Clauses on equality and anti-discrimination have been among the most frequently used constitutional provisions in the process of constitutional review in CEE. This is understandable. Firstly, these provisions are eminently malleable, “open-ended”, and lend themselves to application in virtually all spheres of law and policy. Secondly, when constitutional courts are identifying the substantive rights provision under which they will consider a particular challenge, they will often have a choice between a socio-economic right and an equality provision. The selection of the equality provision as a basis for review has the advantage of appearing less controversial, less “activist” than if a specific socio-economic right were to be appealed to directly. 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 introduction of the market economy, coupled with deeply ingrained egalitarian societal attitudes. This explains the inclination of constitutional courts to use the equality provisions generously, a tendency that will be discussed in sections 1-3 below. In contrast, however, to the general equality and anti-discrimination provisions, the constitutional rules on minority rights, and, in particular, on the rights of ethnic and national minorities, became something of a problem for constitutional courts: they were, by and large, neither intellectually equipped nor morally and politically prepared to interpret them in an expansive, generous manner. This will be discussed in sections 4-7 of this chapter.

1. EQUALITY AND CONSTITUTIONAL REVIEW

It is useful to sketch at the outset a brief account of the design of equality provisions in the constitutions of the region. Two techniques are used: either a general statement on equality (or a prohibition of discrimination; the two concepts are treated interchangeably), or a general provision on equality with a list of specific grounds of prohibited discrimination. The first technique is used in a small minority of constitutions in the region: Poland, Latvia and Belarus belong to this category. For example, the 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”. As is readily evident, 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 spelled out. 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 limiting it to the protection of “human rights” only, and not to any and all legitimate interests of individuals.

In contrast, a great majority of the CEE constitutions attach a list of specific grounds of prohibited discrimination to the general provisions on equality. These characteristics are strikingly similar: of the 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 fifteen constitutions), property (thirteen) and ethnic or other origin (eleven). Less than half of those constitutional provisions mention birth (eight) and education (six) 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 that make an effort to list the grounds of prohibited discrimination mentions sexual orientation. This clearly reflects the widespread ambiguity – often, outright hostility – in attitudes towards homosexuality in CEE.⁴ There were powerful counter-incentives at work, preventing constitution drafters in the region proposing, or supporting, the inclusion of an explicit prohibition of discrimination based on sexual orientation: such a proposal was unlikely to find favour among the majority of voters, and certainly would have been ridiculed and rejected by powerful traditionalist groups (such as the Catholic church and related political forces). It does not, however, necessarily follow that anti-homosexual legislation automatically passes constitutional muster in those countries: indeed, decisions by the Romanian⁵ and Hungarian⁶ Constitutional Courts have already shown this not to be the case. But in order to find constitutional arguments against such proposed or actual legislation, its opponents must look to the general equality provisions rather than to the list of specific prohibitions of certain grounds of discrimination.

In fact, this omission is not surprising, given that a number of the constitutions that do list specific grounds of prohibited discrimination provide, at the end of these lists, that “any other reasons” for discrimination are also prohibited, thus explicitly acknowledging that the list provided is non-exhaustive.⁷ Anti-discrimination provisions in these constitutions are therefore “open” in two ways: firstly, by allowing any other, unspecified reasons, to count as impermissible grounds for discrimination; and secondly by attaching the lists of specific grounds for prohibited discrimination to the more general provisions on equality and discrimination. As the principle of equality is violated by any classification that relates a specific treatment to personal characteristics that are irrelevant to that treatment, or where they may be relevant but there is no proportionality between the characteristic and the different
treatment, the lists of prohibited grounds for discrimination may be seen as redundant.

What role, then, do they actually play? One can venture two hypotheses. The first is that, notwithstanding the open character of the prohibition of discrimination, some types of discrimination are viewed as being worse than others, with those that treat people unfairly on grounds listed belonging to this group. Such an explanation would make sense provided that there was a clear and obvious common denominator between those grounds of prohibited discrimination that would point at the common rationale for our particular hostility towards classifications based on that rationale. But there is none. Clearly, the immutability of the listed personal characteristics that form the 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 more realistic: the catalogues of prohibited grounds serve a rhetorical purpose of symbolically conveying a message to the population, to the effect that the constitutional drafters are not misogynist, not racist, not bigots etc. This is harmless enough; however, it shows that the actual constitutional value of these lists is extremely limited.

The Polish Constitutional Tribunal has worked out a relatively elaborate theory of equality-based scrutiny of legislation, focusing on the idea that equality before the law is compatible with the fact of legal differentiation, as long as the differences in treatment are related to relevant differences in those involved. Early on in its 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 classes of citizens. . . . reasoning on equality before the law therefore collapses into an evaluation of adopting a particular classificatory criterion as justified and as just”. Perhaps the most developed definition of this position thus far provided by the Constitutional Tribunal is as follows:

If the differential 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 [i.e. 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).

