "indexation" of pensions (i.e., adjustment of pensions to the rise of cost of living): upper limits imposed upon pension payments were found to be inconsistent with the principle of social justice, and *hence* with equality.[13]

There have been, however, some decisions in which the CT attempted to narrow down the scope of the characteristics which may be deemed "relevant", by appealing at times to the concept of immutability (albeit without saying so) as an indicium of a forbidden characteristic. For instance, in its early decision of 1987 which struck down gender quotas in admissions of students to the medical academy, the Tribunal pronounced the principle that equality "in the field of law" is respected "when every citizen *may become* an addressee of each [legal] rule conferring a certain civil right".[14] The upshot is that it is improper to differentiate among citizens with regard to such criteria (as gender) which lead to the creation of closed (caste-like) categories of citizens.[15] This has not been, however, an argument to be developed or even repeated in the decisions of the CT in later years, and the theory adopted by the CT has relied on the more open-ended concept of the relevance of the distinction to the purpose of a rule.

1.2. Gender equality

Just as the last example shows, decisions related to gender equality belong to the most important in the equality jurisprudence of the constitutional courts in CEE. No wonder: old Communist laws and rhetoric paid a lip service to the ideal of equality of men and women while maintaining, and often petrifying, traditional social norms of inequality and discrimination against women. Modern ideas about the equality of men and women, especially in the workforce and in political life, collide with traditional attitudes and prejudices. As a result, various forms of

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[12] See e.g. Decision K. 7/90 of 22 August 1990, discussed id. at 53.

[13] Decision K. 14/91 of 11 February 1992, discussed id. at 53.

[14] Decision no. P. 2/87 of 3 March 1987 (the text of the decision on file with the author), pp. 12-13 (italics added).

[15] Domańska, "Analiza", at 52.

discrimination against women, both in the legal system and in society, have persisted. One obvious area is in the sphere of employment, with a disproportionately small number of women in higher managerial positions, with the average remuneration of women well below that of men (e.g. in Poland the average remuneration of women constitutes 75 percent of men's), with no equal pay for equal work, and with a tendency widespread among employers to follow discriminatory practices, such as demanding pregnancy tests prior to hiring a woman.[16] Often the discrimination results not so much from formal legal rules but from societal norms and prejudices, such as a strong conviction persisting in the countries of the region about the existence of "feminine" (secretaries, cleaners, etc) and "masculine" (engineers, managers) professions and positions.[17] There is also a dramatic under-representation of women in politics: in parliamentary and local legislative bodies, in governments, in top judicial bodies, etc.[18]

One example of such discrimination, traditionally taken as allegedly reflecting self-evident differences between men and women, concerns the differences in compulsory retirement age, which in most countries in the region has usually been about five years less for women than for men. The most progressive in this regard turned out to be the Polish CT. Beginning with 1991 when it abolished a differential retirement age in academic positions,[19] it subsequently took several decisions, striking down particular statutes which provided for a lower compulsory retirement age for women than for men, e.g. for employees of pharmacies,[20] for civil servants,[21] and for teachers.[22]

In this series of decisions, the most elaborate and interesting is the one which struck down the earlier retirement age for women than men in civil service, and at the same time established the grounds of permissible positive discrimination.[23] *Under challenge was the rule of a 1996 statute about the civil service which*

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[16] On Poland, see Helsinki Committee, "Gender Equality", supra at 156. According to Eleonora Zielińska of University of Warsaw, the difference in average wages between men and women in Poland varies between 30 and 40 percent, see "Praw kobiet nie wprowadzimy czarodziejską różdżką" (Interview with Professor Zielińska), "Rzeczpospolita" (Warsaw) 17 April 2002, at A9.

[17] Helsinki Committee, "Gender Equality". at 163.

[18] For statistics in Poland, see id. at 190-91.

[19] Decision Kw. 5/91 of 24 September 1991.

[20] Decision K 15/99 of 13 June 2000.

[21] Decision K. 15/97 of 29 September 1997; Decision K 35/99 of 5 December 2000.

[22] Decision K 27/99 of 28 March 2000.

[23] Decision K. 15/97 of 29 September 1997, *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997* (C.H. Beck: Warszawa 1998) at 367-86.

allowed the discharge of a female civil servant at the age of 60, against her will, (that is five years earlier than a non-voluntary discharge of a male civil servant). In this decision, the CT criticized an earlier decision of the Supreme Court (SC) in an analogous matter in which the SC found no discrimination in an earlier discharge age for women on the basis of the theory that such a disadvantage for women is counter-balanced by the respective advantages which they receive, namely, an earlier acquisition of retirement pension benefits.[24] *The SC then argued that no discrimination exists when the different treatment was relevant to the different positions of the addressees of a rule, and the relevant differences here applied not only to "biological and social differences" but also to those established by the law, namely, the legal privileges that only women enjoy (such as earlier pension benefits). According to the SC, the benefits for women outweigh the disadvantages, and so, in the words of the SC "the reasons which support a more advantageous status vis-à-vis pension benefits for women . . . argue for a differential regulation of the situation of both these categories of persons [women and men] with regard to the possibility of their discharge, and in any event can be sufficient evidence to deny the charge of discrimination against women".*[25] *The CT has categorically rejected this theory. At the beginning it reasserted its earlier pronouncements on gender equality which had established the principle that departures from equal treatment can only be legitimate where they may be justified by "a desire to achieve actual social equality [between men and women]"*[26] *It is constitutionally acceptable, the CT said, to establish a different legal status for men and women insofar as it is based on the principle of social justice which demands that women are offered equal positions compared to men. This is an explicit articulation of the principle of affirmative action: "since in social reality women, as a rule, have weaker positions . . . there is a constitutional justification for enacting rules which confer certain benefits upon women because this is an instrument leading to actual equality for women".*[27]*. The CT even went a step further and said that when social and biological differences between men and women are particularly pronounced, the enactment of such "compensatory privileges" is a duty of the legislator.*[28] *Having so defined the principle of positive discrimination, the CT rejected the SC's theory about the mutual balancing of the privileges and*

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[24] The decision of the SC of 14 May 1996, discussed and cited in the decision of CT 15/97, id. at 373-74. The Supreme Court had considered the matter not from the point of view of constitutionality of the relevant rule but as a top judicial appellate body, in the process of so-called "extraordinary appeal" from a decision of the Supreme Administrative Court (NSA) which had considered the matter in 1993.

[25] Id., cited at 373-74.

[26] Id. at 376, quoting its decision P. 2/87 of 3 March 1987.

[27] Id. at 378

[28] Id. at 378.

disadvantages for women. It said: "there are no constitutional grounds to accept the thesis that if the legal position of a female employee displays in a particular respect a privilege vis-à-vis the position of males, then the principle of equality allows (or perhaps even, demands) a balancing of this privilege by an imposition upon women of certain duties which do not apply to men".[29] *There is no requirement of an overall equal balance of benefits and duties of employees of both sexes, the CT emphasized.*[30] *A parallel argument does not apply to men, the CT added, because "in Poland these days there are no grounds for treating men as a weaker social group".*[31] *That is why the rule of an earlier discharge is discriminatory and this discriminatory character is not redeemed by a benefit consisting in an earlier acquisition of old-age pension benefits.*[32] One should emphasize the particularly progressive and enlightened character of this (relatively unknown) decision. The CT rejected, not in so many words, a spurious doctrine of the "equivalence" of compensatory privileges for women and men thus adopting a context-sensitive approach in which lawmakers are sensitive to the actual pattern of disadvantages in their society. Further, it rested its theory justifying affirmative action (again, without making it explicit) upon a goal of "genuine" (or "fair", in Rawlsian terms) equality of opportunity which sees actual material inequalities as relevant to inequalities of opportunity in a society of systemic inequalities.

In a somewhat different context, the Hungarian CC appealed explicitly to the notion of "positive discrimination" in favour of women when rejecting a complaint by a man who challenged a gender distinction with regard to military service: since women were not compelled to serve in the army, he claimed, they received an unfair legal benefit.[33] *The Court explained that this distinction amounted to a "positive discrimination" aimed at achieving eventually greater equality; though, as a commentator (otherwise very sympathetic to the Hungarian Court) caustically observed, the Court "did not explain why excluding women from military ranks constitutes 'positive discrimination', or how exclusion would lead to greater equality in the long-term…".*[34]

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[29] Id. at 381.

[30] Id. at 381.

[31] Id. at 381.

[32] Id. at 382.

[33] Decision 9/1990, discussed in Kim Lane Scheppele, "Women's Rights in Eastern Europe", *EECR* 4:1 (Winter 1995): 66-69 at 69.

[34] Id. at 69.

1.3. Sexual orientation

As mentioned above, anti-homosexual prejudice and hostility is quite widespread in the CEE region. In particular, those inspired by the teaching of Catholic Church display a hostile approach to homosexuality, considering it as a deviation and a threat to the moral fabric of society.[35] Apart from societal hostility, formal legal rules generally discriminate against homosexuals, especially in family and succession law: there is no possibility of registering gay marriages, nor any possibility of persons living in homosexual relationships having family member status for the purpose of taxation, inheritance, social assistance, etc.

In the most important decision on the question of sexual orientation in the region, the Hungarian Court struck down the legal non-recognition of a homosexual de facto relationship qua "a common household" but at the same time upheld the rule of heterosexual-only marriages.[36] Under challenge were two provisions: a family law provision which defined marriage as a union between a man and a woman, and a civil code provision which defined domestic partnership as a woman and man living in a common household outside marriage. As to the question of the legal definition of "marriage", the Court based its decision on the basis of traditional understanding "both in our culture and in law" of the institution of marriage as a heterosexual union.[37] One might object of course that the traditional understanding of marriage in law is precisely what is at issue here, and so cannot figure both as an evidence and as a conclusion. But surely one would not expect the Hungarian Constitutional Court to be the first legal authority in the world at that time to recognize same-sex marriages, and its relative conservatism with regard to the notion of marriage is counterbalanced by its liberalism with regard to the second issue in this decision, namely, to the de facto relationship. In this respect, the Court linked its reasoning with the principle of equal personal dignity which must apply to any union of two persons living together, regardless of their gender. To deny legal recognition to same-sex couples is a case of "negative discrimination" because "[t]he cohabitation of persons of the same sex . . . [is] in all respects . . . very similar to the cohabitation of [heterosexual] partners in a domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship,

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[35] For examples of such publicly stated views in Poland, see Helsinki Committee, "Gender Equality", supra at 218-19.

[36] Decision 14/1995 of 13 March 1995, translated in *East European Case Reporter of Constitutional Law* 2 (1995) at 194-200, and in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press: Ann Arbor, 2000) at 316-22.

