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Effective Participation of National Minorities in Public Affairs in Light of National Case Law

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Abstract
Based on different concepts of nation-states, the article tries to demonstrate through the analysis of decisions of national courts that despite the same wording of the constitutional text, supreme and constitutional courts may come to totally differing conclusions in light of the constitutional history and doctrine of the respective country. The first part of the article gives an overview on case-law denying effective participation through non-recognition of ethnic diversity as a legal category, for instance through the ban of the formation of political parties along ethnic lines or through interpretative pre-emption of the legal status of minority groups. The second part of the article gives an overview of various legal mechanisms in order to enable, support, or even guarantee the representation and process-oriented effective participation of minorities in elected bodies, such as exemptions from threshold requirements in elections or reserved seats in parliament, and through cultural and territorial self-government regimes in those constitutional systems which legally recognize ethnic diversity. Nevertheless, the case-law demonstrates how difficult it remains to reconcile the notion of "effectiveness" with a positivistic and formal-reductionist understanding of terms such as equality, sovereignty, people or nation. The Lund Recommendations have served as an important guideline for a new, "communitarian" understanding of "effective" participation so that the author argues in conclusion that it requires more intra- and inter-disciplinary dialogue between law, politics and (legal) philosophy as well as between national and international minority protection mechanisms to "constitutionalize" this philosophy.

Keywords
state-nation; ethnicized nation-state; ethnic diversity; ethnic cleansing; territorial separation; institutional homogenization; interpretative pre-emption; legal positivism; vote dilution; exemption from thresholds; reserved seats; proportional representation; veto power; citizenship; residency; language proficiency requirements

1. Introduction

When trying to analyze the case law of national courts regarding effective participation of national minorities in public life, the qualification "effective" in any case requires a functional analysis of law in order to be able to assess the effect, in other words, the result of legal instruments designed by law-makers for the purpose of participation of minorities. Therefore, a functional analysis must also take the "context" of decisions and rulings of courts into account which is very often not openly addressed in the text of the operative part and/or reasoning of a judgment. This context is very often determined by ideological and political

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traditions developed over decades or even centuries which are crystallized in constitutional "doctrines" which form the great mass of the ice-berg in the shallow water under the tip of the visible and readable text of constitutional law.

Such doctrines are of particular relevance for minority protection mechanisms. In a nutshell, French and German political tradition and constitutional doctrine represent in an almost ideal-typical way two opposing models of nation-states. The "state-nation" had transformed "peasants into Frenchmen"[1] based on the inter-play between two basic constitutional principles: the concept of strictly *individual* equality *before* the law and the concept of *national* sovereignty, complementing the principle of popular sovereignty. However, this constitutional doctrine of an ethnically "indifferent" state-nation does not recognize ethnic diversity as a social phenomenon and its legal institutionalization as an instrument of conflict regulation, in particular by the possible legal instrument of group rights on behalf of minorities.[2]

In contrast, the model of the "ethnicized" national state, which has its ideological roots in the writings of philosophers of German idealism, is normatively based on the so-called "nationality principle": a "people" is formed according to so-called "objective" criteria such as a "common" language, religion or the belief in a common history or culture with a "natural" right to found its own state. Since an ethnically conceived nation is based on the categorical division into a "majority" population, usually "identified" with the ethnic nation-state,[3], and "others" who, because of this cultural "otherness", are categorized as "ethnic or national minorities", the principle of equality before the law has a rather different meaning for persons either belonging to the majority population or to a minority. "Others", simply by belonging to the wrong group, are never equal in practice.

In conclusion, even the idea of "minority protection" and their integration into society makes only sense if the problem is taken seriously in the development of any constitutional theory and doctrine of how to reconcile the normative principle of equality with the social fact of ethnic diversity of societies as a problem of democratic governance. Hence, Francesco Palermo and Jens Woelk differentiated four models: the "repressive nationalist state", based on the fiction of ethnic homogeneity and thus suppressing all ethnic diversity, the "agnostic liberal nation state", which is "indifferent" to ethnic diversity, the "national state of multinational and promotional aspiration", which is characterized by the predominance of a

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[1] *See* E. Weber, *Peasants into Frenchmen. The Modernization of Rural France, 1870-1914* (Stanford University Press, Stanford, 1976).

[2] For a detailed analysis *see in particular* S.P. Caps, 'Constitutional Non-Recognition of Minorities in the Context of Unitary States: An Insurmountable Obstacle?', in Venice Commission (ed.), *The Participation of Minorities in Public Life* (Council of Europe Publishing, 2008), pp 12–13, and J. Marko, 'The Law and Politics of Diversity Management: A Neo-institutional Approach', 6 *European Yearbook of Minority Issues* (2006/7) pp. 256–257.

[3] The "identity fiction" as an essential element of the nation-state model until this very day raises conflicts on the symbolic level as can be seen from disputes on names, flags and other symbols.

national group *vis-à-vis* one or several recognized and protected minority groups, and the "paritarian multinational state", which aims at integration and reflection of the multicultural society on a paritarian basis through territorial and/or institutional arrangements.[4]

Moreover, as can be seen from the developments at the international level since 1989, there is a shift in the paradigm from the (individual) protection of the rights of persons belonging to minorities in the context of state sovereignty and the European nation-state models, which had dominated international relations and law in the Cold War period, towards the management of ethnic diversity within and between states. This new paradigm is based on the central values and functional prerequisites of fostering cultural diversity of society as well as the economic, social and political integration of ethnic groups as can be seen from the provisions of various international documents such as the chapter on national minorities of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, the preamble of the Council of Europe Framework Convention for the Protection of National Minorities (FCNM) of 1995 and not the least the general principles of the Lund Recommendations of the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM) of 1999. This shift of the paradigm and the incorporation of international law into domestic law is a long process, very often contested before national courts about the dogmatically "correct" interpretation of very often vague constitutional provisions based on "concepts" such as "democracy", "rule of law", "sovereignty", "equality", "people" or "nation." It follows from provisions such as Articles 4 and 15 of the FCNM and in the same way from the general principles of the Lund Recommendations that not only (individual) equality before the law but "full and effective equality" as well as "effective participation" together with the notion of a group-oriented promotion of national minorities' identities and cultures are seen as "the three corners of a triangle which together form the main foundations"[5] not only of the Framework Convention as the recently published Thematic Commentary explains, but of the entire new paradigm of conflict resolution through diversity management. Thus national courts would be required to interpret constitutional provisions no longer only with regard to the literal meaning of the text, but more from a process- and result-oriented approach[6] by taking also the "context" into account as will be demonstrated in the following analysis.