As is clear, the identification of the “relevance” of a subject’s particular characteristic to the goal pursued is the cornerstone of this analysis. The question of what characteristics are relevant to particular purposes is however, an essentially open-ended one, inevitably implicating issues of either morals or policy; thus, scrutiny of the constitutionality or otherwise of legislation through the lens of the equality principle necessarily grants a wide range of discretion to any court exercising judicial review of statutes. In this respect, it is significant that the Constitutional Tribunal described the principle of equality as derivative from the principle of social justice. It shows that, as views on social justice are essentially contestable and largely indeterminate, so are conclusions as to whether a given
regulation complies with the constitutional principle of equality. The Tribunal has used this conceptual device to strike down a number of socio-economic regulations, such as the laws on “indexation” of pensions (i.e., adjustment of pensions to rises in the cost of living): upper limits imposed upon pension payments were found to be inconsistent with the principle of social justice, and hence with equality.\(^{12}\)

There have been, however, also some decisions in which the Constitutional Tribunal has attempted to narrow down the scope of those characteristics that may be deemed “relevant”, by appealing at times to the concept of immutability (albeit tacitly) as an indicium of a forbidden basis for discrimination. For example, in one early decision, in 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”.\(^{13}\) The upshot of this is that it is improper to differentiate among citizens in terms of criteria (such as gender) that lead to the creation of closed (caste-like) categories of legal subjects.\(^{14}\) This argument has not, however, been developed or even repeated in later decisions of the Tribunal; the preferred theory in all subsequent cases has been based upon the more open-ended concept of the relevance of the contentious distinction to the purpose of the rule in question.

More generally, it should be observed that the great majority of decisions of constitutional courts taken under equality provisions do not appeal directly to any of the prohibited grounds of invidious discrimination, but rather challenge the rationality of the legal classifications employed in various areas of socio-economic policy: in taxation, pensions, unemployment and welfare benefits, etc. They can be considered to be the more routine, less obvious cases of discrimination, in which no suspicion of the 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 questioned by the constitutional courts on the basis of its perceived irrationality or arbitrariness.

An interesting case on pensions for war veterans was brought, in 1994, before the Romanian Constitutional Court.\(^{15}\) Under challenge was a statutory provision that 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 had been compulsorily conscripted into the Magyar army (as 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 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”.\(^{16}\) The Court, however, rejected this argument, finding that, given that the obligation (to fight for, and not against, one’s own army) was impossible for some to fulfil, this law unlawfully discriminated against those who had been conscripted into the Magyar army. It was thus held to be in violation of 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 possible accusations 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 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 juridical [sic] solution given for the problem does not distort in any way the historic reality, nationally and internationally known.17

A decision of the Slovenian Constitutional Court on a law dealing with the reprivatisation of land illustrates how the equality principle can be used to interfere with a policy – in this case, 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).18 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 hectares 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”19 More relevant to our current discussion, however, is the Court’s objection to the fact that the moratorium only applied to land over 200 hectares. This, according to the Court, amounted to discrimination between denationalisation claimants (as between those entitled to receive over 200 hectares as opposed to under 200 hectares, and also as between those who had not yet had their claims processed and those who had already received their land over 200 hectares before this moratorium came into force);20 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; any such line can be attacked as arbitrary.

2. GENDER AND SEXUAL ORIENTATION EQUALITY

Decisions related to gender equality belong to the most important in the equality jurisprudence of the constitutional courts in CEE. Small wonder: old Communist laws and rhetoric paid lip service to the ideal of equality of the sexes, while at the same time maintaining, and often petrifying, traditional social norms of inequality and discrimination against women. Modern ideas concerning gender equality, especially in the workforce and in political life, collide with traditional attitudes and prejudices. Ken Jowitt is correct when he observes: “Antifeminism is palpable throughout Eastern Europe”.21 As a result, various forms of discrimination against women, both in the legal system and in society in general, have persisted. One
obvious area is in the sphere of employment, with a disproportionately small number
of women in higher managerial positions, 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; in the Czech Republic, that figure is 70 percent), no equal pay for
equal work, and a widespread tendency among employers to follow discriminatory
practices, such as demanding pregnancy tests prior to hiring a woman.22 Often the
discrimination results not so much from formal legal rules, but from societal norms
and prejudices, such as, for example, the strong conviction persisting in the countries
of the that there exist “feminine” (secretaries, cleaners, etc) and “masculine”
(engineers, managers) professions and positions.23 There is also a dramatic under-
representation of women in all areas of politics: in parliamentary and local
legislative bodies, governments, top judicial bodies, etc.24

One example of such discrimination, traditionally taken as reflecting self-evident
differences between men and women, is provided by 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 court in this regard turned
out to be the Polish Constitutional Tribunal. Beginning in 1991, when it abolished a
differential retirement age in academic positions,25 it subsequently took several
decisions, striking down particular statutes that provided for a lower compulsory
retirement age for women than for men, e.g. for civil servants,26 for employees of
pharmacies,27 and for teachers.28