[37] Id. at 318.

and taking on all aspects against third persons . . .”[38] *Such a legal exclusion “is arbitrary and thus violates human dignity; therefore it is discriminatory. . . “.*[39] *This compelled the Parliament to amend certain laws, including the Civil Code, in order to allow succession of property within homosexual de facto couples.*

A relatively minor but symbolically meaningful decision of the Hungarian CC of 1999 struck down as unconstitutional a provision of the Criminal Code which penalized “normal” heterosexual intercourse between siblings and “unnatural” homosexual intercourse between siblings.[40] *“Unnatural” heterosexual intercourse between siblings was not singled out in the code, and on this basis the Court struck down the provision saying (with two judges offering dissenting opinions) that it differentiated arbitrarily between “unnatural” sexual intercourse between siblings of the same, and of different, sex. (The same Court also dealt, more generally, with the issue of homosexuality in its decision regarding the membership of minors in associations of homosexuals).*[41]

A much more fundamental, and more objectionable form of discrimination, was invalidated by the Romanian Constitutional Court which struck down, in 1994, a Criminal Code provision (art. 200) prohibiting homosexuality even in private.[42] *The matter came to the Court in the process of concrete review, at the insistence of two indicted men charged with the offence under art. 200. They claimed that art. 200 violated several articles of the Romanian Constitution*[43] *as well as art. 8 [right to privacy] of the European Convention on Human Rights (ECHR); the trial court, for its part, thought that the challenged penal law provision did not violate the Constitution because it defended public order and “good morals”, hence, the values protected by the Constitution (art. 26). In accordance with the usual procedure in such cases, the CC asked the government and both chambers for their views; the only substantive response came from the government which defended the penal prohibition under the constitutional exception to the right of privacy which refers to the “rules of conduct of the other members of society” as well as “the general moral sense”. Ditto for the government’s reading of the*

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[38] Id. at 320.

[39] Id. at 320.

[40] Decision of 25 June 1999, no. 20/1999, summarized in *Bull. Const. Case-Law* 1999 (3): 389-90, no. HUN-1999-3-005.

[41] See Working Paper No. 4 in this series.

[42] Decision no. 81 of 15 July 1994, *Curtea Constituțională - Decizii de Constatare a Neconstituționalității, 1992-1998* (Editura Militară: Bucureşti, 1999): 335-39. The quotations that follow are from the English translation of the Decision, on file with the author.

[43] Articles 11 (treaties ratified by the Parliament become part of the domestic law), 20 (precedence of ratified international covenants on human rights over domestic law, in cases of the conflict), and 26 (right to privacy).

ECHR: the limits on the right to privacy in art. 8 include interference based on the protection of public order and morals. CC was therefore confronted with a traditionalist viewpoint whereby the right to act in accordance with one's sexual orientation has to surrender to the majority's views about the proper rules of conduct, moral sense, etc. And to reinforce this stance, a number of religious groups and churches (which were also asked to express their opinion) "condemned drastically homosexual acts, the majority of them asking for maintaining the criminal prosecution of these practices". On the other hand, a number of NGOs, both Romanian (e.g. the Romanian Institute for Human Rights and the Helsinki Committee) and international (including International Commission of Jurists and Amnesty International) provided the Court with their negative opinion about art. 200 and asked for its abolition. Faced with all this, the Constitutional Court decided purely on the grounds of inconsistency of art. 200 with art. 8 of the ECHR as interpreted in the line of cases on sexual orientation by the Strasbourg Court. On the grounds that Romanian constitutional provisions have to be interpreted in accordance with the treaties to which Romania is a party, and that Romania is a party to the ECHR, the Court saw its duty to remove the inconsistency between the anti-homosexual penal law provision and art. 8 of the ECHR. At the same time, it was careful to emphasize that the art. 8 protection applies only to homosexual acts among consenting adults in private "under the condition that they do not provoke public scandal". It seems to be implied by the Court that the last proviso (public scandal) may be activated only when the act is committed in public and not when it is committed in private by other people who somehow find out about a homosexual intercourse and become shocked or outraged. The latter interpretation (public scandal produced by a private act) would of course render the whole argument meaningless. Unfortunately, such an interpretation is not explicitly rejected by the Court: the public scandal proviso is listed in addition to the other conditions which would render the act actionable,[44] *and this small ambiguity is perhaps a sign of the Court's effort to appear more moderate than it in fact was when striking down the anti-homosexual provision.*

1.4. Nationality

There have been some interesting decisions related to discrimination based on nationality. Not surprisingly, they occurred chiefly in post-Yugoslav states,[45] and

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[44] In the words of the Court, art. 200 is unconstitutional in so far as it applies "to same-sex relations between adult consenting persons, that are not committed in public and do not produce public scandal".

[45] Apart from the Slovene decision mentioned in the main text, consider e.g. the decision of the Croatian CC of 21 April 1999, no. U-III-673/1996, summarised in *Bull. Const. Case-Law* 1999 (1) at 34, no. CRO-1999-1-005, in which the Court struck down a provision of the law on compensation for property taken away during the Yugoslav Communist rule, which provided for different treatment of Croatian nationals and non-nationals in relation to the

also in the Russian Federation, with respect to its ethnically-based sub-units.[46] *The Slovenian CC decision regarding compensation for the victims of the Communist regime is very interesting in this regard.*[47] *The Redress of Injustices Act established two categories of "former political prisoners" in the period before the democratic transition. The first included those who were on the territory of the present Republic of Slovenia, and were improperly sentenced or arrested for political reasons (art. 2(1)). The second category included all persons of Slovenian national origin who were convicted by courts of other Yugoslav republics or the former Yugoslav Federation, as long as they resided in the territory of the present Republic of Slovenia at the time of coming into force of this law, and are Slovenian citizens (art. 2 (3)). The law stated that all such persons are also considered to be former political prisoners. It was this second category, namely that persons must also have Slovenian national origin in order to be included within Art. 2 (3) category which the Court found problematic. The Constitutional Court held that drawing a distinction between persons convicted on the territory of the present Republic of Slovenia and those convicted by other republics or the former Yugoslav Federation, was not contrary to the principle of equality before the law contained in Article 14(2) of the Constitution. However, where someone has asserted that they are a former political prisoner within that second category (i.e., that they have been convicted by other republics or the Former Yugoslav Federation), the law was not allowed to make differentiations on the basis of personal characteristics, such as being of Slovenian national origin.*

1.5. Arbitrary distinctions in economic and social policy

A great majority of the decisions of CCs taken under equality provisions do not implicate any of the prohibited grounds of invidious discrimination but rather challenge the rationality of legal classifications employed in various areas of social-economic policy: in taxation, pensions, unemployment and welfare benefits, etc. They can be considered to be the more routine, less obvious cases of discrimination where no suspicion of intention of the legislator to act to the prejudice of a specific group – women, ethnic minorities, people of unpopular sexual orientation – is justified but rather where a socio-economic choice is

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scope of property rights in this context.

[46] See, e.g. Decision of the Russian Constitutional Court of 24 June 1997, http://ks.rfnet.ru/english/codicese.htm visited 8 May 2001. The Court struck down, as inconsistent with the Russian Constitution's equality provision (art. 19 (2)) a rule of the Constitution of Khakassia which provided that only citizens of the Khakassian Republic who have been permanently resident there for the last five years may be elected to the Supreme Council of that Republic.

[47] Decision U-I-371/96 of 23 September 1998, summarized in *Bull. Const. Case Law* 3 (1998): 463-65.

questioned by the constitutional courts based on its perceived irrationality or arbitrariness.

As an example of such a decision, among a great number of decisions of this kind, consider the verdict of the Croatian CC concerning the calculation of pensions.[48] *Under the Retirement Fund and Insurance of Workers statute, pensions were calculated on the basis of net earnings. As a result, insured persons, who earned the same wages and paid the same contributions to the insurance fund, actually received different amounts of pensions because they could claim deductions from their taxable income. They were therefore privileged. The Court established that the amount of the pension should be determined only by the person's contribution to social security funds, and that the number of dependents of a retired person and his ensuing tax exemptions should not affect the pension.*

An interesting case on pensions for war veterans was brought in 1994 before the Romanian CC.[49] *Under challenge was a statutory provision which excluded those who had fought against the Romanian Army from receiving veteran benefits. The Constitutional Court ascertained that this section related to those persons who were compulsorily conscripted into the Magyar army (since they lived in territory that was temporarily occupied). It was thus impossible for the Romanian army to have conscripted them at that date. According to the government who defended the legislation before the Court, whether the Romanians fighting in the enemy armies were volunteers or forcibly drafted was irrelevant: the argument against granting them war veteran benefits was presented as a "moral" one as "it would be inconceivable that the Romanian state should give rights to the people who infringed upon its independence and integrity".*[50] *The Court, however, rejected this argument: since the obligation (to fight for, and not against, one's own army) was impossible some to fulfil, this law is discriminatory towards those conscripted in the Magyar army. It thus contradicts Article 16(1) of the Constitution, which states; "Citizens are equal before the law and public authorities, without any privileges or discriminations". However, it is interesting that the Court felt compelled to make the following statement in its opinion, probably as a concession to the Government and to rebut the possible objections of insufficient patriotism: "The arguments [by the government] involved in the combat of claims [sic] examined by the Court, referring to the events that took*

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[48] Decision of 2 December 1998, original number U-II-411/1995, U-II-624/1995, U-II-831/1995, U-II-345/1996 and U-II-444/1996; summarized in *Bull. Const. Case Law* 1998 (3) p. 404, CRO-1998-3-019.

[49] Decision No 47 of 17th May, 1994, http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/jurisprudence_main.htm, visited on 4 May 2002.