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[4] *See* F. Palermo and J. Woelk, 'No Representation without Recognition: The Right to Political Participation of (National) Minorities', 25:3 *European Integration* (2003) pp. 227–228.

[5] *See* Advisory Committee under the Framework Convention for the Protection of National Minorities, *[Thematic] Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, ACFC/31DOC(2008)001, para. 13, at <www.coe.int/minorities>.

[6] *See also* A.Verstichel, 'Special Measures to Promote Minority Representation in Elected Bodies: The Experience of the OSCE High Commissioner on National Minorities', in Venice Commission,

2. Non-recognition of Ethnic Diversity

2.1. Is there a Need to Combat Ethnic Cleansing and to Reverse its Effects?

To begin with the worst case against the values enshrined in the Lund Recommendations: ethnic cleansing[7] is either an instrument of warfare or an effect of violent ethnic conflicts. It goes without saying that violent attacks such as killing, torture, raping or taking of hostages going hand in hand with the actual expulsion of persons from the territory or in order to make them flee of fear of such acts are criminally liable acts both under public international criminal law and national criminal law.[8] What is, however, of concern for the topic of this paper is the question whether there is a legal responsibility of state authorities to combat ethnic cleansing and to reverse its effects.

This problem was the context of the so-called "constituent peoples" case U 5/98 of the Bosnian Constitutional Court.[9] In the framework of an abstract review procedure the Court had to establish the meaning of the phrase "constituent peoples" in order to determine whether both Articles 1 of the constitutions of the Entities of Bosnia and Herzegovina are unconstitutional. I have commented this decision in detail elsewhere.[10] In short, the Court had two options. The first was to uphold the "historic compromise" concluded at Dayton in 1995, with its territorial separation and institutional homogenization of Entity institutions along ethnic lines through a historic interpretation of the meaning of the relevant provisions, thereby constitutionally legitimizing past ethnic cleansing and the ongoing ethnic homogenization of Entity institutions based on exclusion. The second option was to rely on the other constitutionally entrenched and "dynamic" goal of the General Framework Agreement for Peace, namely the return of refugees and displaced persons in order to re-establish a multiethnic society as it had existed before the war through a functional interpretation of the constitutional system.

After the Constitutional Court had established itself the facts of ongoing discrimination and segregation on the ground, the Court – in a narrow five to four decision – took the second option and declared both Articles 1 of the Entity

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supra note 2, pp. 45–61 which comes to the same conclusion in regard to the "essence" of the Lund Recommendations.

[7] For a typology and case-studies *see* A. Bell-Fialkoff, *Ethnic Cleansing* (St. Martin's Griffin, New York, 1999).

[8] *See for instance* Human Rights Watch (ed.), *Genocide, War Crimes, And Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal For Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, New York, 2004.

[9] Constitutional Court Bosnia and Herzegovina, U 5/98, handed down and published in four Partial Decisions. It is Partial Decision III which is informally called "constituent peoples case", of 1 July 2000, Official Gazette No. 23/00.

[10] *See* J. Marko, 'United in Diversity?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia and Herzegovina', 30:2 *Vermont Law Review* (2006) pp. 503–550.

constitutions unconstitutional. In a nutshell, the Court argued that "the collective equality of constituent peoples following from the designation of Bosnians, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation".[11]

The explicit requirement to effectively combat and reverse the effects of ethnic cleansing was also ruled out in cases U 15/99[12] and U 16/00.[13]

An indirect confirmation of this principle by the European Court of Human Rights (ECtHR) can also be seen in *Cyprus* v. *Turkey* with the Court requiring the Turkish-Cypriot authorities of the "Turkish Republic of Northern Cyprus" to re-establish mother-tongue education in secondary schooling for children of Greek-Cypriot parents.[14]

2.2. Non-recognition of Minorities and Prohibitions of Ethnic Interest Representation

That the existence of national minorities under the French model of the state-nation is an ongoing problem in France itself can be seen from two cases of the Conseil Constitutionnel. In 1991 the Conseil declared parts of the Draft Autonomy Statute of Corsica unconstitutional, in particular the category of a "*peuple corse*", despite the declaration that such a *peuple corse* would be part of the "*peuple français*".[15] In the reasoning the Conseil came to this conclusion through the interpretation of Articles 1 and 3 of the French Constitution with the consequence that the "indivisibility" of the Republic and equality of all citizens according to Article 1 in conjunction with the principle of national sovereignty according to Article 3 lead to the constitutional doctrine of "ethnic indifference" excluding all ethnic references *by* law for the public sphere[16] in a similar way as the principle of laicity according to Article 1 led to the constitutional doctrine of a strict separation of state and religion. The doctrine of "ethnic indifference" was confirmed by the Conseil in 1999 by declaring also the planned ratification of the Council of Europe's Charter for Regional and Minority Languages unconstitutional with regard to the given "text" of the Constitution.[17]

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[11] *See* Constitutional Court BiH, U 5/98, Partial Decision III, paras. 55 to 60.

[12] *See* Constitutional Court BiH, 15 December 2000, concerning the "exchange of property" under duress in violation of Article II.5. Dayton Constitution.

[13] *See* Constitutional Court BiH, 2 February 2001, concerning a two years limit prohibiting the sale of restituted property in order to foster effective refugee return to their homes of origin.

[14] *See* ECtHR, 10 May 2001, *Cyprus* v. *Turkey*, Appl. No. 25781/94, paras. 273–280.

[15] *See* Conseil Constitutionnel, Decision 91-290 DC, 9 May 1991, at <www.conseil-constitutionnel.fr/decision/1991/91290dc.htm>.

[16] *See also* the critical comment by Caps, supra note 2, pp 12–13.

[17] Conseil Constitutionnel, Decision 99-412 DC, 15 June 1999 at <www.conseil-constitutionnel.fr/decision/1999/99412/99412dc.htm>.

Freedom of association, in particular the freedom to found political parties, is a precondition for political representation and participation. Following the "unitary state"-tradition in conjunction with the model of the "state-nation", some countries in Eastern and South-Eastern Europe prohibited either implicitly or explicitly the foundation of associations and political parties along ethnic lines. Albania abolished such an explicit prohibition in her Constitution following the criticism by the country-specific Opinion of the Advisory Committee (AC) of the FCNM,[18] whereas the respective provision of the Bulgarian Constitution is still in force.

