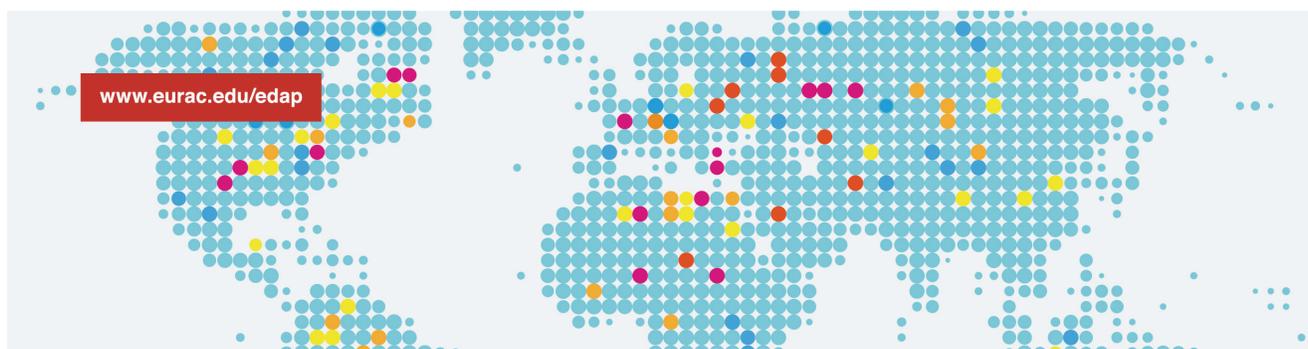


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# Judicial Adjudication of Language Rights in Central, Eastern, and South-Eastern Europe. Principles and Criteria

Francesco Palermo



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## Abstract

Central, Eastern, and South-Eastern Europe are among the regions where minority, including linguistic rights, are more developed, at least on paper. Not always, however, have these rights been fully and effectively implemented so far. Several obstacles hamper effective implementation. Besides general problems, such as high costs or administrative and organizational requirements, in many countries of Central, Eastern and South-Eastern Europe, linguistic rights have been granted as a concession to the international community rather than out of sincere commitment. Minority rights are thus often highly politicized. In such a context, the role of the judiciary in determining principles and criteria for the practical development of linguistic rights is of extreme importance. The paper casts some light on the adjudication of linguistic rights of national minorities in Central, Eastern, and South-Eastern Europe, by examining the relevant case law and, above all, by trying to infer the underlying principles developed by the courts. It concludes that courts are overall quite deferential to the general political climate in their respective country. At the same time, however, some judicial decisions clearly indicate that courts are gradually emancipating from the mainstream political options and are increasingly able to impose non-majoritarian decisions, thus proving evidence of a slow but evolving establishment of the rule of law.

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## Keywords

Central, Eastern, South-Eastern Europe - Linguistic rights (of minorities) - Case-law - (Constitutional) adjudication - Rule of Law.

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# Judicial Adjudication of Language Rights in Central, Eastern, and South-Eastern Europe. Principles and Criteria\*

Francesco Palermo

## 1. Introduction

Central, Eastern, and South-Eastern Europe is perhaps the most advanced laboratory for minority rights in general and linguistic rights of persons belonging to minorities in particular. This is due to a number of circumstances, notably including the strong impact of international conditionality: in order to be admitted to the “European club” after independence or re-gained full sovereignty in the 1990s, these countries had to accept conditions in terms of respect of human and minority rights.<sup>1</sup> As a consequence, all of them have ratified the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM), nearly all of them have ratified the European Charter for Regional or Minority Languages (ECRML) and all their constitutions have been influenced, to a different extent, by the international community through special assistance, expertise and, in some case, by *de jure* or *de facto* imposition.<sup>2</sup>

Such an extraordinary development of minority (including linguistic) rights has not been followed, however, by full and effective implementation. Besides the “usual” difficulties in implementing linguistic rights that are common to most countries (high costs, administrative and organizational requirements, structural conditions), in the context of Central, Eastern, and South-Eastern Europe several other obstacles hamper effective implementation. Among them, the fact that linguistic rights of minorities have generally been granted as a concession to the international community rather than out of sincere commitment,<sup>3</sup> and that, consequently, minority

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<sup>1</sup> Cesare Pinelli, “Conditionality and Enlargement in Light of EU Constitutional Developments”, 10 *European Law Journal* (2004), 354-362.

<sup>2</sup> The only significant exceptions being the Russian Federation and Georgia. Both countries committed to ratify the Charter upon admission to the Council of Europe but have not done so yet. For details see Iryna Ulasiuk, *Europeanization of Language Rights in Russia and Ukraine*, PhD, European University Institute, Florence 2010, now published as Iryna Ulasiuk, *Europeanization of Language Rights in Russia and Ukraine: A Myth or a Reality?* (Lambert Academic Publishing, Saarbrücken 2010).

<sup>3</sup> In fact, most of these states were (re-)established having a clear titular majority in mind, and minorities in most cases were at best tolerated, if not expressly repressed.

rights are highly politicized and (often irrationally)<sup>4</sup> linked to threats to the territorial integrity of the new states. Such threats are the more perceived by the majority, the weaker their identity is: nationalistic policies are all the more frequent, the more insecure and fragile the identity of a country is.<sup>5</sup>

In such a context, the role of the judiciary in determining principles and criteria for linguistic rights also presents some contradiction: on the one hand, given the amount of linguistic rights granted by the domestic legislation, as well as the overall disappointing degree of their implementation, the courts have been less decisive than one could have expected in enforcing the linguistic rights of national minorities; on the other hand, considering that most of these countries are still in transition and the rule of law – including judicial independence – is not yet fully achieved, the role played by judicial decisions on linguistic rights is all but insignificant.<sup>6</sup>

This paper casts some light on the adjudication of linguistic rights of national minorities in Central, Eastern, and South-Eastern Europe, by examining the relevant case law and, above all, by trying to infer the underlying principles and criteria developed by the courts. It concludes that courts are overall quite deferential to the general political climate in their respective country and tend to uphold the interpretation provided by the main political actors, *i.e.*, by the majority. At the same time, however, some judicial decisions clearly indicate that courts are gradually emancipating from the mainstream political options and are increasingly able to impose non-majoritarian decisions (usually on procedural grounds), thus proving evidence of a slow but evolving establishment of the rule of law. It is argued that, in the future, the role of the courts as guarantors of linguistic rights of persons belonging to national minorities is deemed to increase, parallel to the (re-) enforcement of the rule of law.