[50] Id.

place during 1940-1945 in temporarily occupied territories . . . are in no way annulled by the present decision, which was imposed in order to insure the concordance of the provisions of the law with the Constitution. The constitutional juridic [sic] solution given for the problem does not distort in any way the historic reality, nationally and internationally known".[51]

A decision of the Slovenian Constitutional Court on the law dealing with the reprivatisation of land shows how the equality principle can be used to interfere with a policy designed to control and restrict the return of large pieces of land to private owners (and, in this case in particular, to the Church).[52] *This case related to Article 1 of the Act on Partial Suspension of the Return of Property. This act put a moratorium of three years on the operation of another law which regulated the return, through denationalisation proceedings, of agricultural lands and forests that had been seized by the former regime. This moratorium applied in all cases where claimants requested the return of more than 200 ha of agricultural lands and forest. The Court conducted a proportionality review of this new statute, and found that the measures adopted were not proportionate to any constitutionally permissible goals; for example that the legislator was motivated by a groundless (in the Court's opinion) fear of a return of "feudal ecclesiastical lords".*[53] *More relevant to our current discussion, however, is the Court's objection to the fact that the moratorium only applied to land over 200 ha. This, according to the Court, amounted to discrimination between denationalisation claimants (as between those entitled to receive over 200 ha as opposed to under 200 ha, and also as between those who had not yet had their claims processed and those who had already received their land over 200 ha, before this moratorium came into force).*[54] *Thus, it violated the principle of equality (Article 14 of the Constitution). However, it is clear that, in cases such as these, any quantifiable line of distinction between different categories of claimants can easily be attacked for its discriminatory character because it draws a line between claimants. And any such line is necessarily arbitrary.*

1.6. Special case of affirmative action

While most of the constitutions limit themselves to the prohibition of discrimination (or a general proclamation of the principle of equality), some of them go further by providing for special protection for specified social groups in special social settings; for example, protection of children and minors in the

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[51] Id.

[52] Decision U-I-107/96, of 5 December 1996, http://www.us-rs.si/en/casefr.html, visited 10 May 2001.

[53] Id., para. 16.

[54] Id., para 28.

workplace,[55] assistance in professional training and special health care;[56] protection of women in the workplace[57] and, more specifically, special protection of pregnant women;[58] special assistance to and protection for mothers;[59] protection of and aid to the disabled[60] etc. However, these provisions have not been worded as mandating positive discrimination, that is, a deliberate set of preferences accorded to a group based on its disadvantage in access to a given social good. In fact, two of the constitutions (which, otherwise, contain provisions about special protection for certain groups) contain explicit prohibitions on granting any privileges based on various prohibited grounds. The Lithuanian constitution states that no restrictions can be imposed upon nor privileges granted to a person on grounds such as sex, race, nationality, etc;[61] likewise, the Bulgarian constitution precludes the conferral of any privileges upon such grounds.[62] This suggests that any acts or statutes which envisage positive discrimination in favour of women or ethnic minorities could be struck down on these grounds. The Slovak Constitution expressly qualifies the provisions about the rights of members of ethnic and national minorities with a proviso that the protection of their rights must not lead to, inter alia, "discrimination against [the Republic's] other inhabitants".[63]

There are, however, some exceptions to this silence of CEE constitutions on measures of positive discrimination. First, the Hungarian Constitution goes beyond merely proscribing any discrimination, and provides that the state shall implement equal rights for everybody "through measures that create fair opportunities for all".[64] This may be seen as a mandate to the state to take positive action which will actually lift the position of disadvantaged groups vis-à-vis other groups.

The Hungarian Constitutional Court considered a challenge to affirmative action in the form of special tax benefits to families with numerous children – hence not a typical "reverse discrimination" issue (which occurs in its most clear way

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[55] E.g. Charter of Fundamental Rights and Freedoms [hereinafter: Czech Charter] Art. 29.

[56] E.g. Czech Charter Art. 29

[57] E.g. Ukraine Art. 24 [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].

[58] E.g. Hungary Art. 66.

[59] E.g. Bulgaria Art. 47.

[60] E.g. Romania Art. 46.

[61] Art. 29 (2).

[62] Art. 6.

[63] Art. 34 (3).

[64] Art. 70 A.

when privileges go to a group which had been traditionally discriminated against); nevertheless, an interesting test for the notion of equality as understood by the Court.[65] *The Court rejected the challenge saying that "the ban on discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden".*[66] *The Court specifically admitted that the Constitution allows positive discrimination aimed at eliminating inequalities of opportunity; it also noted that the anti-discrimination clause of the Hungarian Constitution (art. 70 A) gives effect to a broader notion of equality, which should be understood as "equal right to human dignity": "The ban on discrimination means that all people must be treated as equal (as persons with equal dignity) by law".*[67] *As an expert of the Court noted, this formulation has been directly influenced by Ronald Dworkin's distinction between equality in the sense of a "right to equal treatment", a sense which is inferior and subordinate to "the right to being treated as an equal."*[68] *Dworkin made this distinction precisely in the context of his discussion of "reverse discrimination" and its compatibility with the principle of constitutional equality.*[69]

2. Minority rights

2.1. Introduction: Minority issues in CEE

The region of CEE displays a wide and untidy mosaic of ethnic, national and religious minorities within and across the states. After the fall of Communism, nationalism was (alongside the religious fervour) often the only force capable of cementing people and counteracting the anomie,[70] but the downside of it was that often nationalism descended into its rampant version, and was fed by hostility towards "the others". Communism often artificially kept various ethnic and national animosities under the carpet: they were not superseded but merely deprived of any open expression under the official orthodoxy of national unity. Balkan wars and the split of Czechoslovakia are the most visible examples but, to a lesser degree, various actual and potential cases of discrimination against ethnic

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[65] Decision No. 9/1990 (IV.25), discussed in Peter Paczolay, "Human Rights and Minorities in Hungary", *Journal of Constitutional Law in Eastern and Central Europe* 3 (1996): 111-26 at 114-15.

[66] Quoted id. at 115.

[67] Quoted id. at 115.

[68] Id. at 116.

[69] See Ronald Dworkin, *Taking Rights Seriously* (Duckworth: London, 1977) at 223-39.

[70] See Andras Sajo, "Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe", *U. Chi. L. Sch. Roundtable* (1993): 53-74.

and national minorities exist everywhere in the region. The characteristics of this discrimination vary, depending upon the nature of the minority in question and its relationship to the majority. Probably the most dramatic is the situation of Roma people, with strongly ingrained hostility, discrimination and prejudice throughout the region,[71] worsened by their added disadvantage of no discrete territorial concentration which would yield a capacity for effective political mobilization. As result, despite running their candidates in parliamentary and municipal elections in a number of countries, they remain virtually unrepresented in the political systems of countries they inhabit – and this despite the substantial numbers (about 20 million) they represent overall in the region.

Some states in the region are relatively homogenous, with small and territorially identifiable minorities (such as Poland with its German, Ukrainian and Belarus minorities). But apart from Poland, the Czech Republic, Albania and Hungary, the presence of ethnic and national minorities in the countries of the region is quite sizeable, and varies between 10 and 55 percent.[72] Some of these minorities actually form a majority of the population in certain regions (e. g. Hungarians in the Southern parts of Slovakia) which leads to understandable nervousness on the part of the national majority towards any claims for territorial autonomy (as an example, consider an initiative by a group of local mayors in Slovakia to establish a self-governing province populated predominantly by Hungarians – a move quickly condemned by Slovakian politicians as a threat to state sovereignty).[73] But more often than not, in CEE countries the minorities are not sufficiently territorially concentrated to render the idea of territorial autonomy plausible. The presence of sizeable Hungarian minorities in Slovakia, Romania and Serbia – 2,5 million ethnic Hungarians live in neighbouring countries, compared to just over 10 million inhabitants of Hungary – poses special problems both for Hungary (which tries to maintain a sort of tutelage over Hungarians abroad)[74] and the host countries which fear an irredentist minority encouraged by

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[71] See Peter S. Green, "Roma Seeking Sense of Unity to Combat Racial Bias", *New York Times* 10 May 2002, http://www.nytimes.com/2002/05/10/international/europe/10POLA.html visited 10 May 2002.

[72] Sajo, "Protecting Nation States", at 54.

[73] See Wiktor Osiatynski, "Rights in New Constitutions of East Central Europe", *Columbia Human Rights Law Review* 26 (1994): 111-166 at 134-35.

[74] As an observer notes: "Hungarian politics fosters the interests of Hungarian minorities living abroad rather than those of non-Hungarian minorities who live on the territory of the Hungarian state", Osiatynski id. 137. These words written in 1994 became even more valid more recently, with the controversial "status law" adopted by the Hungarian parliament in June 1991: the law provides for rights and certain preferences for ethnic Hungarians who live beyond Hungary's borders, such as the right to work in Hungary for a three-month period each year, financial support for public-transportation costs as well as assistance for ethnic-Hungarian students from neighbouring states to study in universities in Hungary, and

its neighbouring kin state. Similar is the case of Albania, a relative homogenous state, but with sizeable Albanian minorities in neighbouring Macedonia and Serbia (Kosovo).

A delicate and fragile situation persists in the Baltic states, a large proportion of whose population is of Russian ethnic origin (for instance, immediately after regaining their independence, thirty percent of Estonia's population, and 34 per cent of Latvia's, was Russian-speaking),[75] as a result of the USSR's deliberate policy of encouraging Russians and other Slavs to settle in the outlying republics. This Russian ethnic population is often regarded with politically-based distrust, as belonging to the formerly oppressing nation, regardless of how long they have lived in these republics. They were also initially denied many rights, including those linked to citizenship, on the "restorationist" theory that Soviet-era migration (which happened to be mainly Russian) was the result of an illegal takeover of the Baltic republics by the USSR in 1940. As an Estonian scholar notes, "Although the Estonians' argumentation was eminently juridical in that it related purely to the consequences of an illegal foreign occupation, its practical consequences in terms of the political marginalisation of a large share of the minority population were severe".[76]

A dramatic legacy of ethnic and religious persecution under the old regime which has persisted in certain forms is exemplified by Bulgaria, where since the early 1950's the Communist Party had led a struggle against "expressions of nationalism and religious fanaticism among the local Turks". Under this label, the persecution and harassment of Turks and Pomaks (ethnic Bulgarians who had opted for Islam in the past) took forms such as the deprivation of Turks of their land; forced emigration to Turkey; forceful renaming of the Pomaks and Turks (as recently as in the mid-1980s); detention of those resisting these campaigns, even peacefully, in prisons and camps; a ban on the use of the Turkish language in public and on the celebration of Muslim holidays and rituals; official anti-Turkish propaganda, etc.[77] As a result, Bulgaria entered into its democratic era with ten percent (and this does not include Roma people)[78] of its population having fresh memories of persecution, harassment and discrimination.

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also assistance to ethnic Hungarians who live in their home countries who have more than two children in Hungarian-language schools, see "Constitution Watch", *EECR* 10 (Fall 2001): 18-19.

[75] They were not all ethnic Russians but also other nationalities for whom Russian was their mother tongue (such as Belorussians, Ukrainians etc).

[76] Vello Pettai, "Democratic Norm Building and Constitutional Discourse Formation", paper presented at the workshop "Rethinking the Rule of Law in Post-Communist Europe", European University Institute, Florence 22-23 February 2002, at 23.

[77] For details, see Antonina Zhelyazkova, "The Bulgarian Ethnic Model", *EECR* 10 (Fall 2001): 62-66 at 62-63.