In this series of decisions, the most elaborate and interesting is the one that
struck down the earlier retirement age for women than men in civil service, and at
the same time established the grounds for permissible positive discrimination.29
Under challenge was a rule in a 1996 statute regulating the civil service, which
allowed the discharge of a female civil servant at the age of 60, against her will –
that is, five years earlier than the permissible non-voluntary discharge of a male civil
servant. In this decision, the Constitutional Tribunal criticised an earlier decision of
the Supreme Court, in which the latter had 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 that they receive, namely,
an earlier acquisition of retirement pension benefits.30 The Supreme Court had 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 Supreme Court, the benefits for women out-
weighed the disadvantages, and so “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”.31 The Constitutional Tribunal catego-
rically rejected this theory. It began by reasserting its earlier pronouncements on
gender equality, which had established the principle that departures from equal
treatment can only be legitimate where they can be justified by “a desire to achieve
actual social equality [between men and women]”.32 It is constitutionally acceptable,
the Tribunal stated, 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: “as in social reality women, as a rule, have weaker positions . . . there is a constitutional justification for enacting rules that confer certain benefits upon women because this is an instrument leading to a de facto equality for women”. The Tribunal even went a step further and held 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. Having so defined the principle of positive discrimination, the Tribunal then rejected the Supreme Court’s approach, based as it was on the mutual balancing of the privileges and disadvantages for women. It stated: “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 that do not apply to men”. Thus, it was held that there is no requirement of an equal overall balance of benefits and duties of employees of both sexes. A parallel argument cannot be applied to men, the Tribunal added, because “in Poland these days there are no grounds for treating men as a weaker social group”. 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 rights. It is important to emphasise the particularly enlightened character of this (relatively unknown) decision. The Constitutional Tribunal rejected, although not in so many words, the 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 based its theory justifying affirmative action (albeit, again, implicitly) 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 Constitutional Court 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: as women were not compelled to serve in the army, he claimed, they received an unfair legal benefit. The Court explained that this distinction amounted to a “positive discrimination” aimed at achieving eventually greater equality; although, as Kim Lane Schepple (who is 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…”.

As mentioned above, anti-homosexual prejudice is quite widespread in the CEE region, with, in particular, those inspired by the teaching of Catholic Church displaying a hostile approach to same-sex relationships, considering them a deviation from and a threat to the moral fabric of society. Furthermore, on top of the general societal aversion, formal legal rules generally discriminate against
homosexuals, especially in the spheres of family and succession law: it is, for example, impossible to legally register same-sex marriages; and those living in homosexual relationships are denied “family member” status for the purposes of taxation, inheritance, social assistance, etc.

In the most important decision on the question of sexual orientation in the region of CEE, the Hungarian Constitutional Court struck down the legal non-recognition of a de facto homosexual relationship *qua* “a common household”, but at the same time upheld the rule allowing only heterosexual marriages. Under challenge were two provisions: a family law provision that defined marriage as a union between a man and a woman, and a civil code provision that defined a “domestic partnership” as a woman and man living in a common household outside marriage. Regarding the question of the legal definition of “marriage”, the Court based its decision on the basis of the traditional understanding “both in our culture and in law” of the institution of marriage as a heterosexual union. One might, of course, object that the traditional understanding of marriage in law is precisely what is at issue here, and so cannot figure both as evidence and as a conclusion. But it surely could not be expected that the Hungarian Constitutional Court would be the first legal authority in the world at that time to recognise same-sex marriages; further, it should be noted that the Court’s relative conservatism with regard to the notion of marriage is counterbalanced by its liberalism concerning the second issue in this decision, namely, the de facto relationship. In this respect, the Court linked its reasoning to 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, and taking on all aspects against third persons . . . .” Such a legal exclusion “is arbitrary and thus violates human dignity; therefore it is discriminatory. . . .” This compelled the Parliament to amend certain laws, including the Civil Code, in order to allow succession of property within de facto homosexual couples.

Further, a relatively minor but symbolically meaningful decision of the Hungarian Constitutional Court of 1999 struck down as unconstitutional a provision of the Criminal Code that penalised “normal” heterosexual intercourse between siblings and “unnatural” homosexual intercourse between siblings. “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.

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. 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 this provision violated several articles of the Romanian Constitution as well as art. 8 [right to privacy] of the European Convention on Human Rights (ECHR). The trial
court, for its part, held 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 Constitutional Court 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 that refers to the “rules of conduct of other members of society” as well as “the general moral sense”. The government also offered a similar reading of the European Convention on Human Rights (ECHR): the limits on the right to privacy in art. 8 include interference based on the protection of public order and morals. The Constitutional Court was therefore confronted with a traditionalist viewpoint whereby the right to act in accordance with one’s sexual orientation has to surrender to the views of the majority concerning the proper rules of conduct, moral sense, etc. Furthermore, to reinforce this stance, a number of religious groups and churches (which were also asked to express their opinion) emphatically condemned homosexual acts “the majority of them is 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 the International Commission of Jurists and Amnesty International) provided the Court with their negative opinion on the legality of the provision in question and called for its abolition. Faced with all of this, the Constitutional Court decided purely on the grounds of the inconsistency of article 200 with article 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 international treaties to which Romania is a party, and that Romania is a party to the ECHR, the Court found that it had a duty to remove the inconsistency between the anti-homosexual provision of the penal law and article 8 of the ECHR. At the same time, it was careful to emphasise that the scope of protection afforded by art. 8 is limited 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 (i.e. concerning public scandal) may be activated only when the act is committed in public and not in private, even if others somehow find out about it 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 that would render the act actionable, and this small ambiguity is perhaps a sign of the Court’s effort to appear more moderate than in fact it was in striking down the anti-homosexual provision.