It follows from the case law of the European Court of Human Rights, also dealt with by Geoff Gilbert in this special issue, that a prohibition of associations or political parties based on the ethnic identities of their members and founded for the representation and promotion of minority cultures as such can never be prohibited. This rule is based on the constantly reiterated reasoning that such a ban cannot be justified to be "necessary in a democratic society" as required for a lawful interference of state authorities by Article 11(2) of the European Convention on Human Rights (ECHR) because pluralism, also in the meaning of cultural/ethnic diversity, is an essential element of democracy even if the party programme or speeches of party officials argue for secession from the country.[19] Despite this case-law, the Bulgarian Constitutional Court repeatedly banned parties declaring to represent a Macedonian minority in Bulgaria with the argument that they are a threat to the territorial integrity of the state.[20] On the other hand, already in one of the first decisions after the establishment of the Constitutional Court following the transition from communism to a democratic regime, the same Court, albeit only with a narrow vote, did not prohibit a political party de facto representing the Turkish minority which had been founded under the name "Movement of Rights and Freedoms" (MFR).[21] The point for Bulgarian judges for distinguishing the case from the Macedonian parties obviously was the reason that this party – symbolically expressing this through the choice of the name – is open to all Bulgarian citizens for membership and therefore not exclusively representing the interests of the Turkish minority.

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[18] *See* Second Opinion Albania, at 33, 42, and 71 at <www.coe.int/minorities>.

[19] *See* ECtHR, 30 January 1998, *United Communist Party of Turkey and Others* v. *Turkey*, Appl. No. 133/1996, and ECtHR, 10 July 1998, *Sidiropoulos and Others* v. *Greece*, Appl. No. 57/1997.

[20] See the first decision of the Bulgarian Constitutional Court, 18 February 1998, No. 2/98, Official Gazette 22/1998. This decision was then "appealed" to the ECtHR, which found Bulgaria guilty of violating Article 11. *See* ECtHR, 2 October 2001, *Stankov and United Macedonian Organisation Illinden* v. *Bulgaria*, Appl. No. 2922/95. The second decision of the Constitutional Court, 29 February, 2000, No. 1/2000, banning also the "successor" organization was again appealed to the ECtHR with the same result. *See* ECtHR, 20 October 2005, *United Macedonian Organisation Ilinden – Pirin et al.* v. *Bulgaria*, Appl. No. 59489/00.

[21] Bulgarian Constitutional Court, 21 April 1992, No. 4/92, Official Gazette 35/1992.

In contrast to this case law, there are several constitutional courts which rejected claims for the prohibition of minority parties. Despite the fact that also Romania's Constitution was clearly tailored in the tradition of the "unitary state" constitutional doctrine, the Romanian Constitutional Court, when ruling on the law of political parties in 1996,[22] gave those provisions of the Constitution prescribing in the same fashion as the French Constitution equality before the law and "the indivisibility of the Romanian nation"[23] a totally contrary meaning referring to the "spirit" of the FCNM as an indirect source of freedom of association also for members of national minorities with the consequence that the formation of associations and parties along ethnic lines cannot be prohibited. Also the Macedonian and Slovene Constitutional Court dismissed claims to prohibit political parties. In the Slovene case, a complaint was raised against an organization with the purpose to represent the interests of Italian refugees who had been forced to leave the peninsula Istria after World War II, and to fight thus for their right to citizenship, domicile and restitution of property. The reasoning of the claim that the priority given to such an organization for immigrants with refugee background would be reverse discrimination was rejected by the Court as "unacceptable already in the origin".[24] The Macedonian Constitutional Court dismissed the claim to prohibit the Party for Democratic Prosperity of Albanians and the National Democratic Party for allegedly inflaming national hatred and religious intolerance as unfounded.[25]

2.3. Who 'Is' a Minority Entitled to Effective Participation?

Closely related but not identical to the problem of prohibition of ethnic parties under the French state-nation concept is the question who is recognized as an ethnic or national minority as such in order to become entitled to participation in public life? This problem can come to the fore also in a system of the "national state of multinational and promotional inspiration".

A minority organization in Poland, claiming to represent a "Silesian" minority, wanted to be registered as a national minority. This was, however, refused by the Polish authorities with the argument that they cannot be registered as a national minority since there is no such "nation or nationality" in Poland and recommended the claimants to ask for registration as a cultural association, which they

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[22] *See* Romanian Constitutional Court, 2 April 1996, case no. 35/1996, in Official Gazette 4-11-1996, No. 75, and G. Cohrs, 'Das neue rumänische Parteiengesetz im Lichte der Verfassungsentscheidung vom 2. April 1996', 39 *WGO-Monatshefte für Osteuroparecht* (1997) pp 3467–3468.

[23] *See* Article 1(1), Article 2(1) and in particular Article 4(1) and (2) of the Romanian Constitution.

[24] *See* Slovene Constitutional Court, 15 January 1998, Official Gazette No. 13/98, at para. 29.

[25] *See* Macedonian Constitutional Court, 8 April 1998, Decision No. 215/97.

refused. The Polish higher courts then took this as evidence that they wanted to obtain, under false pretence, the electoral privilege of the exemption from the five per cent threshold requirement foreseen under the electoral law for parties of national minorities. As can be seen from this reasoning, state authorities, even if these are independent courts, are given unlimited discretionary power to decide on the "existence" of a national minority without prior constitutional clarification and thereby the possibility to pre-empt the exercise of the guaranteed right to political participation. In light of its former case law with regard to the "margin of appreciation" of national authorities, it was therefore astonishing that the ECtHR upheld this decision of the Polish Supreme Court in *Gorzelik* v. *Poland*.[26]

Another problem in this respect is raised in particular in multi-national states through the question whether also persons belonging to the majority population but in a minority position on the regional or local level can claim minority rights including the right to effective participation? This problem came to the fore again in Bosnia and Herzegovina in the "constituent peoples" case. In reviewing the constitutions of both Entities, the Court raised the question whether, as a consequence of ethnic cleansing and ethnic homogenization of state institutions during and after the war, Bosnians and Croats have to be considered now to be in a minority position in the Republic of Serbia and likewise Serbs in the Federation of Bosnia and Herzegovina with a right to participation according to Article 15 FCNM since the Dayton Constitution itself is silent on the institutional make-up of the Entities. The Court finally held with reference to the Explanatory Report of the FCNM that the position of minorities is determined by their factual situation so that also persons belonging to the majority population can claim the minority rights in legal force.[27]

2.4. Interpretative Pre-emption of the Legal Status of Minority Groups and/or Persons Belonging to National Minorities

Finally, also in a "state of promotional inspiration" such as Austria, the determination of legal standing of persons belonging to national minorities or minority groups before courts for the necessary decision on the admissibility of the claim can lead to a more or less total pre-emption of minority rights with regard to effective legal remedies as a necessary requirement for effective participation as

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[26] ECtHR, 17 February 2004, Appl. No. 44158/98.