[78] In 1992, the population census showed Turks constituting 9,4 % of then population (Roma,

The disintegration of the old Soviet Union produced a situation in Russia where a host of ethnic conflicts very early on were transformed into ethnic-territorial conflicts: while Russia is more mono-ethnic than many other European states (with over 80 percent ethnic Russian), there are also more than a hundred different indigenous ethnic groups and thirty-one ethnic territorial units, and the national-ethnic conflicts are never far from the surface in the clashes of those units with "the Center".[79] But the "ethnic region versus the Center" conflict (of which the Chechen and Tatarstan crises are examples) is only one of a number of different types of ethnic-based tensions in the Russian federation: a knowledgeable scholar also identifies the conflicts between ethnic regions themselves (e.g., Ingushetia v. North Ossetia); conflicts within a region between titular ethnic groups controlling "their" territories (e.g. Karachai-Cherkessia), and within an ethnic group between sub-ethnic groups, clans, etc.; conflicts within a region between ethnic groups including non-titular ones for control over resources (e.g., anti-Chinese feelings in the Far East), and tensions arising out of the claims by nations separated by frontiers of territorial units (e.g. Ossetians, and of course Russians).[80] In any event, the territorial solution cannot be seen as an adequate response to ethnic tensions as there is no sufficient correspondence between an ethnic group and a territory: not only are there many groups which are spread over a number of different units (for instance, only one-third of ethnic Tartars, the second largest ethnic group in Russia, lives in Tatarstan).[81]

In sum, the nature of the problem varies from country to country, but none has a record free of discrimination and persecution on racial or ethnic grounds. Throughout the region, states attempted to consolidate the power of the majority marginalizing and under-valuing the cultural and political claims of minorities; the demands for minority rights were, more often than not, "defensive responses to the threats posed by assertions of majority nation-building".[82] Hence, the constitutional method of protecting minorities was one of the most contentious problems in the process of constitution drafting in the region, and in the Constitutional Court practice of at least some of the CEE states.

3,7 %), see id. at 66.

[79] See Nikolai Petrov, "Political Institutions and the Regulation of Ethnic Conflicts: Russia's Experience", paper presented at Conference on "Legal Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe", Baku 11-12 January 2002, available at http://www.venice.coe.int/docs/2002/CDL-JU(2002)025-e.htm visited 1 July 2002, at pp. 2-3.

[80] Id. at 7.

[81] Id. at 3.

[82] Will Kymlicka, "Western Political Theory and Ethnic Relations in Eastern Europe", in Will Kymlicka & Magda Opalski, eds., *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Presss 2001): 13-106 at 61.

2.2. Constitutional design of minority rights

The only constitution in the region which fails to mention minority rights is the Constitution of Bulgaria. All the others list various catalogues, with special prominence given to language and educational rights, the right to preserve one's cultural and religious identity, etc. Minority language is clearly the main protected interest among minority rights (and will be discussed, in more detail, below). All constitutions, with the exception of the Bulgarian one, contain provisions granting a right to preserve one's language and cultural identity. For example, the Constitution of Latvia provides as follows: "Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity." [83] The catalogues of minority rights are often more elaborate, as in this provision of Romanian constitution: "The state recognizes and guarantees the right of persons belonging to national minorities, to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity."[84]

There are both negative and – at times – positive formulations of minority rights. They are formulated negatively when – as in the Latvian wording just quoted – members of a group are protected against possible infringement of their interest in the preservation and development of their culture, language, etc. But often certain minority rights – in particular the right to education in one's language – are framed as positive rights imposing certain active duties upon the state. For example, in Hungary the Constitution states that "The Republic of Hungary shall provide for the protection of national and ethnic minorities… education in their native languages",[85] and the Macedonian Constitution declares that "The Republic guarantees the protection of the ethnic, cultural, linguistic and religious identity of the nationalities".[86] Positive state duties are sometimes restricted to particular obligations, especially in the sphere of official communications and interaction of the citizens with the governmental bodies. For example, in Estonia,

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[83] Albania (art 20) ; Belarus (art 15 and 50), Croatia (art 15), Czech Charter (art 25), Estonia (art 52 and 37), Georgia (art 38), Hungary (art 68), Latvia (art. 114), Lithuania (art 37), Macedonia(art 48), Moldova (art 35), Poland (art 35), Romania (art 6 and 32), Russia (art. 26), Slovakia (art 34), Slovenia (art 11 and 61), the Ukraine (art 10 and 53), the Federal Republic of Yugoslavia (art 11 and 45), Montenegro (art 34 and 68-73) and Serbia (art 49 and 32).

[84] Art. 6.

[85] Art. 68(2). See also the constitutions of Albania (art 20), Belarus (art 50), the Charter of the Czech Republic (art 25), Hungary (art 68), Macedonia (art 48(4)), Slovakia (34), Romania (32(3)), the Ukraine (53), the Federal Republic of Yugoslavia (art 46), Montenegro (art 68) and Serbia (art 32).

[86] Art. 48 (2).

there is a very specific regulation concerning the official use of language which provides: "In localities where at least half of the permanent residents belong to an ethnic minority, everyone shall have the right to receive answers from state and local government authorities in the language of the ethnic minority." (art 51 (2)).

Finally, several constitutions provide for the rights of minorities to participate in public affairs qua minorities. The Hungarian constitution proclaims that "national and ethnic minorities will be assured collective participation in public affairs" and that "The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within a [the] country."[87] The constitution of Montenegro goes even further by envisaging a system of proportional representation not only in the "state authorities" but even in the public service: "Members of the national and ethnic groups shall be guaranteed the right to a proportional representation in the public services, state authorities and in local self-government."[88]

The constitutions do not, on the whole, attempt a definition of the term minority, nor refer to a definition enshrined in any other international document (which is not surprising, given the lack of any such precise definitions in the major international agreements on this subject). A couple of constitutions do, however, make statements in this regard. The constitution of Macedonia relates 'minority' protections to "inhabitants belonging to a nationality"[89] (in the context of the right to use a language other than Macedonian as an official language) or "[m]embers of nationalities".[90] The Russian constitution, instead of providing protection for minority groups, or individuals belonging to them, generalises the problem; it grants traditional minority protections instead to *all* citizens. Thus, article 26 states that "Everyone shall have the right to determine and state his national identity. No one can be forced to determine and state his national identity. Everyone shall have the right to use his native language, freely choose the language of communication, education, training and creative work."

The constitution of Slovenia distinguishes between different types of minority groups in its provisions on the protection of minorities. For example, it states, in article 61, that "Each person shall be entitled to freely identify with his national grouping or autochthonous ethnic community, to foster and give expression to his culture and to use his own language and script." However, in addition to this, there are specific rights subsumed under the heading "Special Rights of the Italian and Hungarian Ethnic Communities in Slovenia" (heading at article 64). Here, these groups are given additional rights such as "to establish organizations,

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[87] Art. 68 (2) and (3).

[88] Art. 73.

[89] Article 7.

[90] Article 48.

to foster economic, social, scientific and research activities… to plan and develop their own curricula [for education]…. In those areas where the Italian and Hungarian ethnic communities live, their members shall be entitled to establish autonomous organizations in order to give effect to their rights…" (article 64). One may add that, while Italians and Hungarians may be seen as "indigenous" groups in Slovenia because they have inhabited there for centuries, they are not the most numerous ethnic minorities: Croats, Serbs and Muslims have proportionately larger minorities in Slovenia than Italians and Hungarians.[91] The only explanation for this apparent abnormality is that the issue of relationship between ethnic Slovenians and ethnic Italians and Hungarians in Slovenia is politically less explosive than the relationship between the members of the ethnic groups making up ex-Yugoslavia; hence, it is safer to accord a special, elaborate and advantageous minority status to Italians and Hungarians than to Serbs and Croats. Different treatment is also accorded to the Roma people. Article 65 states that "The status and rights of Gypsy communities living in Slovenia shall be such as are determined by statute." This would suggest that they do not fall within the general provisions on minorities and are not considered to be a minority group.

2.3. Individual or group rights?

Most of the constitutions of the region phrase minority rights in the language of *individual rights,* as held by "persons belonging to national minorities…"[92]. In fewer cases, the language of group rights is used. For example, the Hungarian Constitution states: "National and ethnic minorities shall have the right to form local and national bodies for self-government".[93] Slovenia also takes this approach in relation to the rights of *Hungarian and Italian minorities only* (the others are treated as individual rights).[94] Thus, these truly create constitutionally guaranteed group rights. Several constitutions use both the language of group- and individual- rights for minority rights, depending on the nature of the right proclaimed. For example, the Polish constitution uses group-rights language with

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[91] See András László Pap, "Representation or Ethnic Balance: Ethnic Minorities in Parliaments", *Journal of East European Law* 7 (2000): 261-339 at 289.

[92] This particular quote is taken from article 6 of the Romanian constitution. The following constitutions have similar provisions: Albania (art 20); Croatia (art 15); Czech Charter art. 25; Georgia (art 38); Latvia (art 114); Lithuania(art37); Macedonia (art 48); Poland (art 35 (1) although section 2 of the same article uses the language of group rights); Romania(art 6); Slovakia art. 34; Slovenia (art 61- although note the exception relating to Hungarian and Italian minorities); the Ukraine (art 53) and Serbia (art 32).

[93] Article 68(4). But note that the statute on the rights of national and ethnic minorities adopted on 7 July 1993 uses both the language of collective and individual rights, see Paczolay, "Human Rights", supra at 123.

[94] Thus, article 64 begins: "The autochthonous Italian and Hungarian ethnic communities and their members shall be granted the right to…".

regard to the establishment of educational and cultural institutions for national minorities,[95] and individual-rights language with regard to the freedom to maintain one's customs, tradition and culture.[96] What difference does it make?

The main constitutional dilemma with regard to the protection of minorities is whether the best way of protecting members of (national, ethnic, religious etc) minorities is simply by strong protection of individual rights backed up by a robust non-discrimination principle, or whether there should be a special constitutional principle (or set of principles) which confers special rights upon minority members. The former (liberal-individualistic) approach dominates in U.S. thinking about the protection of minorities: the idea is that if every citizen, regardless of their (*inter alia*) national or ethnic group membership benefits from the same strong civil and political rights, then any special group-based protection is redundant, and potentially dangerous.[97] This may be called a "liberal-neutralist" (or individualistic) approach. But in the continental European setting this approach has been seen as largely ineffective and insufficient. There is much less faith in the beneficial effects of the extension of individualistic liberal principles to a situation where anti-minority prejudices and hostility are deeply ingrained, and also are displayed by those who are entrusted with the enforcement of general rules. Further, the liberal-individual approach is considered well-suited to the particular situation of immigrant societies where the dominant concern of new minorities is to enjoy the same rights as the older population and to integrate themselves into a larger society governed by neutral rules. In contrast, when the claims for protection come from groups which have been present in a given territory for a long time, or which find themselves sharing the same nation-state due to changing borders, forced movements of population (hence, forced rather than voluntary migration) etc, the purely individualistic approach appears much less capable of providing real and effective protection to

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[95] Art. 35 (2).