3. SPECIAL CASE OF AFFIRMATIVE ACTION

While most of the constitutions in the region limit themselves to the prohibition of discrimination (or a general proclamation of the principle of equality), some go further by providing for special protection for certain specified social groups in
particular social settings: for example, protection of children and minors in the workplace,\textsuperscript{50} and affording to them assistance in professional training and special health care;\textsuperscript{51} protection of women in the workplace,\textsuperscript{52} and, in addition, special protection of pregnant women;\textsuperscript{53} special assistance to and protection for mothers;\textsuperscript{54} protection of and aid to the disabled\textsuperscript{55} etc. These provisions, however, have not been worded so as to mandate positive discrimination, that is, a deliberate programme of preferential treatment 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 on special protection for certain groups) contain explicit prohibitions on granting any privileges based on various listed grounds. The Lithuanian constitution, for example, states that no restrictions can be imposed upon nor privileges granted to a person on as the basis of sex, race, nationality, etc;\textsuperscript{56} likewise, the Bulgarian constitution precludes the conferral of any privileges upon such grounds.\textsuperscript{57} This suggests that any acts or statutes that envisage positive discrimination in favour of women or ethnic minorities could be struck down on these grounds. The Slovak Constitution expressly limits the provisions concerning the rights of members of ethnic and national minorities with the qualification that the protection of their rights must not lead to, inter alia, “discrimination against [the Republic’s] other inhabitants”.\textsuperscript{58}

There are, however, some exceptions to this general silence of CEE constitutions on measures of positive discrimination. 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”.\textsuperscript{59} This may be seen as a mandate to the state to take positive action that will actually lift the position of disadvantaged groups vis-à-vis others in society.

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 obvious form when privileges are granted to a group that has traditionally been discriminated against); nevertheless, it did represent an interesting test for the notion of equality as understood by the Court.\textsuperscript{60} The Court rejected the challenge, stating that “the ban on discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden”\textsuperscript{61} The Court specifically acknowledged that the Constitution allows for 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 an “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”.\textsuperscript{62} As one expert on the Court has 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 that is inferior and subordinate to “the right to being treated as an equal”.\textsuperscript{63} Dworkin had made this distinction precisely in the context of his discussion of “reverse discrimination” and its compatibility with the principle of constitutional equality.\textsuperscript{64}
The region of Central and Eastern Europe displays a wide and untidy mosaic of ethnic, national and religious minorities within and across state boundaries. After the fall of Communism, nationalism was (alongside religious fervour) often the only force capable of cementing people together and counteracting the prevailing anomie; the downside of this, however, was that all too often such nationalism was characterised by rampant and violent exclusion, fed by a widespread sense of hostility towards “the other”. Communism had often swept various ethnic and national animosities artificially “under the carpet”: these tensions were thus not overcome but merely deprived of any open expression under the official orthodoxy of national unity. The Balkan wars and the split of Czechoslovakia are the most visible examples of this but various actual and potential cases of discrimination against ethnic 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, against whom hostility, discrimination and prejudice are strongly ingrained throughout the region, and rendered even worse by their added disadvantage of no specific territorial concentration that could help to build the capacity for effective political mobilisation. As a result, despite putting forward 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 (around 20 million) belonging to this minority 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 Belarussian minorities). Apart, however, 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 of the population in any given state. 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. More often than not, however, the minorities in CEE countries are not sufficiently concentrated in any given area 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 in Hungary itself) pose special problems both for Hungary, which tries to maintain a sort of tutelage over Hungarians abroad, and the host countries, which fear an irredentist minority encouraged by its neighbouring kin state. A similar case is that of Albania, a relatively
homogenous state, but with sizeable Albanian minorities in neighbouring Macedonia and Serbia (Kosovo).

A delicate and fragile situation persists in the Baltic states, in which a large proportion of the population is of Russian ethnic origin (for example, immediately after regaining independence, thirty percent of Estonia’s population, and 34 per cent of Latvia’s, was Russian-speaking), as a result of the USSR’s deliberate policy of encouraging Russians and other Slavs to settle in the outlying republics. This ethnic Russian population is often viewed 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 take-over of the Baltic republics by the USSR in 1940. As an Estonian scholar Vello Pettai 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”.

The dramatic legacy of ethnic and religious persecution left by the old regime, which has persisted in certain forms, is exemplified by Bulgaria where, since the early 1950s, 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 converted to Islam in the past) took various forms, such as the deprivation of Turks of their land; forced emigration to Turkey; forced renaming of the Pomaks and Turks (as recently as 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. As a result, Bulgaria entered into its democratic era with ten percent of its population (and this does not include the Roma minority) nursing fresh memories of persecution, harassment and discrimination.

The disintegration of the old Soviet Union produced a situation in Russia in which a host of ethnic conflicts were very early on transformed into ethno-territorial conflicts: although Russia is more mono-ethnic than many other European states (with over 80 percent of the population being ethnic Russian), there are also more than a hundred different indigenous ethnic groups and thirty-one ethnic territorial units; ethnic conflicts are never far from the surface in the clashes between these units with “the Centre”. However, the “ethnic region versus the Centre” conflict (of which the Chechen and Tatarstan crises are examples) is only one of a number of different types of ethnic-based tension in the Russian federation: one knowledgeable scholar has identified others, such as the conflicts between ethnic regions themselves (e.g., Ingushetia v. North Ossetia); conflicts within a region between titular ethnic groups controlling “their own” 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 competing claims to resources made by nations separated by frontiers of territorial units (e.g.
Ossetians, and, of course, Russians). In any event, the territorial solution cannot be seen as an adequate response to ethnic tensions as there is not a sufficient degree of correspondence between an ethnic group and a given territory: there are many groups that 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).