[27] There are, of course, cases where "real" minorities are discriminated against in their right to representation and participation due to constitutional arrangements which foresee on federal and/or regional level the equal or proportional representation of co-nations as this has been or still is the case in Belgium with the German minority and in South Tyrol for the Ladins. For systematic reasons this issue will be dealt with below in more detail.

can be seen from a ruling of the Austrian Constitutional Court in 2004.[28] The Constitutional Court had ruled in previous decisions that bi-lingual place name signs have to be established if the number of minority population amounts to a share of ten per cent of the population of the given administrative unit, but these decisions of the Court were never implemented on the ground due to inactivity of the respective legislative and executive authorities at the level of the federation and the Land Carinthia. Hence, in 2004 more than 40 inhabitants of a municipality in this province as well as two associations representing the Slovene minority claimed the establishment of bi-lingual place name signs at the municipality boundaries which mark the beginning and the end of the territory of that municipality and thereby also a speed-limit for traffic. The Constitutional Court, however, denied the admissibility of these claims with the argument that neither persons belonging to the minority nor groups representing the minority have a "subjective" right on bilingual place names or other topographical indications according to Article 7(3) of the Austrian State Treaty. In light of the previous minority-friendly decisions of the Constitutional Court, thereby correcting the inaction of the legislature and executive to effectively guarantee the rights following from Article 7 of the State Treaty, this ruling was quite a surprise. But as can be seen from the reasoning, the argumentation in this case followed the constitutional doctrine of the so-called Viennese school of legal positivism which strictly divides "objective" law and "subjective" rights. The former confers, at best, obligations on state authorities, but no rights including legal standing for persons or legal entities before courts. Against previous decisions of the Constitutional Court with regard to language rights in primary and secondary public education as well as before administrative and judicial authorities according to Article 7(2) and (3), in which the Constitutional Court had struck down the argumentation of the government that these provisions do not grant rights, but are only positive obligations, the Court this time followed these arguments and declared the provision prescribing bi-lingual place names and other topographical indications to be "objective" law.[29]

The same formalistic approach of legal positivism can also be seen from two decisions of the Austrian Administrative Court, which is, in addition to the Supreme and Constitutional Court, one of the three "supreme" courts in Austria. Despite the provision that "associations" representing minorities have legal standing before the Administrative Court against appointments of members of minority consultative bodies according to § 4, sub-paragraph 1 of the Federal Law on Ethnic Groups, this Court ruled that such associations have no (guaranteed)

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[28] Constitutional Court Austria, VfSlg 17.416/04.

[29] For a detailed critique see J. Marko, 'Artikel 8 Abs 2', in Korinek/Holoubek (eds.), *B-VG Kommentar* (2008) paras. 18–24.

"right" to representation, but may only propose candidates.[30] The same logic is applied in a second decision in which the Administrative Court ruled that "the mentioning of a Slovene minority in Article 7 of the Austrian State Treaty 1955" does not lead to a right with regard to the composition of minority consultative councils.[31]

3. Effective Participation in the Legislative Process

All legal instruments for effective participation of minorities in public life can be classified according to their effectiveness on a continuum between the individual right to vote and the "collective" right to proportional representation in state institutions. "Special" measures for effective participation will enable, foster or even guarantee representation in elected bodies, the executive and judiciary. However, these legal instruments providing for representation will not necessarily decide the degree of (procedural) influence on decision-making processes within these bodies and their outcomes, i.e., participation in the more narrow sense of process- and result-orientation. Again from an ideal-typical point of view, the procedural role of legal instruments for participation in this sense may be put on a continuum between mere observer status or consultation towards unlimited veto-power. It goes without saying that all "special" measures for effective participation characterize the "state of promotional inspiration" and multi-national states, but not without problems raised in their implementation as can be seen in the following from the analysis of the case law of national courts.

3.1. The Right to Vote

As far as the right to vote and to stand as candidate in elections as the fundamental political right in every democratic regime is concerned, there is the problem of "vote dilution" in order to use this term coined by the US Supreme Court, i.e. that the individual votes cast do not have the same "weight" for gaining a seat in elected bodies. Such a dilution is the effect of the majority vote system as such. Moreover, the sub-division of the national territory into two or more electoral districts is usually used as a technique for negative or positive discrimination in such systems. Vote dilution is also an effect, albeit to a much lesser extent, in the proportional vote system (PR), in particular if threshold requirements are introduced. The central concern of minority protection, but also democratic theory and constitutional doctrine, is thus the question whether it is necessary and, if

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[30] *See* Adminstrative Court Austria, 29 August 2000, 2000/12/0091.
[31] *See* Administrative Court Austria, 26 May 2003, 98/12/0528.

this is the case, how to overcome the disproportionate effects of electoral mechanisms for minorities in order to achieve not only formal, procedural equality of voting rights, but also "full and effective equality" in the language of Article 4 of the FCNM.

It goes without saying that the exclusion from the fundamental right to vote is *prima facie* a violation of the democratic principle, but the direct or indirect exclusion from the active or passive right to vote can happen even in a "state of promotional aspiration" and a multi-national state, as can be seen from the following case-law.

First, a legally foreseen exclusion from the right to vote and to stand as a candidate is a consequence of ethnic conflict settlement mechanisms as can be seen in Bosnia-Herzegovina and Cyprus. As already outlined above, the category of "constituent peoples" and the need for their "collective equality" through proportional representation in elected and executive bodies on state and Entity level is entrenched in the Dayton Constitution and confirmed by the Constitutional Court. The problem raised thereby is, however, the *de jure* exclusion of members of minorities from the right to stand as a candidate for the direct elections of one of the three members of the Presidency of Bosnia and Herzegovina or for the indirect elections in the House of Peoples, the second chamber of Parliament. Since the Constitutional Court remained silent on this problem in the "constituent peoples" case, then President Tihić tried twice to attack this exclusionary mechanism by initiating an abstract review procedure before the Constitutional Court. In case 5/04[32], President Tihić requested the Court to review Articles 4 and 5 of the Dayton Constitution in light of the right to vote as it is guaranteed by Article 3 of 1st Protocol of the European Convention on Human Rights in conjunction with Article 14 ECHR, the non-discrimination provision, since Article II.2 of the Dayton Constitution states that the ECHR "shall have priority over all other law" thereby theoretically enabling the Court to review also the Dayton Constitution itself in light of the ECHR. The Court, however, declared the request inadmissible. The majority opinion argued that the ECHR would – in the hierarchy of legal norms – not enjoy a rank above the Dayton Constitution since the ECHR became legally valid in Bosnia and Herzegovina only through its incorporation by the Dayton Constitution itself. Thus, the Court has no jurisdiction to review the Dayton Constitution in light of the ECHR. In case 13/05,[33] the *de jure* exclusion was again brought before the Constitutional Court by President Tihić, this time contesting the Election Law, but not the Dayton Constitution itself. Again the majority of the Court rejected the request as inadmissible with the argument that the provisions of the Election Law are based on