[96] Art. 35 (1). For other examples of the mixed use of both group- and individual rights language, see Estonia Art. 49-51.

[97] As an account of the actual, authoritative legal situation of the United States this is an oversimplification: the rejection of group rights is not absolute in the United States law. For example, when the U.S. Supreme Court allowed Amish families to keep their children out of school up to a certain age (see Wisconsin v. Yoder, 406 U.S. 205 (1994)), or when it upheld Native American tribal law which imposed patrilineal kinship rules that limited women's marital choices (see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)), it clearly recognized the legal weight of group-based claims for treatment different to that accorded by universally binding legal rules. Similar group-based thinking is visible in the enhanced legal protection of those who are victims of crimes motivated by hatred of a group (in the form of enhanced punishment for hate crimes, see Wisconsin v. Mitchell, 508 U.S. 476 (1993)). On the qualified nature of the group/individual rights distinction in U.S. law, see Jack Greenberg, "Affirmative Action in Higher Education: Confronting the Condition and Theory", *Boston College Law Review* 43 (2002): 521-621 at 580-81.

minorities.[98] This distinction corresponds to what some refer to as the difference between "minorities of force" (minority groups which desire equal treatment but are denied equality by dominant majorities) and "minorities of will" (groups which desire to maintain their separate identity and thus demand different treatment from the dominant group).[99] The terminology may be somewhat misleading because the latter groups are also often victims of force and oppression exercised by the majority, but the nature of their claim is different. The demand of the latter groups is for constitutional entrenchment of minority rights distinct from, and operational alongside, the universal individual rights. If non-dominant groups wish to preserve their identities, threatened as they are by extinction, a prescription of equal protection and strict non-discrimination is not sufficient. Special measures designed to protect minority groups may be called for. Rights such as the right to use one's own language in dealings with the authorities or of special representation in local or national bodies, do not lend themselves to individual formulation because at a certain point the group which is entitled to such privileges has to be identified, and at this point the universal-individualistic approach ceases to be suitable.[100] If these forms of protection are viewed as important, then they have to be accompanied by certain limiting clauses: not every single foreign-language speaker (or, put more cautiously, non-majority-language speaker) can be given an opportunity to use her or his language in communications with the state, and not every minority (however small) can be granted recognition through special representation in the legislature. The right then ceases to be universal; the question of feasibility will have a bearing on the choices which are made to single out some groups, but not others, for legal privileges.

Perhaps one of the main reasons why the individualist-liberal rejection of the notion of minority rights has been more ingrained in the Anglo-American constitutional systems (in particular, in the U.S., and to a lesser degree in countries such as Canada, Australia and New Zealand) than in Europe is that in the former, but not the latter, setting there is a problem which traditionally gave a headache to liberal theorists: how to reconcile universal commitment to individual human rights (including the right to autonomy) with respect for the traditions of minorities which often do not practice autonomy and are (by liberal standards) quite oppressive towards their members. This may be seen as the fundamental liberal dilemma when it comes to minority rights. On the one hand,

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[98] See Dimitrina Petrova, "Racial Discrimination and the Rights of Minority Cultures", in Sandra Fredman, ed., *Discrimination and Human Rights: The Case of Racism* (Oxford University Press: Oxford 2001) at 65; Miriam J. Aukerman, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context", *Human Rights Quarterly* 22 (2000): 1011-1050 at 1029-30.

[99] The terminology is of J.A. Laponce, discussed by Aukerman, "Definitions", supra at 1029.

[100] See Sajo, "Protecting Nation States", supra at 70-71.

a liberal is committed to extending some fundamental dignity-based rights to everyone: no-one, regardless of their group membership should be denied freedom of choice about fundamental personal matters, fair political representation, free expression, non-discriminatory treatment, physical inviolability etc. On the other hand, those minorities, often indigenous ones, which do not respect fundamental equality between men and women, practice corporeal punishment, and do not respect the individual's right to control their life to a degree deemed necessary by a liberal pose a threat to these fundamental values. Hence, the liberal theorist is concerned about the position of the most vulnerable members of those minorities – often women and children – who are threatened with deprivation of all those individual rights which non-minority citizens take for granted. Group rights aimed at the protection of the identity of the group as a whole give to that group a degree of immunity from interference of the community at large into its "internal affairs", which may extend to the interests of the vulnerable insiders. As Michel Rosenfeld observed (deliberately pushing the dilemma to the extreme): "it appears impossible for any constitutional regime to guarantee at once a minority group's survival and the most fundamental rights of an individual dissident within that group".[101] This perception animates much of the liberal critique of group rights. As noted by another author who has recently made by far the most eloquent and passionate defence of such liberal universalism: "[I]t seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of at any rate some of their members. To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrive at the conclusion that diversity is desirable to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members"[102]

The prima-facie hostility of the Anglo-American law to minority rights can be seen as resulting largely (though not solely; one should not discard much more invidious explanation related to racism) from this dilemma. But in the continental European setting, and in particular in CEE, this dilemma is out of place; the problem just identified simply does not ring true. The pattern of relationship between an ethnic majority and minority (or minorities) plainly does not fit the description of "liberal majority versus oppressive minority".[103] So the

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[101] Michel Rosenfeld, "Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities", *Columbia Human Rights Law Review* 30 (1999): 249-84 at 254.

[102] Brian Barry, *Culture and Equality* (Polity: Cambridge, 2001) p. 134.

[103] "All post-communist states of the region claim adherence to liberal constitutionalism, and *no national minority . . . would question main liberal tenets*", Nenad Dimitrijević, "Ethno-Nationalized States of Eastern Europe: Is there a Constitutional Alternative?", *Studies in*

fundamental philosophical reason for distrusting the very idea of minority rights does not apply (or applies to a much lesser degree than in the US) to the European situation. But obviously this does not negate the fact that a "multicultural" solution, with an explicit recognition of separate minority rights, is often seen as a threat to the culture of the majority, and to state sovereignty. The problem, then, is not whether a liberal-neutralist model or a diversity-accommodating model (that is, a pluralist model) should be adopted because this dilemma seems to have been answered overwhelmingly in favor of the latter. As a Serbian legal scholar concludes: "experience in [CEE] countries has shown that ethnocultural neutrality and group-neutral regulation cannot accommodate cultural pluralism, and cannot guarantee stability and peace between ethnic majorities and minorities. Traditional liberal attitudes lack empathy towards maintaining diversity, and cannot provide solutions in traditionally multicultural environments where equality presumes an equal right to maintain one's distinct identity".[104] The question is, how to reconcile the diversity-accommodating constitutional regime of protection of minority rights with the values underlying the rule of law, namely equality before the law and the prevention of arbitrary privileges and discrimination.

At first glance it might appear that minority rights are necessarily group rights. This, however, is not the case: one should distinguish between group rights *sensu stricto*, where the beneficiary and rightful claimant of a right is a group as a whole (and where, presumably, the right is exercised in accordance with the decisions of some authorized leaders and representatives of the group) and, on the other hand, rights which are conferred upon *individuals* by virtue of their belonging to an ethnic, national or other minority. Group-specific rights may be individual in the sense that a claim-holder is an individual though the basis of his or her claim is that he or she belongs to a group. As a Russian scholar observes: "Any public support to institutions that address specific needs of persons belonging to minorities can be justified in terms of individual rights".[105] Whether the distinction is significant in practice is another matter; the point can be made that individuals are best able to exercise their minority-based rights when they act in concert with other members of the same minority: "we may insist that a certain right . . . is due to individuals but the enjoyment of that right is nonetheless unthinkable without others".[106] But this is a practical and contingent matter; and

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East European Thought 54 (2002): 246-69 at 247, emphasis added.

[104] Tibor Várady, "On the Chances of Ethnocultural Justice in East Central Europe", in Kymlicka & Opalski, *Can Liberal Pluralism be Exported?* supra, 135-49 at 147-48.

[105] Alexander Ossipov, "Some Doubts about 'Ethnocultural Justice'" in Kymlicka & Opalski, id., 171-85 at 175.

[106] Petrova, "Racial Discrimination", supra at 66. See similarly Rosenfeld, "Can Human Rights…", supra at 257.

need not always to be the case. As one commentator observes, "for some aspects of minority/indigenous protection – such as standing to bring complaints before international bodies – it may be important to determine whether a right is collectively or individually held".[107] Some rights, by their very nature, better lend themselves to a collectivist articulation than to an individualist one, or *vice versa*. Generally speaking, one may venture the proposition that, if a right more closely resembles an *exemption from* a general duty than a *claim to* provision of certain services, it is perfectly imaginable and practicable to claim such a right individually and regardless of others, even if the basis for the claim is membership of a certain group. In that case, there is no need to collapse an individual group-based right into a group right. One might think, for example, of officially recognizable conscientious objection to military service based on belonging to a religious group of which one is the only adherent in a given country! As a general proposition, therefore, these two understandings of rights are quite distinct from each other. In the case of a group right *sensu stricto* there must be an officially recognizable (and recognized) corporate body which speaks on behalf of the group. This raises the obvious problem of whether that body has the legitimate authority to represent all its members. The process of decision-making as to the exercise of a right is then taken away from the individuals concerned – who may actually reject the group's authority to represent them – and centralized in a group-representative body.. In the case of individually phrased group rights (where the individuals can claim their rights, for example, to access to education in their language) the problem of representation disappears but, as a practical matter, it is inconceivable that such a right can be satisfied unless there is a sufficient critical mass of people to claim it.

2.4. Special case of linguistic rights

The legal regime governing the relationship between the official state language and minority languages is a good test of the degree of accommodation of minorities in CEE countries. Usually the greater the fear of, or intolerance towards, the minorities in a given state, the lower the willingness to open up a significant public space for permitted use of that minority's language in official interactions. As one commentator notes, in some CEE countries (in particular, the Baltic states) the assumption seems to be: "minorities should not be denied the right of enjoying their culture and using their language, but it must only be within their 'own', isolated environments".[108] This, as Will Kymlicka adds, indicates a worrying reversal of assumptions in comparison with the liberal-pluralist ideal: rather than assuming that minority languages can be used in social life unless

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[107] Aukerman, "Definitions", supra at 1032.