## 2. Language rights in Central, Eastern, and South-Eastern Europe. Main features and criteria for selection of cases

Language issues are deeply intertwined with other aspects of minority rights, to which they are a precondition (*e.g.*, educational rights) or instrumental (*e.g.*, participation rights).<sup>7</sup> Linguistic rights are thus conditioned, in practice,

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<sup>4</sup> Francesco Palermo, “When the Lund Recommendations are Ignored. Effective Participation of National Minorities through Territorial Autonomy”, 16 *International Journal on Minority and Group Rights* (2009), 653-663.

<sup>5</sup> Natalie Sabanadze, *Globalization and Nationalism: The Cases of Georgia and Basque Country* (Central European University Press, Budapest, 2009).

<sup>6</sup> Josef Marko, Francesco Palermo, Jens Woelk, “Reinforcement of the Rule of Law. Division of competencies and interrelations between courts, prosecutors, the police, the executive and legislative powers in the Western Balkans countries”, *Strategic studies - CARDS* (2003), at: <http://www.kfunigraz.ac.at/suedosteuroopa/media/Finalreport.pdf>.

<sup>7</sup> See for these links the two commentaries adopted so far by the Advisory Committee on the FCNM, respectively on Education and on “the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs”. Both commentaries highlight the role played by linguistic rights for the full exercise of the right of minorities to education and participation. See also Antoni Milian i Massana, *Derechos lingüísticos y derecho fundamental a la educación* (Civitas, Barcelona, 1994), esp. 52 ff., Xabier Arzoz, “The Nature of Language Rights”, 2

by factors that may be linked with the overall approach to minority rights. This goes, in particular, for the territorial scope of application of the rights. Due to the widespread suspicion vis-à-vis territorial solutions to ethno-national claims in Central, Eastern, and South-Eastern Europe, minority rights, including linguistic rights, are usually not defined in territorial terms but are rather conceived as rights valid for the state as a whole. However, in practical terms, almost all countries make the use of linguistic rights of national minorities conditional upon the presence of a minimum threshold of speakers of minority languages in a given territory (in most cases: 20%) or to a specific region.<sup>8</sup> This discrepancy between rights designed as non territorial but practically limited to specific territories is one of the reasons that make implementation of linguistic rights sometimes difficult and has led to some important clarifications by the courts on the territorial scope of application of linguistic rights.

Moreover, when linguistic rights are litigated and adjudicated in courts, several different aspects are considered: seldom is the linguistic issue at stake decided as a matter of principle; rather, it is often linked with other issues (administrative procedures, consumers protection, territorial scope of norms, etc.), that make it sometimes difficult and arbitrary to identify the relevant cases. In this analysis, the cases are classified according to the main language-related element brought to the attention of the respective court. Accordingly, the analysis will look at the cases dealing with language laws in general—both on state language(s) at the national and sub-national level and on laws on the use of minority language(s)—with the use of language(s) in dealings with the administration, with the use of language(s) in judicial proceedings, with language(s) in the media, with personal and geographic names, and with the use of language(s) in schools.

For each of these areas, the main principles and interpretative criteria will be highlighted in a comparative perspective and finally some general conclusions will be drawn on the trends of comparative adjudication regarding language rights of persons belonging to national minorities in Central, Eastern, and South-Eastern Europe.<sup>9</sup>

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*JEMIE paper* (2007), at [http://ecmi.de/jemie/special\\_2\\_2007.html](http://ecmi.de/jemie/special_2_2007.html) and Francesco Palermo, “The Dual Meaning of Participation: The Advisory Committee’s Commentary to Article 15 of the FCNM”, 7 *European Yearbook of Minority Issues* (2008), 409-424.

<sup>8</sup> Most of the countries provide for a threshold of 20% (usually at local level, but sometimes also at national level, such as in Macedonia) in order to allow the official use of minority languages. In some cases, thresholds are even higher, such as in the case of Croatia and Estonia, where the requirement is that of a minimum of 50% of minority language speakers at local or district level. This practice is criticized by the Advisory Committee under the FCNM for being too high. See Advisory Committee, First Opinion on Croatia, and First Opinion on Estonia.

<sup>9</sup> In this paper the general term “persons belonging to national minorities” or simply “national minorities” is used. This term is the most recurrent in international practice, encompassing a wide range of minority groups, including religious, linguistic, and cultural as well as ethnic minorities, although the individual countries often use different terminology. In particular, in several Western Balkan countries the expression “community” is used rather than minority, and sometimes a legal difference is associated with the term (such as in Bosnia and Herzegovina, whose legislation refuses to consider the three constituent peoples as “minorities” - these are only the seventeen officially recognized minorities). Precisely to avoid possible misunderstandings, the terminology chosen follows the practice of international organizations such as the Council of Europe and the OSCE.

### 3. Specific areas of significant judicial adjudication of linguistic rights

#### 3.1. Language laws

##### 3.1.1 *At the level of the state...*

The most glaring manifestation of the contradiction pointed out above between generous linguistic rights and weak majority identity, is the field of language laws. In this area, in fact, a permanent tension is to be noted in several Central, Eastern, and South-Eastern European countries between progressive rights for minorities and repressive practice by majorities. All countries of Central, Eastern, and South-Eastern Europe have adopted specific legislation on the use of languages of national minorities, demonstrating the high level of protection of these rights in the region. At the same time, several of these countries have also adopted laws protecting and promoting the state language, often demonstrating much greater interest in the language of the majority than in those of the minorities. Even more significantly, the languages of the minorities are often seen as the main threat to the development of the state language, thus something against which the state language must be protected. This often creates a clash between laws aimed at protecting the minority languages and state language laws. Such a clash sometimes ends up in courts and courts find it difficult to strike the right balance between the legitimate protection of the state language and the necessity that this protection is not pursued at the expenses of the fundamental rights of persons belonging to national minorities.

The first landmark decision on the relationship between promotion of the state language and protection of minority languages was issued in 1997 by the Slovak Constitutional Court. Two years before, the Slovak Parliament, controlled by a nationalistic majority under Prime Minister Meciar, passed a law on the state language of the Slovak Republic.<sup>10</sup> While aimed at protecting and promoting the use of the state language, the law contained several restrictions to the use of minority languages in Slovakia, including the obligation to use exclusively the state language in written communication with the administration. The law also provided for pecuniary sanctions in case of violation of some of its provisions. The law prompted the sharp reaction of the international community, and was challenged in courts by some opposition parties, including the party representing the Hungarian minority.<sup>11</sup> In a fundamental decision, the Slovak Constitutional Court declared some provisions of the state language law to be contrary to the Slovak constitution, notably the obligation to use the state language in written dealings with the

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<sup>10</sup> Act no. 270/1995.