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[32] *See* Constitutional Court Bosnia and Herzegovina, 27 January 2006.
[33] *See* Constitutional Court Bosnia and Herzegovina, 26 May 2006.

the Constitution. In a very interesting dissenting opinion, Judge Constance Grewe referred to the "real" political problem of identification of territory and ethnicity. In her eyes not the system of proportional representation as such but this identification would have the exclusive effect which might have been legitimate in 1995, but is no longer legitimate after the recent ratification of the 12th Protocol to the ECHR. In case AP 2678/06,[34] Mr. Pilav, who had been denied the right to stand as a candidate in elections by the electoral commission, finally brought an appeal to the Constitutional Court. This time the Court declared the case admissible, but again rejected the appeal since the exclusion of "Others" would still be justified due to the situation of conflict. Again Judge Grewe argued in her dissenting opinion that the constitutional principle of multi-ethnicity would require giving up the application of the territoriality principle for the elections of the Presidency of Bosnia and Herzegovina and that the Court was legitimized in requiring even an amendment of the Constitution from Parliament in order to fulfil Bosnia and Herzegovina's international obligations. At the moment of writing this article, the cases *Sejdić* and *Finci* v. *Bosnia-Herzegovina* are pending before the ECtHR, both claiming the violation of Article 3 of 1st Protocol ECHR due to the Dayton arrangements. In an *amicus curiae* brief,[35] the Venice Commission argues that the *de jure* exclusion of minorities is a violation of Article 3 of 1st Protocol in conjunction with the 12th Protocol, because it is not the least burdensome means and therefore not proportional for the justification of this exclusion as can be seen from the Entity constitutions. They award the right to proportional representation also to the constitutional category of "Others" which enables to uphold the system of proportional representation without, however, the exclusion of minorities as a necessary consequence.

In Cyprus, electoral rolls for parliamentary elections are, according to the Constitution, divided into rolls for Greek Cypriots on the one hand and Turkish Cypriots on the other. Since the (Greek) Cypriot government has no control over the Turkish part of the country which has declared independence under the name Turkish Republic of Northern Cyprus and holds its own elections, citizens belonging to the Turkish nation living in the government controlled area are in a *de facto* minority position and, due to the electoral mechanism, completely excluded from the right to vote. In *Aziz* v. *Cyprus* the ECtHR has found Cyprus guilty of violating Article 3 of 1st Protocol ECHR since there was no legislative activity for decades to abolish this absolute exclusion from the right to vote.[36]

Already the decisions of the constitutional courts quoted above have made clear that freedom of association and the formation of parties as well as the

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[34] *See* Constitutional Court of Bosnia and Herzegovina, 29 September 2006.

[35] *See* Venice Commission, *Amicus Curiae Brief in cases of Sejdic and Finci v. Bosnia and Herzegovina*, CDL-AD(2008)027.

[36] *See* ECtHR, 26 June 2004, Appl. No. 69949/01.

exclusionary mechanisms from the right to stand as a candidate in elections cannot properly be understood as strict individual rights of persons without taking a group-oriented dimension into account, i.e. that individuals do not exercise rights in an "abstract way" but on behalf of group formation and the representation of interests of groups. The same holds true for the notion of "full and effective equality" which cannot be evaluated without taking into account the underlying categories or groups such as age, gender, or belonging to a national minority, for the necessary point of comparison. All "special measures" on behalf of minorities with regard to representation and participation thus raise the problem inhowfar group-orientation is considered a legitimate aim under the auspices of equal voting rights.

Thus, in a next step on the scale from the strict individual right to vote towards proportional representation we will find the problem whether there is not only a right to vote for any of the parties or candidates participating in the electoral competition, but also a right to "vote for a candidate of one's choice", to take up again the phrase from the US Supreme Court, i.e. that there is also a "specific" right to be able to cast a vote for a party or candidate who is representing a particular national minority. The Austrian Constitutional Court has explicitly denied such a right to vote for a candidate of one's choice or a right to ethnic representation in elected bodies in a decision in 1981. The Koroška Enotna Lista, a political party representing the Slovene minority in the Austrian Land Carinthia, had brought a claim against the general elections for the Parliament of this Land after having failed to gain a seat under a PR system with a "natural" threshold due to the division of the Land into several electoral districts which had split up the settlement area of this minority. They claimed to be discriminated against by this drawing of boundaries of electoral districts and that the Slovene minority has a right to "ethnic representation" in the Land Parliament. Both claims were rejected by the Court.[37]

3.2. Exemptions from Thresholds

As can also be seen from the decision of the European Commission on Human Rights in Lindsay and *Others* v. *UK*,[38] a PR system is generally considered to be more favourable for the representation of minorities in elected bodies. However, in order to guarantee political stability, in particular stable governments, very often electoral thresholds are introduced in PR systems to avoid political fragmentation of parliaments. On the average, European countries with a PR system

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[37] *See* Constitutional Court Austria, VfSlg 9224/81. The same claim to have a right to vote for a candidate of one's choice was also denied by the ECtHR, *Mathieu-Mohin and Clerfayt* v. *Belgium*, 2 March 1987, Appl. No. 9267/81.

[38] ECHR, 8 March 1979, Appl. No. 8364/78.

have introduced three to five per cent thresholds.[39] As can be seen from various studies,[40] political parties representing smaller or territorially dispersed minorities will therefore be disadvantaged by such threshold requirements.

The German Constitutional Court had to deal with electoral thresholds for parties of national minorities in two decisions already in the 1950s. A party representing the Danish minority in the most northern Land of Germany, Schleswig-Holstein, filed a complaint against a draft for the reform of the electoral law aiming to increase the electoral threshold from 5 per cent to 7.5 per cent with the consequence that they would have lost their representation in the parliament of this German Land. In the first decision[41] the Court declared a 7.5 per cent threshold unconstitutional. The Court came to this conclusion by taking the political situation into account which had been characterised by controversies between the German majority and the Danish minority with the effect that German political parties, despite representing different ideological orientations, concluded coalition agreements for those electoral districts where the Danish minority party also participated in the electoral competition. The Court thus concluded that a 7.5 per cent threshold would under those circumstances distort the "normal situation of competition". Following this decision, the Danish minority party requested also an exemption from the still valid 5 per cent threshold because it became clear due to the demographic and economic developments that it would no longer be able to win a seat even under this lower threshold requirement. In the second decision,[42] however, the German Constitutional Court rejected this request for an exemption from the threshold requirement by arguing that, "first, the constitutionally entrenched equality principle is not violated, if the legislator does not make a distinction, which it could make; second, the character of a political party in representing a national minority does not constitute an essential difference which has to be taken into consideration by the legislator in the design of the rights of political parties in the electoral process".[43] In conclusion, the Court thereby established, first, the doctrine – as already discussed above – that there is no right to ethnic representation and, second, that the legislator can make an exemption without violating the equality principle, but is not required to do so.