[108] Boris Tsilevich, "New Democracies in the Old World", in Kymlicka & Opalski, supra, 154-70 at 159.

there is a compelling reason for uniform language regulation, the assumption now is that the state language should be used in all aspects of public life except for narrowly defined designated areas and environments.[109]

Almost all CEE constitutions contain provisions stipulating the official language of the State;[110] and all but one[111] contain provisions stating that minorities are allowed to use their own language. More than half of these constitutions contain a bare permission for groups to use their languages.[112] In fact, the majority of these constitutions do not attribute these rights to minorities[113] but say that all people have the right to use their native language, a statement obviously directed to minorities. However, eight constitutions go further in their wording and proclaim the minorities' rights to foster, preserve or develop their language.[114] Some constitutions allow for the languages of minorities to be in official use within the State. This is mandated either by allowing the minority language to be used officially in all aspects of public life within a certain locality (where a majority of the inhabitants of a certain area belong to that minority)[115] or simply by allowing for members of a minority to interact with certain state bodies using their own language.[116] In addition, a large majority of these constitutions grant the right to be educated in one's own language[117] though usually it is weakened by a stipulation that the exercise of this right will be regulated by statutory acts.[118]

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[109] Kymlicka, "Western Political Theory", supra at 89 n. 44.

[110] The Constitutions containing no provision relating to an official language are those of Bosnia and Herzegovina, the Czech Republic, Hungary, and Russia.

[111] The exception, containing no such right, is the Constitution of Bosnia and Herzegovina.

[112] Belarus (art. 50), Bulgaria (art. 36(2)), Croatia (art. 15(2)), Czech Republic (art. 25(1)), Georgia (art. 38(1)), Hungary (art. 68(2)), Russia (art. 26), Slovakia (art. 34(1)), Slovenia (art. 61), Ukraine (art. 10), Serbia (art. 49), Montenegro (art. 68).

[113] Of this group, only the Constitutions of Croatia, Hungary, Ukraine and Montenegro, do state in express terms that the right is for minority groups.

[114] Albania [20(1)], Latvia [114], Lithuania [37], Macedonia [48(2)], Moldova [10(2)], Poland [35(1)], Romania [6(1)], and Yugoslavia [11].

[115] Macedonia [7(2)-(3)], Serbia [8], Montenegro [9], and F.R.Yugoslavia [15].

[116] Czech Republic [25(2)], Estonia [51 and 52], Slovakia [34(2)], Slovenia [62], and Montenegro [72]. The Constitution of Montenegro uses both these techniques for official uses of minority languages. The Estonian Constitution states that the right to an official use (not the exclusive official use!) of a minority language exists when the majority of the residents of any given locality belong to the minority in question.

[117] Albania [20(2)], Belarus [50], Bulgaria [36(2)], Czech Republic [25(2)], Estonia [37(4)], Hungary [68(2)], Macedonia [48(4)], Moldova [35 ((2)], Romania [32(3)], Russia [26], Slovakia [34(2)], Ukraine [53], Montenegro [68], Serbia [32], and F.R. Yugoslavia [46]. The Estonian Constitution only allows for this right to be exercised in schools specially established for minorities.

[118] Belarus, Czech Republic, Macedonia, Romania, Slovakia, Slovenia, Ukraine,

Two of the constitutions which grant the right to be educated in one's own language assert that the official State language must be learnt concurrently with this,[119] and in addition, the constitution of Bulgaria is quite unique in laying down a definite obligation on citizens to learn the state language.[120] Finally, a number of Constitutions contain provisions guaranteeing that persons accused of an offence, or finding themselves in court, have a right to receive information in a language they understand[121] – including the right to a translator in court should one not be fluent in the official State language.[122]

The tension between the establishment of an official (state) language and the right to use, in official contexts, minority languages when minorities are relatively sizeable and territorially identifiable, remains a constant theme in a number of countries in the region; in particular in the Baltic states (especially as regards its Russian population) and in countries such as Slovakia or Romania (with their Hungarian minority). In Slovakia, the tension is symbolized by two clauses of art. 6: the first clause provides that "Slovak is the state language on the territory of the Slovak Republic"; the second, that "The use of other languages in dealings with the authorities will be regulated by law". The right envisaged by the latter clause has been a constant bone of contention in the relationship between the authorities and the Hungarian minority in Slovakia. The statute on state language of 1990 *allowed* the use of minority languages where minorities constitute at least 20 percent of the population but the governmental practice has been often contrary to that rule. The Slovak Constitutional Court considered a challenge to a number of provisions of the 1995 Law "On the State Language".[123] One of them stated that individuals were obliged to make written petitions only in Slovak. The Constitutional Court held that this contravened the constitutional right to use a minority language in official communications, even though the regulation of this right was to be done by statute.

Not surprisingly, Macedonia – a country plagued by strong ethnic conflict between the Macedonian Slav majority and the Albanian minority– has seen a number of challenges to its laws relating to minority linguistic rights. *In one decision, the CC rejected a challenge to a law which allowed public radio to*

Montenegro, Serbia, and F.R.Yugoslavia.

[119] Macedonia [48(4)], and Moldova [35(3)].

[120] Art. 36 (1).

[121] Albania [28(1)], Bosnia and Herzegovina [ECHR 6(3)(a)], Croatia [24(2)], Estonia [21(1)], Poland [41(3)], Romania [23(5)], Montenegro [22], and F.R. Yugoslavia [23(3)].

[122] Albania [31], Bosnia and Herzegovina [ECHR 6(3)(e)], Czech Rep [37(4)], Moldova [118], Romania [127(2)], Serbia [123], and F.R. Yugoslavia [49].

[123] Decision 8/96 of 26 August 1997, summarized in *Bull. Constit. Case Law* (1997, no. 2): 252-53, SVK-1997-2-007.

broadcast in the languages of national minorities (as well as in Macedonian).[124] *The challenge was based on the official-language provision of the Constitution (Art. 7 (1)). The Court found, however, that the state has a constitutional duty to protect the ethnic, cultural, linguistic etc. identity of members of national minorities (Art. 48 (2)), and that the ensuing minority rights are not dependent upon a national minority being a majority in a certain locality. Hence, the provision for multi-linguistic public radio did not amount to the creation of an official multi-language situation in the Republic, and did not contradict the constitutional establishment of Macedonian as the only official language.*

In two other decisions, however, the same Court took a less pro-minority position, and struck down certain provisions as inconsistent with the official-language rule. The difference is, they both concerned the dealings of citizens with public authorities (rather than the regulation of public radio), and more specifically, the judicial process. In the first of these decisions, the Constitutional Court struck down the provision of criminal law which obliged courts to deliver summonses and other written documents to members of non-Macedonian nationalities in their own language.[125] *In a Salomonic decision, the Court upheld (on the basis of the principle of fair trial) the right of those persons to use their own language in lodging petitions and in proceedings before the court; as far as the courts were concerned, however, the CC decided that the official-language constitutional provision applied to it unconditionally. The second decision related to a provision of the Law on Civil Procedure which stipulated that in local self-government units (where persons belonging to a national minority are the majority or a substantial part of the total population), the notification of trial dates, should be written in the language and alphabet of the national minority.*[126] *The Constitutional Court found this provision of the law to be unconstitutional, under the constitutional provision which declares that Macedonian, in the Cyrillic alphabet, is the official language (Art. 7 (1)). The Court had the opposite avenue open to it because articles 7(2) and 7(3) of the Constitution stipulate that where there is a majority or a significant number of a national minority in a local self-government unit, their language shall also be in official use (as determined by law), along with the official Macedonian one in the Cyrillic alphabet. However, despite articles 7(2) and (3), the Constitutional Court held that courts undertaking official activities cannot use languages which are not official – thus they can only use the Macedonian language in the Cyrillic alphabet – regardless of the proportion of the national minority resident in any particular area. In*

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[124] Decision U.br.49/98 of 20 May 1998, described in *Bull. Constit. Case Law* (1998 no. 2) at 326, MKD-1998-2-004.

[125] Decision U.br.36/98 of 25 November 1998, http://www.cecl.gr/RigasNetwork/databank/jurisprudence_main.htm, visited 10 May 2001.

[126] Decision U.br. 32/99, of 9 June 1999, described in Bull. Const. Case-Law 1999 (2) at 286-87, MKD-1999-2-007.

other words, the Court found the multi-linguistic provisions of the Constitution inapplicable to official court proceedings.

Poland provides an unwholesome example of a rigid, uniformizing constitutional attitude towards official language. The constitutional provision which declares that "Polish is the official language" (Art. 27) leaves no room for the introduction of any minority languages into official fora, even in a narrowly restricted manner. While there is an additional sentence in this article, namely that the official-language rule "shall not infringe upon national minority rights resulting from ratified international agreements", a prominent critic of the constitutional provision says that it does not add anything to the first sentence, and does not open up the possibility of introducing minority official languages.[127] It is therefore not an exception to the rigid rule: "national minorities have not acquired in this Constitution a right to depart from a general rule that Polish is the official language".[128] The above-quoted critic reviews all the international treaties between Poland and its neighboring states and concludes that none contains a rule permitting a minority to have its language recognized as an official language in Poland. If the constitution-makers wanted to allow for such a possibility, they should have said so explicitly in the official-language provision.[129] *The only time when the Constitutional Tribunal was asked to consider the meaning of the "official language" provisions was in its "interpretive decision" of 14 May 1997;[130] hence, before the new Constitution entered into force. The subject-matter of the CT's interpretation was a 1945 decree about the official language (previous Polish Constitutions had not dealt with the issue at all) but, according to the authoritative commentators, this decision also applies to the new Constitution;[131] hence, it can be seen as a statement of the current official position of the CT on the issue of the "official language". The Tribunal was asked by the President of the Supreme Chamber of Control (SCC) to provide an interpretation of the official language provisions by saying to whom exactly they apply, and also what sort of official actions they apply to. The reason for this request for interpretation was that the SCC had ascertained in the process of its controlling activities that some "decisions [were being] taken on the basis of documents and reports in foreign languages and that no translations into Polish*

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[127] Janusz Trzciński, Remarks about Article 27, in L. Garlicki, ed., *Konstytucja Rzeczypospolitej Polskiej: Komentarz*,) (Wydawnictwo Sejmowe: Warszawa 1999) (loose leaf).

[128] Id. at 4 (quoting, approvingly, J. Boć).

[129] Id. at 4.

[130] Decision W. 7/96 of 14 May 1997, *Orzecznictwo Trybunału Konstytucyjnego: Rok 1997* (C.H. Beck: Warszawa 1998) at 770-96.