<sup>11</sup> ACFC, First Opinion on the Slovak Republic.

administration and the imposition of fines.<sup>12</sup> The Court, however, dismissed several other complaints against the law and above all upheld its overall aim and structure by affirming that the protection and promotion of the national language be a legitimate interest protected by the constitution, limited only by the general interpretative criteria of proportionality and reasonability. The most immediate consequence of the judgment was the immediate elimination of fines for breaches of the state language law and, a few years later, the adoption of a law on the use of languages of national minorities (1999)<sup>13</sup> which, however, designs a relatively weak system of protection of linguistic rights of national minorities.<sup>14</sup> In 2009, the state language law was substantially amended and sharpened in a number of provisions, limiting again the possibility to use minority languages in public life and even in some private undertakings, and fines for the violation of the state language law have been re-introduced, although so far not imposed.<sup>15</sup> Should that be the case, however, it is likely that a case will be brought again to the Constitutional Court.<sup>16</sup>

Another seminal decision on the compatibility of restrictive state language laws with the fundamental rights guaranteed by the constitution, particularly those of persons belonging to national minorities to use their own language, was issued in 1999 by the Ukrainian Constitutional Court.<sup>17</sup> The Court was asked to provide the interpretation of Article 10 of the Ukrainian Constitution, which confers the status of state language to Ukrainian only (al. 1), obliges the state to ensure “the comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory” of the country (al. 2) and guarantees “the free development, use and protection of Russian and other languages of national minorities”. The case brought to the Court concerned, inter alia, the status of the state language in the teaching process in educational institutions and had to determine the concrete balance between the constitutional obligation to promote the state language and the constitutionally guaranteed opportunity for Russian and other minority languages to develop freely.<sup>18</sup>

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<sup>12</sup> Slovak Constitutional Court, judgment no. 260/1997.

<sup>13</sup> Act no. 184/1999.

<sup>14</sup> In particular, the minority language law does not provide for an obligation for the civil servants to speak minority languages in areas inhabited by more than 20% of persons belonging to a national minority. The practical exercise of the right to use minority languages in dealings with the administration—where the required numerical threshold is met—is therefore still conditioned, de facto, by the linguistic skills of the civil servants and ultimately, by their good will.

<sup>15</sup> Acts No. 318/2009 and 357/2009 on the State Language of the Slovak Republic (30 June 2009). These amendments to the state language law were complemented by some guidelines (Principles of the Government) for their implementation (adopted in December 2009) which make it in practice more difficult to impose fines. The imposition of fines has subsequently been removed from legislation.

<sup>16</sup> It must be noted that, after the adoption of the amendments to the Slovak state language law, the Hungarian Government has created a special fund (of about 180.000 Euro) to cover legal assistance to persons belonging to the Hungarian minority in Slovakia who should be sanctioned for violations of the state language law.

<sup>17</sup> Decision of the Constitutional Court of Ukraine of 14 December 1999, no. 10- pn/99.

<sup>18</sup> Oleksandr Hrytsenko, “Imagining the Community: Perspectives on Ukraine’s Ethno-cultural Diversity”, 36 *Nationalities Papers* (2008), 197-222.

The Court tried to find an interpretative way out of the dilemma. It stated that Ukrainian is the “obligatory means of communication in the whole territory of the country for all the bodies of the state power and local governments”, *i.e.*, the language of acts, work, correspondence, documentation, etc. However, “together with the state language, local governments (as well as state bodies in Crimea) could use Russian and other minority languages within the framework provided by the legislation”. In practice, also other languages could be used in education, while Ukrainian must be utilized as the language of the teaching process. The Court also stressed the symbolic meaning of the state language for the Ukrainian nation:<sup>19</sup> “It entirely corresponds to the state-building role of the Ukrainian nation, specified in the Preamble of the Constitution, which has traditionally resided on the territory of Ukraine, makes up the majority of its population and has given the official name to the state”.<sup>20</sup> Notwithstanding some limited openings to the use of minority languages, it has been noted that “the decision was unequivocally perceived as being aimed at strengthening the position of the state language, primarily by implicitly ruling out Russian as an acceptable language in the central power bodies”.<sup>21</sup>

It is precisely the systemic effect of the decision that matters more than its specific contents. Even more than the ruling by the Slovak court, the Ukrainian decision contributed to “set the tone” with regard to the interplay between state language and minority languages and such a constitutional tone contributed greatly to creating the overall climate discouraging the use of minority languages even where this was legally possible.

By the same token, another important decision of the Ukrainian Constitutional Court deserves to be mentioned, since it also decisively contributed to supporting the overall negative climate against the use of minority languages, thus backing the policies aimed at discouraging minority languages pursued by the governments. In 2000, the Court ruled that the ratification procedure of the ECRML followed by Ukraine in 1999 was unconstitutional.<sup>22</sup> The reasoning of the Court was based on the procedure for ratification of international treaties, which was declared unconstitutional, while the contents of the Charter were not scrutinized. As a result, however, the ratification of the Charter was delayed by four years.<sup>23</sup> As it has been

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<sup>19</sup> For a comprehensive historical and legal analysis of language disputes in Ukraine see Iryna Ulasiuk, “The Language Issue in the Evolution of Ukrainian Constitutionalism”, 54 *Revista de Llengua i Dret* (2010), 135-165.

<sup>20</sup> Constitutional Court of Ukraine, dec. no. 10- пп/99, para. 2 of point 4 of the resolute part. See Iryna Ulasiuk, *Europeanization of Language Rights in Russia and Ukraine*, cit., 298.

<sup>21</sup> Volodymyr Kulyk, “Revisiting a Success Story: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Ukraine, 1994-2001”, *CORE Working Paper*, Hamburg 2002, 112.

<sup>22</sup> Decision of the Constitutional Court of Ukraine of 12.7.2000, no. 9- пп (on the compliance of the Law of Ukraine on ratification of the ECRML with the Constitution).