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[39] *See* Venice Commission, *Comparative Report on Thresholds and Other Features of Electoral Systems which Bar Parties from Access to Parliament*, CDL-AD(2008)037.

[40] *See recently* D. Hine, *Electoral Systems, Party Law and the Protection of Minorities*, Strasbourg, 2 April 2009, Report for the Committee of Experts on Issues Relating to the Protection of Minorities, DH-MIN(2006)013final, and F. Bieber, 'Regulating Minority Parties in Central and South-Eastern Europe', in B. Reilly and P.Nordlund (eds.), *Political Parties in Conflict Prone Societies: Regulation, Engineering and Democratic Development*, UNUP, Tokyo/NewYork/Paris, 2008) pp. 95–125.

[41] *See* German Constitutional Court, 5 April 1952, BVerfGE 1, p. 208.

[42] *See* German Constitutional Court, 11 August 1955, BVerfGE 4, 31.

[43] Translation by the author.

I have criticized the legal-dogmatic reasoning of this decision in detail elsewhere.[44] From a legal-dogmatic point of view, the exemption from a threshold requirement for parties representing national minorities cannot be a "privilege": already the introduction of a threshold is an exemption from the principle of proportionality as such, which is guaranteed to all parties and needs a justification usually given by reference to the danger of parliamentary fragmentation and therefore the need to exclude "splinter parties". But parties representing national minorities cannot simply be qualified this way as the first decision of the Court has demonstrated so that – quite contrary to the rule established by the Court quoted above – the application of a threshold on minority parties needs special justification under the equality principle![45]

Hence, the equality principle does not only allow making an exemption from the threshold requirement, but this may even be required. Exactly this conclusion was established as a general rule by the Austrian Constitutional Court in the already mentioned decision in 1981 concerning the representation of the Koroška Enotna Lista (KEL). With regard to several minority provisions in the Austrian constitutional system the Court declared: "All these quoted legal provisions, each one serving the protection of minorities under a certain aspect, have a value-judgement of the constitutional legislator on behalf of minority protection in common. ... The protection of persons belonging to minorities may, according to the respective area of regulation, justify or even require to privilege the minority in certain aspects vis-à-vis persons belonging to other societal groups."[46] The Court, however, did not apply its own rule in this case and rejected the claim of the minority party.[47]

The same problem came to the fore also in Italy when a four per cent threshold was introduced in the course of electoral reforms in 1993 for the allocation of those 25 per cent of seats to be distributed under PR. The Italian Constitutional Court recognized in its decision[48] that "the German-speaking and Ladin-speaking minorities have the constitutionally guaranteed right to be politically represented in conditions of actual effective parity", but rejected the claim raised by the Autonomous Province of Bolzano despite the allusion to the threshold's

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[44] *See* J. Marko, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich* (Böhlau Publishers, Graz/Wien/Köln,1995) pp. 458–468.

[45] The Parliament of Schleswig-Holstein then introduced the exemption from the five per cent threshold so that the Danish minority party was represented after the next elections.

[46] Austrian Constitutional Court, VfSlg 9224/81. Translation by the author.

[47] In 1999, the Court again rejected the constitutional complaint of an electoral coalition "Democracy 99 – The Electoral Coalition: Greens, Liberal Forum, Enotna Lista/United List and United Greens of Austria" with the argument that the requirement of proportional representation in electoral districts is not violated by a "natural" threshold of ten per cent. *See* Constitutional Court Austria, VfSlg 15.616/99.

[48] Italian Constitutional Court, Decision No. 438, 1993.

"hypothetical constitutional illegitimacy". The Court argued on the discretionary power of the legislature in electoral matters: "Since there is no single solution, but a plurality of solutions [in electoral matters], this Court can in no way ... replace the law maker in a decision which pertains solely to it". As Francesco Palermo and Jens Woelk criticize, this is reminiscent of a sort of political question doctrine which the Italian Constitutional Court had continuously expressed in previous decisions.[49]

Only a few years later, however, the Italian Constitutional Court seems to have changed its mind. When a law of the autonomous region of Trentino-South Tyrol introduced a five per cent threshold for the elections of the Regional Assembly, the Court struck down this provision, because this would have impaired the fair representation of the small Ladin community.[50]

Also the Polish Constitutional Tribunal upheld special measures for the parties representing national minorities with regard to the exemption from a 5 per cent threshold requirement and also a lower number of signatures required for registration in elections,[51] whereas the Serb Constitutional Court set aside an administrative decision of the electoral commission for the elections in 2008 allowing for a smaller number of signatures for the registration of national minority parties.[52] Despite referring to the constitutional provisions and the FCNM allowing for "special measures" to be directly applied, the Court argued that the decision was not in conformity with the Law on Elections for Parliamentary Representatives insofar as this Law does not authorize the electoral commission to take such decisions. The Court, however, did not take into account the problem whether the Law as such is in conformity with the Constitution and the international obligations of Serbia.

The Spanish Constitutional Court only declared that any threshold over 5 per cent for the election of parties in the autonomous regions would be constitutionally inadmissible due to the disproportionate effect higher thresholds would have.[53]

In order to come full circle, the German Constitutional Court had to decide again on the allegedly electoral "privilege" for the Danish minority party in 2004. The claimant asked to strike down the exemption from the threshold requirement because the party would no longer represent the Danish minority after everybody

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[49] *See* Palermo and Woelk, *supra* ntoe 4, p. 233. The decision of the Italian Constitutional Court was finally upheld also by the European Commission of Human Rights. *See Silvius Magnago and Südtiroler Volkspartei* v. *Italy*, 15 April 1996, by rejecting the claim as "manifestly ill-founded" since the ECHR does not compel the Contracting Parties to provide for positive discrimination in favour of minorities.

[50] *See* Italian Constitutional Court, Decision No. 356/1998.

[51] *See* Polish Constitutional Tribunal, 30 April 1997, Official Gazette No. 2/1997.

[52] *See* Constitutional Court Serbia, Decision Nr. IU-42/2008, Official Gazette 28/08.