[131] Trzciński, Remarks, supra at 3; Jerzy Oniszczuk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (Zakamycze: Kraków, 2000), at 230.

were made of the contracts and agreements entered into by Polish state institutions or the companies set up by these institutions".[132] *The direct trigger for the decision was therefore unrelated to minority languages. Still, at the end of its lengthy decision – which confirmed that the requirement to use the official language applies to all state institutions, and to all their official actions – the CT dropped a hint that, as far as citizens are concerned, the official-language rules apply to them "indirectly" (when they communicate with state bodies) but that constitutional rights and freedoms define the limits of this duty. As the CT said in the very last sentence of its decision: "A citizen, whenever he wants to exercise his fundamental freedoms and rights, cannot be forced to comply with the provisions establishing the official language".*[133] This pronouncement was, however, left hanging in the air, so to speak: no specific criteria about how to reconcile the official-language provisions with the rights of minority members have been identified (to be fair, the CT was not asked to do so in this particular interpretative decision). But the limits on these rights seem to be very strong and rigid: as the above-quoted, authoritative commentator[134] notes, under the present Constitution the right to use a minority language in public "does not imply that state organs have a duty to issue official certificates (e.g., birth certificates) or conduct court proceedings in the language of ethnic minority". [135] As an example of acceptable uses of this right he refers to the possibility of conducting an campaign for election to the parliament or to local self-government bodies in the minority language. In other words, no duties upon state bodies are implied by the "fundamental freedoms and rights" to which the CT had referred and which, allegedly, establish the limits of the official-language provisions.

The situation of Russians in the three Baltic republics – in particular in Latvia and Estonia rather than in Lithuania – raises special issues due to the mixed political and ethnic nature of the problem. On the one hand, just as nowhere in the old Soviet Union were Russians treated as "immigrants", Russians in the Baltics have not considered themselves "immigrants". The USSR was their natural, single space (with only a sham federal structure), and they knew that if they settled anywhere within the borders of the USSR, they would be "at home", without the need to learn local languages, adapt to local culture, adjust to a different legal system etc. In fact, Russian was the lingua franca within the entire USSR. Hence, the liberation of the Baltics from its oppressive neighbour left a large number of Russians in those countries, many of them having lived there for

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[132] Decision W. 7/96, at 773.

[133] Id. at 796.

[134] Professor Trzciński's authoritative status on this particular issue is beyond any doubt because, before having written the constitutional commentary from which this excerpt is quoted, he had authored the Constitutional Tribunal's decision of 14 May 1997.

[135] Trzciński, Remarks, supra at 4-5.

some generations now, with Russian-language institutions, schools etc. At the same time, Latvians and Estonians were not only unhappy to maintain the status of Russian as an official (even if not *the* official) language in their countries; they also resented the very presence of Russians, frequently viewing them as the remnants of the old, oppressive regime. Especially in Estonia, where immediately after independence the Russian-speaking population was estimated at half a million (one-third of the total population), there was a real fear on the part of ethnic Estonians of a move towards a bi-national, Estonian-Russian state, of which a bi-lingual policy would be a symbolic first step. As a knowledgeable insider notes: "the strength of Estonian nationalist feeling was such that this [bi-national] destiny for the state was rejected by the vast majority of Estonians, and their entire struggle for the restoration of their independence represent for them as much an effort to stem this bi-national future as a desire to regain their formal sovereignty".[136] And elsewhere, this same writer notes that any steps towards accommodating Russian-speaking minority into broader social institutions, and of encouraging their meaningful political participation have so far been weak and ineffective: "Too many Estonian and Latvian memories of Soviet russification remained, while the Russian communities themselves were slow to really mobilize their strength and press for meaningful change".[137] Hence, right after independence especially in Latvia and Estonia they were placed in a situation not unlike illegal immigrants: stripped of their citizenship and even denied permanent resident status.[138]

The Constitutional Review Chamber (CRC) in Estonia was twice asked to decide about the constitutionality of imposing Estonian language requirements on electoral candidates running in national and local elections. The 1997 amendments to the Language Act provided for language requirements of electoral candidates (as well as the tightening of the Estonian language proficiency requirements for non-Estonian employees in the public and private sectors). As one commentator notes, the law had been "motivated by nationalist desires to make sure that no non-Estonian-speaking person could be elected to parliament or local council".[139] The President – who challenged the law[140] which of course was very controversial for the Russian-speaking community – did not

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[136] Petai, "Democratic Norm Building", supra at 22.

[137] Vello Pettai, "Definitions and Discourse: Applying Kymlicka's Models to Estonia and Latvia", in Kymlicka & Opalski, supra at 267, footnote omitted.

[138] See Kymlicka, "Western Poltical Theory", supra at 76-9.

[139] Pettai, "Democratic Norm Building", at 26.

[140] President Meri initially vetoed the law, and after the parliament (the Riigikogu) adopted the law without any of the amendments postulated by the President, the President exercised his constitutional right to challenge the law before the CRC. I am indebted for this description of the decision and its background to Pettai, "Democratic Norm Building" at 26-29.

attack it head-on but rather on technicalities. First, he claimed that the law was unconstitutionally vague: by formulating language requirements in such a vague manner, it ran afoul of the constitutional requirement that limitations on rights cannot distort the nature of the right (Art. 11): the vague formulation of language requirements in employment tended to distort the right to non-discrimination in employment. The second charge was that by delegating the task of controlling electoral candidates' knowledge of Estonian to the executive branch (namely, the Minister of Education), the law threatened the constitutional separation of powers because the executive would potentially be able to harass these candidates after they have been elected. As is clear, the challenge was based not on minority-rights grounds; after all, it would be hard for minority rights-based arguments to prevail constitutionally over an argument derived from a very strong constitutional rule concerning the official language (Art. 6 and Art. 52 (1)) which leaves very little room for any public uses of minority languages. But there was at least some room for this: the Constitution provides that "in localities where the language of the majority of the population is other than Estonian, local government authorities may use the language of the majority of the permanent residents of that locality for internal communication to the extent and in accordance with procedures determined by law" (Art. 52 (2)). While the last limiting clause effectively delegates to statute the authority to define the use of non-Estonian at the local level, the Language Act's requirement for electoral candidates in local elections to pass a language requirement seems to effectively annihilate the possibility opened up by Art. 52 (2), as far as the local elected councils are concerned. But the Court did not follow this path of reasoning. Instead it chose the narrow line of argument suggested in the presidential challenge.[141] *In fact, it preceded its argument about invalidation with a nationalist salvo, stating that one of the duties of the State is to preserve the Estonian nation and culture, as evidenced by the Constitution's preamble and state language provisions. On the basis of these provisions, and additionally of the provision that everyone has the right to address the authorities in Estonian and to receive answers in Estonian (art. 51 (2)), the Court inferred that the challenged law's requirement of the Estonian language for the candidates to parliament and councils was not unreasonable. As a matter of fact, the Court did conduct an "activist" or a "expansive" interpretation but in the direction of undermining any possible claims for minority language rights! On the basis of the Constitution's preamble (incidentally, a non-typical basis for a Constitutional Court's reasoning!) which declares that the State will guarantee "the preservation of the Estonian nation and culture through the ages" (note there is no mention of the language!), and on the basis of the principle that Estonia is a democratic republic (Art. 1), the Court concluded that language requirements for*

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[141] Decision 3-4-1-1-98 of 5 February 1998, summarised in *Bull. Const. Case Law* 1998 (1): 37-8, EST-1998-1-001.

electoral candidates could be justified/were constitutional. The argument goes as follows: for a democracy to function, those who exercise power must understand what is happening and must use a single communicative system for their mutual communications; hence, only one language (Estonian) may be used in local councils and in the parliament. However, as one commentator noted, even if this argument properly applies to the actual proceedings in the councils and in the parliament once they are formed, "it did not address in any way the issue of restricting candidate rights during elections themselves".[142] *So it was on narrow technical grounds that the Court struck down the controversial provisions. It agreed with the challenger that the law was impermissibly vague insofar as the requirements for employment were concerned, and also that by delegating the power to exercise the language requirements to the government regarding the election candidates, it was contrary to the separation of powers: decisions connected with electoral rights should be made by the legislature and not the executive.* The postscript to the decision is that the parliament properly saw the CRC decision (and an analogous decision handed down a few months later)[143] as a "green light . . . to legislate language requirements for electoral candidates",[144] which it did in November 1998 by passing amendments to the electoral law which the President soon promulgated, despite protests from Russian community leaders. These language requirements were eventually repealed in November 2001 under direct pressure from the OSCE and the EU, not as a result of a constitutional challenge.

2.5. The special case of minority representation in public authorities

The most far-reaching proposal of political protection of minority rights consists of the demand for special political representation at a national or local level, implemented through some "sui generis minority mandates".[145] There are of course a variety of milder methods of strengthening the political representation of minorities such as "the role of the minorities ombudsman, local and national minority self-government, effective official lobbying mechanisms incorporated into parliamentary decision-making, and parliamentary candidates of minority parties and social organizations, who have gained their mandates under 'ordinary' election laws".[146] There are also some ways of facilitating the representation of minority parties in parliaments without at the same time creating special quotas

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[142] Pettai, "Democratic Norm Building", at 28.

[143] In November 1998 the CRC considered a challenge, which reached it via a lower court, to the original Language Act (not the 1997 amendments) requirements for local deputies; see id. at 28-29.

[144] Id. at 29.

[145] Pap, "Representation", supra at 262 and 267.

[146] Id. at 263.

of seats set aside for these parties: some Constitutions provide preferences in the form of less lenient election "threshold". For example, in Poland, electoral committees representing ethnic minorities do not have to pass the five percent threshold to achieve parliamentary representation.[147] Similarly, in Lithuania the organizations representing ethnic minority parties were exempt (until the 1996 amendment of the 1992 election law) from the four percent threshold needed to elect candidates under the proportional rules (which apply to one-half of the MPs, the remaining MPs being elected through a majoritarian system).[148]

Often set-asides are subject to a specified electoral result. For instance, the Romanian Constitution reserves one seat in the parliament for each ethnic minority organization which fails to obtain a sufficient number of votes to get elected though the regular procedure;[149] the electoral law clarifies that this is subject to obtaining at least five percent of votes otherwise required under ordinary procedures.[150] In Slovenia, the Hungarian and Italian minorities can elect one candidate each to the National Assembly (At. 80 (3)). In Croatia, where the Constitution remains silent on the matter, according to the electoral law all nine specified ethnic communities are entitled to one mandate each, plus any ethnic community which exceeds eight percent of the population (only the Serbian minority meets this requirement) is entitled to additional proportional representation.[151]

In Hungary, apart from the right to be represented in national and local bodies (Art. 68 (3)), national and ethnic minorities have a constitutional right to form their own minority self-government (art. 68 (4)). The statute on ethnic and national minorities provides that when a local government is elected with over half of the representatives elected as minority candidates, they may declare themselves as a minority self-government; by the mid-1990's, it has been reported that over 800 such minority self-government units existed in Hungary.[152] When it comes, however, to formal parliamentary representation of ethnic minorities, despite an impressive number of assorted legislative proposals aimed at designing an acceptable system,[153] no political consensus has emerged as yet to allow the adoption of a statute to regulate such representation.