<sup>23</sup> The issue was whether or not the speaker of the parliament did or did not submit the law to the President for promulgation. The speaker of the parliament followed the procedure laid down in the law on ratification of international treaties, which exempts such laws from presidential promulgation (article 7). According to the Court such provision violated the constitutional division of powers between the Parliament and the President and was thus declared unconstitutional.

noted, while based on procedural grounds, the decision of the Court, given the overall political climate in the country at that time, “was a political one, designed to foster exclusionary language policies”.<sup>24</sup>

Furthermore, it must be noted that several other state language laws never faced, so far, significant challenges in courts. Quite restrictive laws on the protection and promotion of the state language, such as the Latvian state language law of 1999<sup>25</sup> or the Tajik state language law of 2010, while attracting some international attention and criticism,<sup>26</sup> have so far not been significantly scrutinized by courts. This shows that the opportunities to challenge highly political laws such as the state language laws remain limited and are de facto hampered by the overall climate surrounding the practical exercise of minority language rights.

### 3.1.2. ... and at the level of sub-state entities

In the context of a multinational federal country, state language laws can be adopted also at the level of the concerned sub-national unit. An important example for the purposes of this paper is represented by the Russian Federation. The Russian federal constitution guarantees the right of the republics composing the Russian Federation to establish their own state languages, alongside with Russian which has official status throughout the territory of the Federation (Article 68.2 Constitution of the Russian Federation). It has to be reminded that most of the republics composing the Russian Federation have adopted state language laws making the language of the titular nationality a co-official language of the republic. Only in a few cases, however, these laws were challenged in courts, thus confirming the relatively limited role played by courts in defining the contours of this matter. In at least a couple of cases, however, the Constitutional Court of the Russian Federation has been called to interpret the concrete meaning of Article 68.2 of the constitution with regard to state language laws adopted by some sub-national entities.

In 1998, the issue at stake was whether the provision of the state language law of Barkortostan requiring the proficiency in the Bashkir language (alongsidewith Russian) in order to stand for the election of the President of Barkortostan was in compliance with the said provision of the Russian constitution. The Court found this provision in breach of the federal constitution.<sup>27</sup> According to the constitutional judges, Article 68.2 of the federal constitution grants the right for the republics to determine additional

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<sup>24</sup> Viktor Stepanenko, “A State to Build, a Nation to Form: Ethno-Policy in Ukraine”, in: Anna-Maria. Biro, Petra Kovacs (eds.), *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe* (LGI, Budapest, 2001), 309-346, at 324.

<sup>25</sup> Act no. 428/433.

<sup>26</sup> Particularly by the OSCE High Commissioner on National Minorities, who assisted in the process of implementation and gradual amendment of the Latvian law and commented on the Tajik law. See OSCE High Commissioner on National Minorities, *Implementation of the Latvian State Language Law. A Practice Guide for the State Language Inspectors* (OSCE High Commissioner on National Minorities, The Hague, 2006).

<sup>27</sup> Constitutional Court of the Russian Federation, decision of 27.4.1998, no. 12- n.

official languages in their territories as a means to preserve bilingualism (multilingualism) of their multinational people, but this is just a right and not an obligation. This right, however, cannot extend to the provision of special linguistic requirements for acquiring passive electoral rights, since political rights are recognized and guaranteed by the federal constitution and cannot be limited by linguistic proficiency in a language that can never be the only official language of a republic. In other words, only proficiency in Russian could be imposed as a legal requirement.

In 2004, the Russian Constitutional Court established an important interpretative principle with regard to the choice of alphabets for languages that are official at sub-national level. For the Court, the right granted by the federal Constitution to the constituent republics to establish other official languages in their territories in addition to Russian (Article 68.2 Constitution of the Russian Federation) does not extend to the choice of the alphabet for that language.<sup>28</sup> The state language law of the republic of Tatarstan not only declared Tatar as the state language of the republic (alongside with Russian according to the federal Constitution), but also envisaged to switch from the Cyrillic to the Latin alphabet for the Tatar language.<sup>29</sup> For the Court, the power to legislate on the alphabet to be used for the written languages in the Russian Federation is vested with the federal level, since this represents a guarantee against possible disadvantages suffered by Russian citizens if any republic would be allowed to introduce a different script. The existence of a single alphabet in the Russian Federation is essential, according to the Court, as it guarantees the balanced functioning of the Russian language and the state languages of the republics “within a common language space”.<sup>30</sup>

In this decision, the Court deliberately omits reference to the fact that where local official languages exist, Russian (in Cyrillic script) is always official too and the linguistic regime the republics may institute is just bilingualism: no document, sign, or any act may be written in the local language only, thus the right for any Russian citizen to obtain information in a language he/she can understand and read is granted. The ruling has therefore the function of posing clear limits<sup>31</sup> to the linguistic freedom of constituent republics and it is not by chance that it was issued with regard to Tatarstan, which is perhaps the most proactive Russian republic with regard to the

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<sup>28</sup> Constitutional Court of the Russian Federation, decision of 16.11.2004, no. 16-п.

<sup>29</sup> The Tatar language was originally written in Arabic characters. These were replaced by the Latin script in the 1920ies and in 1939 the Soviet authorities imposed the exclusive use of the Cyrillic alphabet. See further Mark Sebba, “Ideology and Alphabets in the former USSR”, 30 *Language Problems and Language Planning* (2006), 99-125.

<sup>30</sup> As appropriately reminded by the Advisory Committee under the FCNM in its second opinion on the Russian Federation, however, “it is difficult to draw a clear distinction between the right to use a minority language and the right to choose the alphabet for the use of the language at issue. The choice of alphabet, as part of the right to use a minority language in private and in public [...] should be decided by the person concerned”.

<sup>31</sup> For broader considerations see Alexei Trochev, *Judging Russia. The Role of the Constitutional Court in Russian Politics, 1990-2006* (Cambridge University Press, New York, Cambridge 2008).

assertion of its own regional identity and language and the most “asymmetric” subject of the Russian Federation.<sup>32</sup>

### 3.2. Use of language(s) in dealings with the administration

According to international standards, the right to use a minority language extends both to the private and the public sphere (see in particular Article 10 FCNM). Since the freedom to use the minority language in private is a fundamental freedom of each person and does not require, in principle, any authorization by the public authorities to be exercised, the legal regulation of linguistic rights and freedoms usually concerns the public sphere or at least areas of public interest (such as the media). Within the public sphere, the first and main field where linguistic rights of persons belonging to national minorities come to the fore is the possibility to use minority languages in written and oral communication with public authorities, particularly with the administration.<sup>33</sup> For this elementary reason, most of the cases involving linguistic rights have to do, more or less directly, with the use of minority languages in dealings with the public administration. What matters for the purpose of this paper, more than a long compilation of case-law on the subject, is to single out the interpretative principles and criteria governing the issue.