[53] *See* Constitutional Court Spain, 25 November 1998, No. 25/1998.

could become a member. Moreover, the party would win votes on the entire territory of the Land Schleswig-Holstein and not only in Schleswig where the minority lives so that the party would no longer stand only for the protection of the Danish language and culture. The Court rejected the claim with a strong statement on behalf of the goal of integration: "From the very beginning it cannot be excluded that the integration of the national minority can legitimately be fostered by this privilege insofar as voters, who do not belong to the Danish minority, support the goal of integration by casting their votes in favor of parties of this minority. The goal of integration, to guarantee the national minority its own representation in the Land parliament, will be served by this type of support."[54] In contrast to the Austrian Constitutional Court and the ECtHR, the German Court thus recognizes a right to ethnic representation which is not contrary to the equality principle, but even follows from it.

3.3. Reserved Seats and Proportional Representation

In contrast to the exemption from threshold requirements, a reserved seats system – either in the form of minimum representation for national minorities or by proportional representation of co-nations and/or minorities – does not only foster but guarantee representation in elected bodies. Constitutional provisions for the minimum representation of minorities can be found on the national level in Slovenia for the Italian and Hungarian minority with one seat each in Parliament, for all minorities with a share of less than 8 per cent of the population in Croatia, and for all minorities in Romania. A system of proportional representation of co-nations is foreseen in Belgium,[55] Bosnia-Herzegovina and Cyprus with all the problems elaborated above, whereas the new Constitution of Kosovo as well as Croatia foresee an overrepresentation of the respective Serb communities.[56] Both forms of guaranteed seats are also applied on the regional and local level in Slovenia in addition to the Italian and Hungarian minority also for the Roma minority, in Croatia, and in the autonomous province of South Tyrol.

In Slovenia both reserved seats are combined with a dual vote system. Hence, persons belonging to either the Italian or Hungarian minority can cast one vote in parliamentary elections for party lists representing the various ideological orientations in a PR system as well as one for candidates representing the respective

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54) *See* Constitutional Court Germany, 17 November 2004, 2BvL 18/02, at para. 31. Translation by the author.

55) On the situation in Belgium *see* W. Pas, 'A Dynamic Federalism Built on Static Principles: The Case of Belgium', in G.A. Tarr, R.F. Williams and J. Marko (eds.), *Federalism, Subnational Constitutions, and Minority Rights* (Praeger, Westport/London, 2004) pp. 157–175, and W. Pas, 'Minority Issues in Belgium: A Brief Overview of Recent Developments', 5 *European Yearbook of Minority Issues* (2005/06) pp. 511–520.

56) For details *see* the country reports in Lantschner *et al.*, *supra* note 23.

minorities under a majority vote system. It goes without saying that this system was contested before the Slovene Constitutional Court with the argument that a dual vote system is a gross violation of equal voting rights. In contrast to the political question doctrine of the Italian Constitutional Court, the Slovene Constitutional Court did not circumvent the relevant constitutional problem, namely whether legislative discretion is nevertheless limited by obligations following from the Constitution, in particular the equality principle. Hence, the Slovene Constitutional Court declared that the special electoral rights for persons belonging to national minorities are based on the constitutionally guaranteed protection of minorities and their members: "Despite the deviation from equal voting rights, such a positive discrimination is not only allowed, but even required by the Constitution: the Constitution requires the legislator to adopt such measures. Since the Constitution itself foresees and requires a deviation from equal voting rights (positive discrimination), it was not necessary to review the effects of the limitation of equal voting rights."[57]

In line with this jurisprudence, the Slovene Constitutional Court declared also the statute of a municipality unconstitutional, because it did not include a provision to guarantee a reserved seat for the Roma community in the local council.[58]

In Croatia the reserved seats system was contested by a claim brought before the Constitutional Court, but rejected by it.[59] The reasoning of the Croatian Constitutional Court is quite remarkable for our topic since it demonstrates how the text of the Croatian constitutional provisions of Articles 1, 2, and 14, referring to "sovereignty of the people", "indivisibility" of this sovereignty, and to individual equality "before the law", in short the language of the "unitary state" doctrine, can be interpreted in light of Articles 4 and 15 of the FCNM as binding legal obligations for Croatia:

> 9. From the aforementioned provisions of the Constitution and the Framework Convention for the Protection of National Minorities ... it is evident that the application of the principle of equality does not always provide for sufficient protection of minority groups. If the principle of equality were applied alone, ... the special characteristics and specific interests of the ethnic or national minorities and communities in society would be neglected, which might, in certain cases, lead to their discrimination. Therefore, the exclusive individual protection, limited to the protection of classical fundamental rights of individuals, is no longer considered sufficient. In accordance with that, the application of the principle of positive discrimination ... points at the deviation from the strictly individual concept of the protection of minority members in Croatian society, i.e. the acceptance of the constitutional and legal concept of minority rights as collective rights of minority communities...

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[57] *See* Constitutional Court Slovenia, 12 December 1998, U-I-283/94, at para. 35. Translation by the author.

[58] *See* Constitutional Court Slovenia, 22 March 2001, U-I-416/98.

[59] *See* Constitutional Court Croatia, 20 April 2001, U-I-732/98.

In conclusion, the Court argues

> 10. Starting from the above mentioned perspective, ... the Court deems that the stipulation of proportional participation ... is not contrary to the Constitution, because... apart from the general right to vote ... also the special right to elect [minority] representatives to the Croatian Parliament ... cannot be evaluated as contrary to the accepted and guaranteed principle of positive discrimination. ... Legal regulations which take into consideration the specific conditions of the members of national minorities ... are not considered an act of discrimination.

In contrast to Slovenia, however, the Court rejected the claims of the Serb and Italian minority organisations for a dual vote system in 2003.[60] And the Montenegrin Constitutional Court declared the provisions in the Law on Minority Rights and Freedoms providing for "special" representation of minorities in parliament and in local assemblies unconstitutional in 2006, because the Constitution of 1992 would not contain a legal basis for affirmative action measures.[61] In stark contrast to the Croatian Court's decision in 2001, the Montenegrin Court did not take into account the fact that Montenegro, having been part of the Federal Republic of Yugoslavia, had also ratified the FCNM.

4. Case Law with Regard to Autonomy Arrangements

Until this very day territorial and/or cultural autonomy arrangements are seen as a strict *domaine réservé* of national legislation following from state sovereignty so that a legal obligation for the establishment of autonomy arrangements is not part of any general international minority rights instrument. Moreover, the establishment of autonomy arrangements is a sensitive political question so that such arrangements, if they are established, usually are entrenched by constitutional law. Hence, disputes on the constitutionality of autonomy arrangements as such should not arise.[62] Most of the case law with regard to autonomy arrangements therefore reflects the general questions of voting rights for autonomous bodies, the composition of such bodies, the use of languages by autonomous bodies, etc.