In sum, the nature of the problem varies from country to country; none however 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 by marginalising 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”. 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 practice of the constitutional court of at least some of the CEE states.

5. CONSTITUTIONAL DESIGN OF MINORITY RIGHTS: GROUP OR INDIVIDUAL RIGHTS?

The only constitution in the region that fails to mention minority rights is the Constitution of Bulgaria. All of 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.” The catalogues of minority rights are often more elaborate, as in this provision of Romanian constitution: “The state recognises and guarantees the right of persons belonging to national minorities, to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity.”

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 infringements on their interests in the preservation and development of their culture, language, etc. Often, however, certain minority rights, in particular the right to education in one’s own 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… [and] education in their native languages”, and the Macedonian Constitution declares that “The Republic guarantees the protection of the ethnic, cultural, linguistic and religious identity of the nationalities.” Positive state duties are sometimes restricted to particular obligations, particularly in the sphere of official communications and interaction of the citizens with governmental bodies. For example, in Estonia, 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.”

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 [the] country.” The Constitution of Montenegro goes even further by envisaging a system of proportional representation not only in the “state authorities” but even in public services: “Members of the national and ethnic groups shall be guaranteed the right to proportional representation in the public services, state authorities and in local self-government.”

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 protection to “inhabitants belonging to a nationality” (in the context of the right to use a language other than Macedonian as an official language) or “[m]embers of nationalities”. The Russian Constitution, instead of providing protection for minority groups, or the individuals belonging to them, generalises the problem: it grants traditional minority protections to all citizens. Thus, article 26 states:

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”. Here, these groups are given additional rights such as “to establish organizations, 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….” One may add that, while Italians and Hungarians may be seen as “indigenous” groups in Slovenia because they have inhabited that area for centuries, they are not the most numerous ethnic minorities: Croats, Serbs and Muslims constitute proportionately larger minorities in Slovenia than do the Italians and Hungarians. The only explanation for this apparent abnormality is that the issue of the 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 that made up ex-Yugoslavia. Hence, it was safer to
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accord a special, elaborate and advantageous minority status to Italians and Hungarians than to Serbs, Croats and Bosniaks (Bosnian Muslims). 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 seem to suggest that they do not fall within the general provisions on minorities and are not considered to be a minority group.

Most of the constitutions of the region phrase minority rights in the language of individual rights, as held by “persons belonging to national minorities…”. In some cases, however, 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”. Slovenia also takes this approach, albeit in relation to the rights of Hungarian and Italian minorities only (the others are treated as individual rights). Thus, these states truly create constitutionally guaranteed group rights. Several constitutions use both the language of group and individual rights, depending on the nature of the right proclaimed. For example, the Polish constitution uses group-rights language with regard to the establishment of educational and cultural institutions for national minorities and individual-rights language when dealing with the freedom to maintain one’s customs, tradition and culture. 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) that confers special rights upon minority members. The former (liberal-individualistic) approach dominates the thinking about the protection of minorities in the United States: 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. This may be called a “liberal-neutralist” (or individualistic) approach. In the continental European setting, however, this approach has been seen as largely ineffective and insufficient. In Europe, there is much less faith in the beneficial effects of the extension of individualistic liberal principles to a situation in which anti-minority prejudices and hostility are deeply ingrained, and are also 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 that have been present in a given territory for a long time, or that find themselves sharing the same nation-state due to changing borders or to forced movements of population (hence, forced rather than voluntary migration) etc, the purely individualistic method appears much less capable of providing real and effective protection to minorities.

This distinction corresponds to what some refer to as the difference between “minorities of force” (minority groups that desire equal treatment but are denied equality by dominant majorities) and “minorities of will” (groups that desire to
maintain their separate identities and thus demand different treatment from the dominant group). 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 minorities of will is for constitutional entrenchment of minority rights distinct from, and operational alongside, universal individual rights. If non-dominant groups wish to preserve their identities, threatened as they are by extinction, then 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 individualistic wording; at a certain point the group that is entitled to such privileges has to be identified, and at this point the universal-individualistic approach ceases to be suitable. 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 the 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 that 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 is more ingrained in the Anglo-American constitutional systems (in particular, in the United States, 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 that has traditionally given liberal theorists a headache: how to reconcile a universal commitment to individual human rights (including the right to autonomy) with respect for the traditions of minorities that 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, 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 basic personal matters, fair political representation, free expression, non-discriminatory treatment, physical inviolability etc. On the other hand, those minorities, often indigenous ones, that do not respect fundamental equality between men and women, that practice corporeal punishment, and that do not respect the individual’s right to control his or her life to the degree deemed necessary by liberals, 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 that 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 by the wider community 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”. 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:

[1]t seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of 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 legal systems to minority rights can be seen as resulting largely (though not solely; one should not discard much more invidious factors related to racism) from this dilemma. However, 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 relations between an ethnic majority and minority (or minorities) plainly does not fit the description of “liberal majority versus oppressive minority”;103 therefore, the fundamental philosophical reason for distrusting the very idea of minority rights does not apply (or applies to a much lesser degree) to the European situation. 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; this dilemma seems to have been answered overwhelmingly in favour of the latter. As a Serbian legal scholar, Tibor Varady, concludes:

experience in [CEE] countries has shown that ethno cultural 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

And it is significant that virtually the same argument has been officially endorsed in Hungarian law, namely in the 1993 Act on the Rights of Ethnic and National Minorities, which proclaims in its introduction that “minority rights cannot be fully guaranteed within the bounds of individual civil rights; thus, they are also to be formulated as rights of particular groups in society”.105 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 authorised leaders and representatives of the group), and, on the other hand, rights that 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, even although the basis of his or her claim is that he or she belongs to a group. As one Russian scholar has noted: “Any public support to institutions that address specific needs of persons belonging to minorities can be justified in terms of individual rights”. 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”. But this is a practical and contingent matter; and need not always be the case. As another commentator has observed, “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”.

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 the provision of certain services, it is perfectly imaginable and practicable to claim that 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 in the strict sense. One might think, for example, of officially recognised 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 recognisable (and recognised) corporate body that speaks on behalf of the group. This raises the obvious problem of whether that body has the legitimate authority to represent all of 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 centralised in one group-representative body. In the case of individually-worded group rights (where the individuals are entitled to claim, for example, for access to education in their own language) the problem of representation disappears; however, 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.

6. 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 that “minorities should not be denied the right of enjoying
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their culture and using their language, but it must only be within their ‘own’, isolated environments.”. This, as Will Kymlicka observes, 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 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.

Almost all CEE constitutions contain provisions stipulating the official language of the State, and all but one contain provisions stating that minorities are allowed to use their own language. More than half of these constitutions contain the bare permission for groups to use their languages, and the majority of these do not attribute these rights to minorities, but rather state simply 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 rights of minorities to foster, preserve or develop their own languages. 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), or simply by allowing for members of a minority to interact with certain state bodies using their own language. In addition, a large majority of these constitutions grant the right to be educated in one’s own language, although it is usually weakened by a stipulation that the exercise of this right will be regulated by statutory acts. Two of the constitutions that grant the right to be educated in one’s own language assert that the official State language must be learnt concurrently with this, while the constitution of Bulgaria is quite unique in laying down a definite obligation on citizens to learn the state language. Finally, a number of constitutions contain provisions guaranteeing that persons accused of an offence, or finding themselves in court, have the right to receive information in a language that they understand — including the right to a translator in court should they not be fluent in the official State language.

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 (particularly with regard to their Russian populations) and in countries such as Slovakia or Romania (with their Hungarian minorities). In Slovakia, the tension is symbolised by two clauses of art. 6 of the Constitution: 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 twenty percent of the population; governmental practice, however, has often been contrary to that rule. The Slovak Constitutional Court considered a challenge to a number of provisions of the 1995 Law “On the State Language”, one of which 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 details of this right were to be regulated 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 Constitutional Court rejected a challenge to a law that allowed public radio to broadcast in the languages of national minorities (as well as in Macedonian). 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 and linguistic 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 multiple official languages in the Republic, and thus 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 here was that 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 a provision of criminal law that obliged courts to deliver summonses and other written documents to members of non-Macedonian nationalities in their own language. In a Solomonic 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; on the other hand, however, the Constitutional Court decided that the official-language constitutional provision applied to official documents of the courts unconditionally. The second decision related to a provision of the Law on Civil Procedure, which stipulated that, in local self-government units (in which 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. The Constitutional Court found this provision of the law to be in violation of the constitutional provision that declares Macedonian, in the Cyrillic alphabet, to be the official language of the state (Art. 7(1)). It should be noted that the opposite decision was genuinely open to the Court; 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), alongside the official Macedonian in the Cyrillic alphabet. However, despite these qualifications on the official-language rule, the Constitutional Court held that courts undertaking official activities cannot use languages that are not official – thus they can use only the Macedonian language in the Cyrillic alphabet – regardless of the proportion of a given national minority resident in any particular area. In other words, the Court found the multi-linguistic provisions of the Constitution to be inapplicable to official court proceedings.
Poland provides an unwholesome example of a rigid, homogenising constitutional attitude towards the official state language. The constitutional provision that declares that “Polish is the official language” leaves no room for the introduction of any minority languages into official fora, even in a restricted manner. While there is an additional sentence in this article, to the effect that that the official-language rule “shall not infringe upon national minority rights resulting from ratified international agreements”, at least one prominent critic of this constitutional provision has argued that it does not add anything to the first sentence, and does not open up the possibility of introducing official minority languages. 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”. The above-quoted critic reviews all of the international treaties between Poland and its neighbouring states, and concludes that none contains a rule permitting a minority to have its language officially recognised in Poland. If the constitution-makers had wanted to allow for such a possibility, they would have said so explicitly in the official-language provision.