In this regard, the most relevant aspect is the threshold of speakers provided by most legislation in Central, Eastern, and South-Eastern Europe, in order to allow the official use of recognized minority languages in dealings with the public administration, especially at the local level. In no case has a court declared the threshold provided by the legislation for allowing the use of minority languages at the local level as disproportionate or unreasonable and therefore unconstitutional.<sup>34</sup> This might be an indicator of the difficulty for the courts to challenge the balance determined by political agreement between the right to use a minority language and the necessary numbers to

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<sup>32</sup> Giovanni Poggeschi, “Federalism in Russia: Ethnic and Asymmetrical”, in: Francesco Palermo, Carolin Zwillig, Karl Kössler (eds.), *Asymmetries in Constitutional Law. Recent developments in Federal and Regional Systems* (Eurac book 53, Bolzano/Bozen 2009), 97-116.

<sup>33</sup> For a more nuanced and complete analysis see Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages. A Critical Commentary* (Council of Europe Publishing, Strasbourg 2005), 160-163.

<sup>34</sup> As it has been the case, on the contrary, in Austria, where the Constitutional Court declared in 2000 that the threshold of at least 20% of minority-language speakers determined by the legislator was arbitrary and unconstitutional, thus lowering the threshold to 10% (V 91/99). The Court ruled that a Carinthian municipality with 10.4% Slovene speakers should be considered an “administrative district with mixed populations” within the meaning of Article 7, paragraph 3 of the State Treaty of Vienna, implying that Slovenian is recognized as an official language, thus enabling its use in official dealings at local level. It must be pointed out, however, that implementation of this decision took ten years: only after a difficult political compromise in 2011 was the threshold put at 17.5%. This demonstrates how difficult it is, in practice, to enforce by judicial decision a principle that is not accepted by the (or, in the case of Austria, only by some) political forces. See Jürgen Pirker, *Kärntner Ortstafelstreit: der Rechtskonflikt als Identitätskonflikt* (Nomos, Baden Baden, 2010).

make such right effective.<sup>35</sup> At the same time, however, it might also be the consequence of an established practice followed by nearly all countries in the region to agree on a shared common denominator, represented by a threshold of 20% of minority-language speakers to make that language official at the local level. In fact, where higher thresholds have been introduced, such as in Estonia or in Croatia, this has been sharply criticized by the “soft-jurisprudence”<sup>36</sup> of international monitoring bodies,<sup>37</sup> which in some case led to the lowering of the threshold.<sup>38</sup>

In other words, while courts have never substantially challenged the thresholds established by the language laws of the respective countries, thus undoubtedly showing (excessive?) deference in this respect, they have also been confronted with uniform standards applied throughout the region and thus were rarely called upon to scrutinize such standards. An interesting and indicative case confirming this approach was decided by the Romanian Constitutional Court in 2001. The Court was asked to rule on the constitutionality of the law on local public administration, which established the right of persons belonging to national minorities to interact in their mother tongue with the local public administration in the areas where they constitute at least 20% of the whole population.<sup>39</sup> In rejecting the claim and thus maintaining the constitutionality of the law, the Court directly applied Article 10.2. FCNM.<sup>40</sup> For the Court, the contested law is nothing but the implementation of the FCNM provision: “the law of local public administration merely states and fixes the details of the enforcement of the provisions in Article 10.2 of the FCNM, which, according to Article 11.2 and 20.2 of the Constitution, may be directly enforced”.<sup>41</sup> Such a ruling confirms that the courts retain the power to determine whether a numerical threshold for the use of minority languages with the administration is proportionate, and that such determination is directly influenced by the comparative practice and the international standards.

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<sup>35</sup> In the language of the Canadian Charter of Rights and Freedoms, this could be phrased with the formula “where numbers warrant” - see section 23 of the Canadian Charter of Rights and Freedoms (1982).

<sup>36</sup> For this expression John Packer, “Situating the Framework Convention in a wider context: achievements and challenges”, in: AA.VV., *Filling the Frame. Five years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), at 45.

<sup>37</sup> See Advisory Committee on the FCNM, First Opinion on Estonia, First Opinion on Croatia. In both cases, the threshold set by the legislator was set at 50%.

<sup>38</sup> For the case of Croatia see Antonija Petričušić, “Constitutional Law on the Rights of National Minorities in the Republic of Croatia”, *2European Yearbook of Minority Issues* (2004), at 607 and Francesco Palermo, “Minority Protection and regulation of Place Names in Croatia”, in Giuseppe de Vergottini, Valeria Piergigli (eds.), *Minorities and Toponymy* (Lang, Frankfurt et al., 2011) (forthcoming).

<sup>39</sup> Romanian Constitutional Court, 9 April 2001, no. 112/2001.

<sup>40</sup> Article 10.2 of the FCNM states: “In areas inhabited by persons belonging to national minorities *traditionally or in substantial numbers*, if those persons so request and where such a request corresponds to a *real need*, the Parties shall *endeavour* to ensure, *as far as possible*, the *conditions* which would make it possible to use the minority language in relations between those persons and the administrative authorities” (emphasis added).

<sup>41</sup> Romanian Constitutional Court, 9 April 2001, no. 112/2001, at I.1.

### 3.3. Use of language(s) in judicial proceedings

A particular segment of the right to use languages in dealings with the administration regards the language regulation in judicial proceedings. In this area, international standards are weaker than in other fields (including with regard to the right to use minority languages with the administration as a whole) and thus conditionality has operated to a much lesser extent as compared to other areas. It must be recalled, in particular, that with regard to judicial proceedings, the FCNM (Article 10.3) does not go significantly beyond the minimum requirement of the assistance of an interpreter in criminal proceedings with no additional costs for the person, which is already prescribed by Article 6 of the ECHR. Slightly more advanced on this subject is the ECRML, which contains provisions also with regard to civil and administrative proceedings, although it leaves to the signatory states a broad discretion as to the measures to implement these provisions.<sup>42</sup>

Judicial proceedings thus remain, to a large extent, the domain in which national authorities have the broadest margin of appreciation in regulating the language issue, with the only limitation of the guarantee of the basic individual right to be informed in a language that the person understands. While such an approach might be justified as the judicial proceedings have to take in due account the speediness and effectiveness of the administration of justice, it seems that there is broad scope for improvement in this area.<sup>43</sup>

Against this background, it is no surprise that courts abstain from challenging restrictive provisions as to the use of minority languages in judicial proceedings, since the standards in international and usually also in domestic constitutional law overall support or at least do not discourage such provisions.