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[147] For a more detailed description, see id. 284-85.

[148] Id. at 285-86.

[149] Art. 59 (2).

[150] See Pap, "Representation", at 286-88.

[151] For a detailed description of the complicated system, see id. at 288-89.

[152] Paczolay, "Human Rights", supra at 125.

[153] See Pap, "Representation" at 320-24.

At the opposite end of the spectrum are the countries which either openly or tacitly oppose the possibility of any formalized ethnic representation in parliamentary bodies. This is the case of Albania[154] and Bulgaria[155] which ban (respectively, in their statutes and the Constitution) any parties based on ethnic lines (though the Constitutional Court in Bulgaria has softened this stance, in a decision to be discussed below); and also Russia where "a number of tacit regulations create a legal climate in which, despite the multiethnic conditions, there is no ethnic party in the more powerful chamber, the *Duma*".[156] There are also a number of CEE countries which, while not prohibiting, make no constitutional or statutory allowances for political representation of minorities in the highest representative bodies: the Czech Republic, Slovakia, the Ukraine, Belarus, Macedonia and Moldova belong to this category.[157]

One example of an intervention by a constitutional court preventing a system of ethnic representation is provided by the Slovakian Court.[158] In that country, there was an attempt to introduce by legislation a rule of proportional representation of ethnic groups. It was struck down under the constitutional principles of equality and political competition. The case before the CC related to the local self-government electoral law of 1998 which stipulated that, in towns and villages where national minorities or ethnic groups lived, the total number of deputies in local elections must be divided proportionately. This had to result in a faithful reflection of the ratio between Slovaks and individual minorities. In effect a quota system for particular minorities (and Slovaks) was created. The Court found that such a system was contrary to the constitutional rule of equal access to public offices (Art. 30 (4)), the principle of equal dignity (Art. 12 (1)), as well as to the constitutional provision which states that the regulation of political rights must facilitate political competition in a democratic society (Art. 31). In effect, the Court rejected any idea of "preferential quotas" in order to improve the status of a national minority and ethnic group, and opted for the individual-civic principle: all citizens are equal in exercising their political rights, regardless of group membership.

The question of defining who belongs to an ethnic minority, in cases where the group is given certain special political rights, arose in Slovenia.[159] The

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[154] The Law on Parties of July 1991, see id. at 279-80.

[155] Art. 11 (4).

[156] Pap, "Representation", at 280, footnote omitted.

[157] See id. at 282-83.

[158] Decision 19/98 of 15 October 1998, summarised in *Bull. Constitution. Case Law* 3 (1998) 460-62, SVK-1998-3-010.

[159] Decision U-I-283/94 of 12 February 1998, in http://www.us-rs.si/en/casefr.html visited 10 May 2001.

Constitution provides for some extensive special rights for Italians and Hungarians, including the rights of these two ethnic communities to be "directly represented at the local level" and also to be represented in the National Assembly (Art. 64 (3)). This gave rise to the question of how to identify the members of those minorities as they posses special voting rights: in effect, they may vote twice – for a member of their national community, but also for other delegates as well. The challenged provision stated that there would be special electoral rolls set up by the self-governing Italian and Hungarian communities and then confirmed by an organ of the jurisdiction. Another article of the law stated that members of these communities not living in the regions where these communities make up a significant part of the population shall be inscribed on this roll upon their written request. The Court was concerned that the criteria for determining who belonged to the minority community were not defined either in the Constitution or in any other law. Thus, inscriptions in the electoral roll were being carried out without any statutory guidelines on who should be included. Since membership of these communities is a status to which the Constitution attaches special rights, criteria of belonging to the minority must be statutorily determined. While everyone has a constitutional right to express freely his or her affiliation to any nation or national community, if the person's will in this particular context of electoral system were to be decisive, this could lead to abuse and an undermining of the real will of the community and their Constitutional rights (in Article 64 of the Constitution), as others could be entered on their electoral roll and affect the outcome of elections. In consequence, the Court declared the legal provisions to be unconstitutional on the basis of their conflict with the rule of law and demanded that the legislator correct this state of affairs.

Probably the most important decision on racial and ethnic equality in CEE (although not argued along the lines of non-discrimination) was the Bulgarian CC decision of 22 April 1992 on the status of the Movement of Rights and Freedom (MRF).[160] According to the petitioners in this case, a group of 53 Bulgarian Socialist Party deputies, 99 percent of the membership of this Turkish-based organization, belonged to the Turkish minority. It had 24 deputies in the parliament and was a crucial ally of (key member of?) the coalition dominated by the Union of Democratic Forces: without its support, the liberal government formed after the October 1991 elections could not survive. The petition to the CC

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[160] For descriptions and analysis of the decision, see Emil Konstantinov, "Turkish Party in Bulgaria Allowed to Continue", *EECR* vol. 1 (Summer 1992): 11-12; Jean-Piere Massias, *Droit constitutionnel des États d'Europe de l'Est* (Presses Universitaires de France: Paris, 1999) at 161-62; Anna M. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej w okresie przekształceń demokratycznych* (TNOiK: Toruń 1997) at 137-39; Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press: Chicago, 2000) at 172-73.

demanded that the MRF be outlawed (and, in consequence, its MPs excluded from the parliament) on the basis of article 11.4 of the Constitution which prohibits political parties based on ethnic, racial or religious lines.[161] Of course, the very principle of outlawing a political group on the basis of its ethnic composition and programme is anathema to the principle of liberal diversity.[162] This was included in the Constitution at the insistence of the post-communists who won a majority in the first multi-party parliament and could shape the design of the hastily adopted Constitution in accordance with their preferences, which also included an embrace of nationalism as their new creed. To question the validity of this constitutional pronouncement was naturally beyond the Court's reach. According to one convincing interpretation, the petition to outlaw the MRF was dictated less by ethnic and national animus and more by pragmatic party-politics considerations: "the attacks against MRF were used – not very successfully – as a public relations device to boost the political fortunes of the former communists".[163] *In any event, the "pro-MRF" judges rejected the argument of the petitioners, and engaged in a rather creative interpretation of the Constitution, stretching perhaps their power of interpretation to its limits, given the relatively clear text, but, admittedly, in a good cause. They explained the true meaning of Art. 11.4 as a ban on parties which actually exclude potential members on the basis of their national etc. origins. Since the MRF's constitution did not contain any such exclusionary rules, the ban of Art. 11.4 did not apply to it. A party cannot be said to contravene Art. 11.4 on the basis that the majority of its members belong to a particular ethnic or religious group – the CC argued – because, if this was the case, all parties which have the word "Christian" in their name would have to be judged unconstitutional. The "pro-MRF" judges also engaged in a discussion of the MRF's programme and discerned that it was opposed to ideas "of autonomy, national chauvinism, revanchism, Islamic fundamentalism and religious fanaticism"*[164] *although, at the same time, it demanded the broadening of the protection of rights of ethnic and religious communities. The Court also sketched a historical-justice analysis: it recalled that the rights of the Turkish minority had been blatantly violated in the past, as was acknowledged in the parliament's declaration of 15 January 1990, and that*

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[161] There was a second constitutional ground cited by the petition: the ban on organisations which call into question the sovereignty and territorial integrity of the country, or that foment ethnic or religious emnity and the violation of the rights and freedoms of citizens (Art. 44 (2)). The petitioners claimed that, by favouring a policy of ethnic assimilation of Bulgarian Moslems into the Turkish minority, the MRF promotes ethnic and religious confrontation. Both for our purposes, and in the argument of the Court, the claim based on Art. 11 (4) was dominant.

[162] See Kymlicka, "Western Political Theory" at 55.

[163] Antonina Zhelyazkova, "The Bulgarian Ethnic Model", *EECR* 10 (Fall 2001): 62-66 at 65.

[164] See Konstantinov, "Turkish Party" at 11.

the emergence of the MRF on the political scene must be seen as a natural reaction of the Turkish minority to these violations. It actually said that the very formation of the MRF was an "immediate consequence of the acts perpetrated by the totalitarian regime against a part of the Bulgarian citizens".[165] *In addition, the judges argued that the MRF was not a "party" but a "movement", as evidenced by its registration in a regional court as a "political organization" and, additionally, by a refusal of a regional court to re-register MRF as a "Party for Rights and Freedoms".* This was a courageous decision, and it provoked a passionate debate, all the more so since it was effectively decided by a minority of judges (five against six): the MRF's parliamentary presence survived only because the Constitution provides that the decisions must be taken by "more than half of the votes of all Justices", which means that seven judges must be in favor of declaring a party (or of a statute, for that matter) unconstitutional.[166] As Venelin Ganev assesses, the decision of the Court "effectively obviated [the] nationalistic, restrictive intent" of Art. 11 (4) and "contributed towards the advancement of the process of ethnic reconciliation".[167] With the benefit of hindsight one can say that the decision certainly has not aggravated ethnic relations in Bulgaria but, if anything, contributed to a further decrease in negative stereotypes towards the Turks in Bulgaria. As a Bulgarian expert in ethnic politics observes, "The fact that [the Turks and ethnic Bulgarians who have adopted Islam] are represented in public life by an independent political organization finally legitimized them in the eyes of Bulgarian society".[168]

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[165] Quoted in Venelin Ganev, "Foxes, Hedgehogs and Learning: Notes on the Past and Future Dilemmas of Postcommunist Constitutionalism", paper presented at the workshop "Rethinking the Rule of Law in Post-Communist Europe", European University Institute, Florence 22-23 February 2002, at 12.

[166] There are 12 judges on the CC but only eleven took part in the consideration of the MRF case (one judge was ill). The rule that the constitutional requirement of "more than half of the votes of all Justices" (art. 151 (1)) means a requirement of at least seven (regardless of the number of Justices participating in the vote) for the decision of unconstitutionality does not have a clear textual mooring but, as Ganev explained, evolved as an established practice which now can be seen as a constitutional convention, see Venelin Ganev, "The Rise of Constitutional Adjudication in Bulgaria", in Wojciech Sadurski, *Constitutional Justice, East and West* (forthcoming 2002).

[167] Id.

[168] Zhelyazkova, "The Bulgarian Ethnic Model", supra at 65.