The only occasion that the Polish Constitutional Tribunal has been asked to consider the meaning of the “official language” provisions was in its “interpretive decision” of 14 May 1997; hence, before the new Constitution entered into force. The subject-matter of the Tribunal’s interpretation was a 1945 decree on the official language (previous Polish Constitutions had not dealt with the issue at all); however, according to the authoritative commentators, this decision also applies to the new Constitution, and can thus be seen as a statement of the current official position of the Constitutional Tribunal on the issue of the “official language”. The Tribunal was asked by the President of the Supreme Audit Chamber to provide an interpretation of the official language provisions by saying to whom exactly they apply, and also to which types of official actions they apply. The reason for this request for an interpretation was that the Audit Chamber had ascertained, in the process of its auditing activities, that some “decisions [were being] taken on the basis of documents and reports in foreign languages and that no translations into Polish were made of the contracts and agreements entered into by Polish state institutions or the companies set up by these institutions”. The direct trigger for the decision was therefore unrelated to minority languages. Nonetheless, 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 of their official actions) the Tribunal dropped a hint that, as far as citizens are concerned, the official-language rules are applicable only “indirectly” (when they communicate with state bodies), and that constitutional rights and freedoms defined the limits of the duty of state bodies to communicate in the official language. As the Tribunal stated 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”. Unfortunately, this pronouncement was left hanging in the air: no specific criteria regarding how to reconcile the official-language provisions with the rights of members of minority groups have been identified (to be fair, the Tribunal was not asked to do so in this particular interpretative decision). However, the limits on these rights seem to be very strong and rigid: as the above-quoted authoritative commen-
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”. As an example of an acceptable use of this right, he mentions the possibility of conducting a campaign for election to the parliament or to local self-government bodies in a minority language. In other words, no duties upon state bodies are implied by the “fundamental freedoms and rights” to which the Constitutional Tribunal 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 – 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 as such. 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, to adapt to local culture, to 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 some generations by this time, having made use of Russian-language institutions, schools etc. At the same time, however, not only were Latvians and Estonians unhappy to maintain the status of Russian as an official (even if not the official) language in their countries, but they also resented the very presence of Russians, frequently viewing them as the remnants of the old, oppressive regime. Particularly in Estonia, in which 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, in terms of which a bi-lingual policy would be a symbolic first step. As a knowledgeable insider, Vello Pettai, has noted:

> 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 represented for them as much an effort to stem this bi-national future as a desire to regain their formal sovereignty.138

The same writer observes elsewhere that any steps towards accommodating the 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”. Hence, right after independence, and particularly in Latvia and Estonia, Russians found themselves in a situation not unlike illegal immigrants: stripped of their citizenship and even denied permanent resident status.

The Constitutional Review Chamber (CRC) in Estonia was twice asked to decide on 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 a local council”. The President – who challenged the law, which of course was very controversial for the Russian-speaking community – did not 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 principle that limitations on a given right cannot distort the nature of that right (Art. 11); thus, he argued that the vague formulation of the language requirements in employment tended to distort the right to non-discrimination. 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; 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. There was, however, 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 languages other than Estonian at the local level, the Language Act’s requirement for electoral candidates in local elections to fulfil certain linguistic criteria seems to effectively annihilate the possibility opened up by Art. 52(2), as far as local elected councils are concerned. The Chamber, however, did not follow this path of reasoning, choosing instead the narrow line of argument suggested in the presidential challenge. In fact, it preceded its argument regarding 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 requirement of proficiency in 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 an “expansive” interpretation, but in the direction of undermining any possible claims for minority language rights! On the basis of the Constitution’s preamble (admittedly, 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 further basis of the principle that Estonia is a democratic republic (Art. 1), the Chamber concluded that language requirements for electoral candidates could be justified. The argument
went 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 Pettai has 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”.144 It was, therefore, on narrow technical grounds that the Chamber eventually 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 regulate the language requirements for election candidates to the government, 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 Constitutional Review Chamber’s decision (and an analogous decision handed down a few months later)145 as a “green light . . . to legislate language requirements for electoral candidates”,146 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.

7. THE SPECIAL CASE OF MINORITY REPRESENTATION IN PUBLIC AUTHORITIES

The most far-reaching proposals for political protection of minority rights contain the demand for special political representation at a national or local level, implemented through some “sui generis minority mandates”.147 There are, of course, a variety of milder methods of strengthening the political representation of minorities, such as by increasing “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”.148 There are also some ways of facilitating the representation of minority parties in parliaments, without at the same time creating special quotas of seats set aside for these parties: some constitutions provide, for example, preferences in the form of a more lenient election “threshold”. This is the case in Poland, where electoral committees representing ethnic minorities do not have to pass the five-percent threshold to achieve parliamentary representation.149 Similarly, in Lithuania, the organisations representing ethnic minority parties were exempt (until the 1996 amendment to 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 half being elected through a majoritarian system).150
Often those seats set aside for minority parties in parliament are subject to a specified electoral result. For instance, the Romanian Constitution reserves one seat in the parliament for each ethnic minority organisation that fails to obtain a sufficient number of votes to get elected in the normal manner; the electoral law clarifies that this is subject to obtaining at least five percent of votes. In effect, Romania has emerged with the most extensive system of minority representation in the region; and, in successive elections, the number of ethnic parties has continually risen, due to the low entry barrier, sometimes even raising the question of the fairness of the system towards non-ethnic parties. In Slovenia, the Hungarian and Italian minorities can elect at least one candidate each to the National Assembly. In Croatia, where the Constitution remains silent on the matter, according to electoral law all nine specified ethnic communities are entitled to one seat each, plus any ethnic community that exceeds eight percent of the population (only the Serbian minority meets this requirement) is entitled to additional proportional representation.