The Ukrainian Constitutional Court ruled in 2008 that the preferential use of the state language in civil and administrative proceedings is in line with the constitution.<sup>44</sup> More precisely, the Court upheld the provisions of the code of civil procedure (Article 7) and of the code of administrative court proceedings (Article 15) which provide that the trials be conducted in the state language and at the same time guarantee the rights of citizens to use their native language or a language they have command of. Drawing on its own precedent from 1999 on the meaning of the official status of the state language, the Court reiterated that the Ukrainian legal system presupposes the use of the state language as a mandatory means of communication in all spheres of public life. The right to use other languages in public, including in judicial trials, is to be seen as an exception to this rule. Such an exception guarantees that citizens who have insufficient or no command of the state language are allowed to use their language or the language of their preference (*i.e.*,

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<sup>42</sup> Woehrling, *The European Charter...*, 165-175.

<sup>43</sup> Valeria Cardì, "Regional or Minority Language Use before Judicial Authorities: Provisions and facts", 2 *JEMIE paper* (2007), at [http://ecmi.de/jemie/special\\_2\\_2007.html](http://ecmi.de/jemie/special_2_2007.html).

<sup>44</sup> Decision of the Constitutional Court of Ukraine of 22.4.2008, no. 8- pn on the use of language in court proceedings.

Russian) in official dealings including in civil and administrative trials, while at the same time preserving the constitutional privilege of the state language.<sup>45</sup> For the Court, the linguistic rights of national minorities in Ukraine in judicial proceedings are “completely in line with the European Charter for Regional or Minority Languages ratified by Ukraine”.<sup>46</sup>

Compared to most countries of the region, it is true that the guarantee of linguistic rights of national minorities in judicial proceedings in Ukraine are more developed. It must be noted, however, that in its decision the Court deliberately narrowed the scope of constitutional guarantees of language rights, by interpreting Article 10 of the Constitution as a mere non-discrimination provision, and “remained silent on the duty of the state to ensure the exercise of language rights of national minorities”.<sup>47</sup> The ruling was described as “a ritualistic political act of state support for the Ukrainian language, aiming to satisfy the nationalistic public during visible reverse trends of re-Russification”.<sup>48</sup> The Court, in other words, chose a formalistic and restrictive approach which safeguarded the elementary linguistic rights of minorities in judicial proceedings but ruled out any positive support by the state for the minority languages: only the state language deserves support through positive measures, while all other languages are guaranteed only insofar as their speakers are not directly discriminated against in their linguistic rights.

### 3.4. Use of language(s) in the media

In the field of media, courts have been asked to intervene essentially in two areas. On the one hand, they have been called to check the compatibility of media broadcast in minority languages with the constitutional provision of official status to the national language only. On the other hand, quotas for state language broadcast imposed by some countries have been scrutinized with regard to their compatibility with minority rights as well as with the freedom of the media.

As to the first set of issues, an important decision was issued by the Macedonian Constitutional Court in 1998, *i.e.*, before the constitutional amendments introduced by the so called Ohrid agreement in 2001, which expanded the linguistic rights of the non-majority communities in the country, notably of the Albanian group. At the time of the decision, the constitution of Macedonia clearly established the official status of the sole Macedonian language throughout the territory of the country, while recognizing the right

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<sup>45</sup> Constitutional Court of Ukraine, 22.4.2008, no. 8- pn, at 6.1.

<sup>46</sup> *Ibid.* The ratification of the ECRML by Ukraine occurred, as mentioned above, in 2003, by law no. 802-IV.

<sup>47</sup> Ulasiuk, *Europeanization of Language Rights...*, 299-300.

<sup>48</sup> Viktor Stepanenko, “Identities and Language Policies in Ukraine: the Challenges of Nation-Building”, in: FarimahDaftary and Francois Grin (eds.), *Nation-Building, Ethnicity and Language Politics in Transition Countries* (ECMI, Flensburg, 2003), at 118.

of persons belonging to national minorities, when sufficiently representative, to use their own language in some areas of public life, such as in dealings with local public administration, in education, and in the media. Against this background, a Macedonian political party lodged a complaint against the law on radio broadcasting, claiming that the provisions ensuring the use of minority languages in the public radio was impeded by the constitutional provision on the official status of the Macedonian language. The Constitutional Court found that a limited radio broadcast in the minority language was absolutely compatible with the status of Macedonian as the sole official language of the State.<sup>49</sup> For the Court there is no contradiction between the official status of one language only and the use of minority languages in some areas as provided by the law.

On the same rationale, the Ukrainian Constitutional Court upheld in 2007 the national law on cinematography which provided for quotas for the state language with regard to movies. The law dictated a complex system of quotas for domestically produced movies as well as for the transmission of foreign movies, aiming at guaranteeing that most of the movies performed in the country's cinemas and television were in Ukrainian, as a means to promote the state language as prescribed by the Constitution.<sup>50</sup> Also in this case, the suit was brought by a number of members of Parliament, who claimed that the quotas for movies were in contrast with the protection of minority languages as well as with the freedom of media and of profession. The Court rejected the claim, affirming that the privileged status conferred to the state language by the constitution allows (and in some circumstances even mandates) positive measures aimed at protecting the state language against the influence of foreign languages.<sup>51</sup>

In both cases, thus, the courts showed deference to the choices of the legislature, and used the margin of appreciation conferred in this issue by the respective constitution to uphold the balance already achieved by the political forces. The intention behind the decisions was clearly not to upset such balance and not to (be perceived as) interfering with the political process.

### 3.5. Personal names

As opposed to the use of minority languages in judicial proceedings, international standards are very detailed with regard to the right of persons belonging to national minorities to have their name spelled in its original form and written in official documents according to the rules of the minority

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<sup>49</sup> Macedonian Constitutional Court, 20 May 1998, U.br. 49/98 (Codices MKD-1998-2-004).

<sup>50</sup> See in particular article 14 of the Ukrainian Law on Cinematography.