Already in 1993 the Italian Constitutional Court ruled that the requirements of bilingualism and ethnic proportionality, which are constitutional requirements

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[60] *See* Constitutional Court Croatia, 17 September 2003, Official Gazette No. 152/03.

[61] *See* Constitutional Court Montenegro, 11 July 2006, No. 53/06.

[62] With the exception of the Autonomy Statute for Corsica discussed above. Moreover, in an obviously exceptional decision, the Constitutional Court of Moldova rejected a claim to declare the provisions of the Organic Law on the Special Legal Status of Gaugazia granting a right to external self-determination to the people of Gaugazia unconstitutional. *See* Constitutional Court Moldova, 21 December 1995, Dec. No. 35/95. In 1993 the Supreme Court of Estonia declared the decision of the Narva City Council to hold a referendum on autonomy null and void. *See* Supreme Court Estonia, 11 August 1993.

for the public service of the Autonomous Province of South Tyrol, are no longer required in those fields where public services have been privatized by an act of the national parliament.[63]

With regard to the Organic Law on the Special Legal Status of Gaugazia, the Moldovan Constitutional Court struck down a provision requiring that the members of the judiciary on the territory of Gaugazia shall be appointed by the Republican President only on proposal of the People's Assembly of the Gaugazia.[64]

In 2001 the Slovene Constitutional Court ruled with regard to minority representation that in case of the termination of the mandate of an elected member of a local self-government council, the office-holder cannot simply be replaced by the next candidate on the list who had received most votes without a new election since such a provision is a violation of the constitutionally required majority vote system.[65]

Obviously in the same "spirit" of legal positivism like the Austrian court decisions discussed above with regard to pre-emption, the Hungarian Supreme Court ruled that the members of local minority self-government bodies are not entitled to submit court actions in connection with the election of officials of territorial self-government bodies.[66]

In 2003 the Croatian Constitutional Court – also in a positivistic interpretative approach in total contrast to the decision on reserved seats discussed above and without any reference to Article 11 FCNM – rejected a constitutional complaint against a decision of the Administrative Court upholding a decision of the administrative supervisory authorities which had declared illegal a bi-lingual Croat-Italian inscription on the name plate of the regional office of the zupanija Istria, one of the regional (self-)government units of Croatia.[67]

5. Citizenship, Residency and Language Proficiency Requirements

There can be also limitations in effective participation due to citizenship, residency or language proficiency requirements in registration processes.

Political rights, in particular the right to vote and to stand as a candidate in elections, affects the "essence" of democratic participation and became almost exclusively restricted to citizens due to the processes of state formation and nation-building in Europe over the last two centuries discussed above with the

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[63] *See* Constitutional Court Italy, 26 May 1993, Official Gazette No. 24/1993.
[64] *See* Constitutional Court Moldova, 6 May 1999, Dec. No. 24/06.
[65] *See* Constitutional Court Slovenia, 17 May 2001, U-I-32/99.
[66] *See* Supreme Court Hungary, 1995.
[67] *See* Constitutional Court Croatia, 23 December 2003, U-III-322/99.

state-nation and nation-state models. Thus, for instance, the extension of the right to vote to non-citizens even at the local level was declared unconstitutional by both the German and the Austrian Constitutional Court.[68] Also the Venice Commission of the Council of Europe came to the conclusion in a study in 2006 that principally "restricting certain political rights – including those guaranteeing minority representation in the legislature – to citizens who belong to a national minority is also viewed as a legitimate requirement under the FCNM".[69]

In Romania, Mr. Gheorge Funda's candidacy for the presidential elections in 1996 was contested before the Constitutional Court because he had frequently taken positions as a "Hungarian" which was not seen as being in line with loyalty to the Romanian state, for instance by declaring that Romanian is a foreign language to him. In the decision on the denial of his registration, the Court, however, rejected the claim because the arguments presented were seen as political or ethical which are not justiciable.[70] Similarly, in 2001 the Romanian Court rejected a claim and the arguments that the provisions of the new law on local public administration would violate the constitutional provisions on Romanian as the official language by allowing also the use of Hungarian in local self-government bodies and that thereby the concept of individual rights would be replaced by collective rights. This decision is again proof how the Romanian Court tries to strike a balance between the "unitary state" doctrine and a more communitarian-liberal approach necessary for the justification of minority protection rights.[71]

In contrast, the Administrative Supreme Court of Finland struck down a language proficiency requirement in the Swedish language in order to obtain a residence permit on the Åland Island. This language requirement in the official language of the Åland Island was used as an instrument for minority protection in the framework of territorial autonomy. But the Court declared that such a minority-friendly requirement is not foreseen in the Autonomy Statute and thus not in conformity with the law.

The Estonian Constitutional Court ruled in 1998 that the Language Act gave too broad discretionary power to the Language Board for the determination of the command of the official language for local government officials who had already been elected.[72] In 2001 the Court ruled again that the language proficiency

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[68] *See* Counstitutional Court Germany, BVerfGE 83, p. 37, and Constitutional Court Austria, VerfSlg 17264/04.

[69] *See* Venice Commision, *Report on Non-Citizens and Minority Rights*, 15/16 December 2006, CD-AD(2007)001, at para. 139.

[70] *See* Constitutional Court Romania, Decision No. 63, 14/10/1996, Official Gazette, No. 258/96.

[71] *See* Constitutional Court Romania, Decision No. 1122, 9 April 2001.

[72] *See* Constitutional Court Estonia, 1998-2-5.

requirement for local government council elections must be proportionate and cannot be an absolute requirement.[73]

6. Conclusions

As the analysis of the case law of national courts with regard to effective participation has demonstrated, countries and courts in Western and – irrespective of the interval of communism – South-Eastern Europe with a long historic record of the "unitary state" doctrine have had or still have their difficulties to give up a strictly individualistic liberal approach combined with a formalistic reductionism through strictly textual interpretation in the tradition of legal positivism on behalf of a more communitarian approach, which is necessary for "effective" participation of minorities and their integration into society and political decision-making processes. The Lund Recommendations with their rather specific policy advice and reference to international standards have served as a prominent international instrument in this respect over the last decade. But more effort, also from international monitoring bodies, not the least the "quiet diplomacy" of the HCNM, will be necessary through a truly inter-cultural, international and inter-disciplinary dialogue not only on all the "technicalities" of legal instruments for minority protection, but also to make the underlying "philosophy" understandable and acceptable.

[73] *See* Constitutional Court Estonia, 2001-3-5. *See also* ECtHR, *Podkolzina* v. *Latvia*, 9 April 2002, Appl. No. 46726/99.