In Hungary, apart from the constitutional right to be represented in national and local bodies, national and ethnic minorities have a constitutional right to form their own minority self-governments. 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-1990s it had been reported that over 800 such minority self-government units existed in Hungary, although it must be added that serious doubts have been expressed as to the resources available to, and powers and effects of these bodies. 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, no political consensus has emerged as yet to allow the adoption of a statute to regulate this issue – even though the Hungarian Constitutional Court declared that the absence of mechanisms to implement the constitutional requirement for parliamentary representation of minorities was unconstitutional.

At the opposite end of the spectrum are the countries that either openly or tacitly oppose the possibility of any formalised ethnic representation in parliamentary bodies. This is the case of Albania and Bulgaria, which ban (in their statutes and the Constitution respectively) any parties based along ethnic lines (although the Constitutional Court in Bulgaria has softened this regime, 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”. There are also a number of CEE countries that, while not prohibiting it, make no constitutional or statutory allowances for the political representation of minorities in the highest and most powerful representative organs: the Czech Republic, Slovakia, the Ukraine, Belarus, Macedonia and Moldova all belong to this category.

One example of an intervention by a constitutional court actually preventing a system of ethnic representation is provided by the Slovakian Court. 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 Constitutional Court 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, resulting 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)), and to the constitutional provision that 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 or ethnic group, and opted instead 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. The 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 possess 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 in which these minorities make up a significant part of the population could be inscribed on this roll upon their written request. The Constitutional 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, the 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 will of each individual were, in this particular context, to be decisive, the potential for abuse and undermining of the “real” will of the minority community and their constitutional rights (contained in Article 64 of the Constitution) is readily evident; 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 in terms of non-discrimination) was the decision of the Bulgarian Constitutional Court of 22 April 1992, on the status of the Movement of Rights and Freedom (MRF). According to the petitioners in this case, a group of fifty-three Bulgarian Socialist Party deputies, ninety-nine percent of the membership
of this Turkish-based organisation belonged to the Turkish minority. It had twenty-four deputies in the parliament and was a crucial 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 Constitutional Court 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.169

Of course, the very idea of outlawing a political group on the basis of its ethnic composition and programme is anathema to the principle of liberal diversity.170 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 thus shape the design of the hastily adopted Constitution in accordance with their own preferences, which also included an embrace of nationalism as their new creed. To question the validity of this constitutional pronouncement was naturally beyond the Constitutional 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”.171 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 interpreted the true meaning of Art. 11(4) as a ban on parties that actually exclude potential members on the basis of their national or ethnic origins. Since the MRF’s constitution did not contain any such exclusionary rules, the ban contained in Art. 11(4) simply 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 Constitutional Court argued – because, if this were the case, all parties that 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 the ideas “of autonomy, national chauvinism, revanchism, Islamic fundamentalism and religious fanaticism”,172 although, at the same time, it demanded a 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 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 stated 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”.173 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 organisation” and, additionally, by the refusal by 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 as it was effectively decided by a minority of judges (five against six): the MRF’s parliamentary presence survived only because the Constitution provides that
decisions of the Constitutional Court must be taken by “more than half of the votes of all Justices”, which means, in effect, that seven judges must be in favour of declaring a party (or a statute, for that matter) unconstitutional. As Venelin Ganev has argued, 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”. With the benefit of hindsight, it is possible to say that the decision has certainly not aggravated ethnic relations in Bulgaria but rather has, if anything, contributed to a further reduction of negative stereotypes towards the Turks in that country. As one 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”.

8. CONCLUSIONS

In contrast to civil and political rights, discussed in the previous chapter, the jurisprudence of the constitutional courts of CEE on equality has not marked such a radical shift away from the values and political principles of the ancien régime: it was more a matter of the careful fine-tuning of standards of non-discrimination as written into the new constitutions. For reasons noted earlier in the chapter, the constitutional clauses of equality served as useful and attractive legal bases for constitutional challenges, and the courts have made a valuable, if careful, contribution towards removing some aspects of discrimination in their respective societies, such as against women, gays and lesbians, etc. When it comes to minority rights and ethnic relations in general, the contribution by the constitutional courts has been modest, and it would be much too generous to claim (as some Western observers have done) that these courts were crucial elements in shaping the “toleration regimes”. Apart from the shining exception of the Bulgarian MRF case, there have been virtually no significant decisions by constitutional courts in CEE that would provide support for this statement. In fact, there have been rather few decisions dealing with ethnic/national problems, even in the places where one would expect them. The case of Estonia is quite instructive in this regard: ultimately, it was only international pressure, and not the intervention by the Constitutional Review Chamber, that compelled the parliament to amend the law discriminating against the Russian-speaking minority. In other post communist countries, very few ethnicity-related decisions have been made by constitutional courts, and, where they have, they would hardly support the thesis that these courts have played a central role in shaping the regimes of toleration.