<sup>51</sup> Decision of the Constitutional Court of Ukraine of 20.12.2007, no. 13- pn/2007 on the official interpretation of the provisions of part 2 of article 14 of the Law on Cinematography.

language, including phonetic pronunciation.<sup>52</sup> Where states have a margin of appreciation, however, is in the use of the alphabet. It is consistent with the FCNM, for example, if states provide that names of their citizens be written in the alphabet of the state language.<sup>53</sup>

Such margin of appreciation has been sometimes used (and abused) by some countries in order to restrict the linguistic (and in this case also identity) rights of persons belonging to national minorities, and again courts have been overall deferential when called upon to challenge such practices. An interesting case was decided in Lithuania in 2004. The country's legislation provides that spelling of names and their registration in official documents be in the state language and alphabet only. This obliges persons belonging to some national minorities to have their names spelled differently than in their native language, such as in the case of persons belonging to the Polish minority, since the Polish language has letters that are alien to Lithuanian. Called by several petitions of citizens belonging to the Polish minority, the Constitutional Court upheld the legislation, based on the assumption that also the spelling of names is part of the national language.<sup>54</sup> For the Court "the state language protects the identity of the nation, integrates a civic nation and assures sovereignty for the nation and [...] guarantees that all citizens are equal in rights because it enables all citizens to communicate with the institutions on equal terms".<sup>55</sup>

In such a reading by the Court a very common approach to minority rights in Central, Eastern, and South-Eastern Europe clearly emerges. Minority rights cannot be neglected, since they are recognized in legislation and entrenched in the constitution. However, they can be remarkably limited by adopting a reading of the constitutional principle of equality based on formal equality only, which necessarily means inequality for minorities. In other words, generous minority provisions can be made quite ineffective by imposing a formal reading of equality. For the Court, Article 29 of the Constitution, which affirms that all persons are equal before the law and that "no privilege can be granted on the ground of gender, race, nationality, language, origin, social status, belief, convictions or views" obliges to use only one language

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<sup>52</sup> See in particular article 11 FCNM.

<sup>53</sup> See Advisory Committee on the FCNM, First Opinion on Azerbaijan. In that very Opinion, the Advisory Committee noted, however, that language "should not be disconnected from its essential elements such as the alphabet. While recognizing that the states may use the alphabet of the official language when writing the names of persons belonging to national minorities, the Advisory Committee expects that the right to official recognition of names in minority languages be fully respected in this connection".

<sup>54</sup> Lithuanian Constitutional Court, judgment no. 1285/2004 (*Kleczkowski/Klečkovski*). The Court of Justice of the European Union has been subsequently asked in a similar case whether the Treaties require that surnames and forenames of persons of different nationality or citizenship must be entered on certificates of civil status issued by a state using the characters of the official language of that state or in their original characters. For the Court, this situation does not come within the scope of the EU race directive (2000/43/EC) and states are thus not precluded to amend the names according to the spelling rules of its official language, provided that this does not give rise, for the citizens, to serious inconvenience at administrative, professional and private levels: judgment 12 May 2011, case C-391-09, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn*.

<sup>55</sup> Lithuanian Constitutional Court, judgment no. 1285/2004.

for the spelling and registration of names, that language naturally being the language of the majority and any distinction based on the fact that a person belongs to a national minority immediately turns into a “privilege” based on a suspectground. Such a reading of equality thus prevails over the specific provisions of the Constitution granting the right of persons belonging to minorities to “foster their language, culture and customs” as stated by Article 37 of the Lithuanian Constitution.

It must be noted, however, that in Lithuania the reading offered by the Court was eventually overruled by a legislative amendment in 2010, which allows for names in passports, personal IDs, and other documents to be spelled in all Latin-based characters (*i.e.*, the Russian-speaking minority won’t have the names in Cyrillic), including those of the Polish language, without any additional write-ups in Lithuanian.<sup>56</sup>

### 3.6. Place names

The right to give places a name in a minority language (or, as it is more frequent, also in the minority language alongside with the language of the majority), albeit clearly established in international standards,<sup>57</sup> is subject to the same general conditions for linguistic rights as a whole, *i.e.*, to numerical thresholds.<sup>58</sup> The courts have in some occasions been asked to interpret the conformity of thresholds for the establishment of bilingual municipalities with the respective constitution, but also to determine the relationship between the right to toponymy in minority languages and the constitutional preference for the state language.

The first set of issues is exemplified by two decisions adopted by the Constitutional Court of Croatia before the radical change in attitude brought in 2002 by the adoption of the constitutional law on the rights of national minorities, which started a new and more favorable phase for the protection of minority rights in Croatia.<sup>59</sup> Prior to that law, the Croatian legislation and even more its interpretation were marked by significant nationalism and the rights of national minorities were limited and scarcely implemented. With regard to place names in minority languages, the legislation provided for a threshold of at least 50% of persons belonging to national minorities in order to make the minority language co-official in the territory of that individual administrative unit, including with respect to the toponymy in minority

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<sup>56</sup> It is expected that also this bill will be challenged by the Constitutional Court in the future.

<sup>57</sup> See again article 11 FCNM.

<sup>58</sup> Although the FCNM provides that the right to co-official place names in minority languages should not be limited to areas where “minorities reside in substantial numbers” (the “substance” having to be determined by the national authorities, that usually impose a threshold of 20%, as stated above), but also to areas where national minorities reside “traditionally” (articles 10 and 11 FCNM), this second aspect is often neglected by the national authorities. See Advisory Committee on the FCNM, Second and Third Opinion on Slovakia.

<sup>59</sup> Petričušić, “Constitutional Law... .

languages.<sup>60</sup>The first autonomy statute of Istria, adopted in 1994, tried to circumvent this provision, by establishing a “presumption of bilingualism” in the region and allowing each municipality, irrespective of the numerical threshold, to determine the co-official status of Italian alongside with Croatian including for the official name of the municipality concerned. The government then led by Franjo Tudjman challenged the statute on as many as thirty-five different grounds, including the criteria for determining the official names of the municipalities. The Court struck down most provisions of the statute.<sup>61</sup>In upholding the government’s observations, the Court affirmed that it follows from the principle of equality between all citizens of the Republic, irrespective of the region in which they live, that only the Constitution and the law can recognize or limit individual freedoms and rights. It follows that only the state could regulate special minority rights, as exceptions to the principle of equality. Besides the formal equality approach, this argument contains another basic contradiction, because it was the national legislation that transferred the concrete enforcement of minority rights to the municipalities, even though the Court certainly had a point in ruling that the content of the first Istrian statute exceeded its competence (*ultra vires*).

The second case arose from an administrative appeal of the Istrian regional government against an order imposed by the central government to remove bilingual signs displayed in the regional headquarters and offices of the town of Pazin/Pisino.<sup>62</sup> The case was complex and essentially administrative. What counts for our purposes was that at the end of a long line of reasoning, the Court rejected the case of the Istrian administration, but basically on the grounds of the principle *tempus regit actum*: indeed, the Court ruled that the legislative situation in 1998 enabled central authorities to remove the bilingual signs, whereas subsequent evolution of the laws at least partly changed the picture.

With regard to the relationship between the right of national minorities to toponymy in minority languages and the constitutional preference for the state language, two decisions of the Lithuanian Supreme Administrative Court decided in 2009 are worth mentioning.<sup>63</sup> The cases regarded disputes between local governments and the state over street names in minority languages: the local authorities (of areas inhabited by a significant number of persons belonging to the Polish minority) claimed their right to set up bilingual street-names signs, whereas the government (through the county governor) ordered to remove them. The Court upheld the decision of the government to remove the street signs, based on essentially the same formal-equality argument used by the Constitutional Court in the mentioned case of the spelling of personal names. For the Supreme Administrative Court, in fact, the cases at stake

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<sup>60</sup> After the adoption of the constitutional law in 2002, instead, regional statutes and municipalities are entitled to determine the co-official status of minority languages at municipal level even when the 50% threshold (which in principle remains as a rule) is not met.

<sup>61</sup> Croatian Constitutional Court, judgment U-II-433/1994 (1996).

<sup>62</sup> Croatian Constitutional Court, judgment U-III-322/1999 (2001).

<sup>63</sup> Supreme Administrative Court of Lithuania (*Lietuvos vyriausias is administracinisteismas*), judgments no. A-261-997/2009 and no. A-756-152/2009.

represented a conflict between the special rights granted to national minorities and the general principle of equality. In case of conflict between these two constitutionally protected rights, the equality principle should prevail as a general rule, except when compelling interests make the exceptional rights prevail, which was not considered to be the case here.

In sum, also in the case of place names in minority languages, the courts tend to use the formal equality argument which always ends up privileging the position of the majority over the rights of minorities.

### 3.7. Use of minority language(s) in schools

The last but not least important area where linguistic rights of national minorities have been frequently challenged in courts is that of education. The right to receive instruction in or on their mother tongue is an essential component of linguistic rights of persons belonging to national minorities, since it makes possible the perpetuation, the promotion, and not least the public use of minority languages.<sup>64</sup> It is in this area that the more significant and courageous steps have been taken by courts, which in some recent occasions have struck down restrictive governmental policies regarding education in minority languages and have thus strengthened the rights of minorities. At the same time, however, there are also remarkable cases of judicial endorsement of restrictive, in some case clearly discriminatory legislation adopted by governments against some national minorities. Therefore, it can be stated that for the time being linguistic rights of minorities in education represent perhaps the most fluid area where the interplay between generous minority rights and reticent implementation, as well as between courts and politics, is developing.

The first case worth mentioning in this respect is a seminal decision by the Latvian Constitutional Court in 2005. The Court was asked to check the constitutionality of some amendments passed in 2004 to the law on education, which aimed at restricting the availability of education in Russian language. The amended law prescribed, inter alia, that not less than 3/5 of the total number of classes be given in the state language, thus limiting the teaching in minority and foreign languages. Such amendment clearly targeted the education in Russian language and reduced the opportunities for Russian speakers (who make up about 30% of the Latvian population) to obtain education in their mother tongue. The Court upheld the amendment law and considered it in line with the constitutional preference for the state language as a means for strengthening the national identity.<sup>65</sup> For the Court, the argument of the negative impact of such a policy on the rights of persons belonging to national minorities was not consistent, because the system still allows for education in minority languages. In addition, and more importantly,

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<sup>64</sup> See for a detailed analysis Milian i Massana, *Derechoslingüísticos...*

<sup>65</sup> Latvian Constitutional Court, judgment 13.5.2005, no. 2004-18-0106.

the Court based its decision on the theory of occupation, which has been developed since the independence of Latvia from the Soviet Union: accordingly, the Russian speakers in Latvia are not to be considered as a national minority, but as settlers who moved into the country during the time of an illegal occupation by a foreign state. These people (and their children, even if born in Latvia) are thus denied, in principle, the citizenship of the country (although this gradually changed over time)<sup>66</sup> and are denied the status of a national minority and the rights connected to this status, including education in their mother tongue.<sup>67</sup> The only Russian speakers that can be considered a national minority in Latvia are thus the so called “old Russians”, *i.e.*, those who were settled in Latvia before the Soviet occupation (1939), who make up about 7% of the population and for whom the pedagogical offer in their mother tongue allowed by the system would be more than sufficient.

What is striking in this judgment is, in particular, the timing of the decision. It was adopted just a few days before the entry into force, in Latvia, of the FCNM.<sup>68</sup> This made it possible for the Court to avoid the analysis of compatibility between the amended law on education and the FCNM, which would have been extremely problematic, also considering that, according to the Latvian Constitution, international treaties prevail over ordinary legislation. Aware of that, the Court denied that the FCNM could have become a norm of international customary law: “the fact of signing the Minority Convention and the content of it do not restrict Latvia in realization of such an education policy, which it considers as well-grounded”.<sup>69</sup> Against this background, the Court also provides its peculiar reading of the FCNM and of the comparative practice developed by the signatory states. For the Court, the FCNM allows the state parties to define what a national minority is, and its implementation in the various countries would justify the exclusion of the Russian community from the scope of the FCNM, even after its entry into force in Latvia: “The practice of the European Union Member States in realization of the Minority Convention [*sic*] testifies that the aim of the above [mentioned] Convention usually is to protect the assimilated ethnic minorities from vanishing. In fact, in the understanding of this Convention, in Western Europe there are no ethnic minorities, the greatest part [*sic*] of which does not know the State language. In the same way, in the greatest number of the European Union Member States this Convention is not applied to the post-war settlers and the greatest part of Russians of Latvia may be regarded as such”.<sup>70</sup> Thus, the Court is extremely diligent in finding somewhat peculiar

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<sup>66</sup> See on the complex process of reduction of statelessness in Latvia Walter Kemp, *Quiet Diplomacy in Action. The OSCE High Commissioner on National Minorities* (Kluwer, The Hague, 2001), 153-165.

<sup>67</sup> On these issues, with particular regard to educational rights in Latvia, see Iveta Silova, *Re-conceptualizing minority education in post-soviet Latvia* (Information Age Publishing, Greenwich, 2006).

<sup>68</sup> The decision was adopted on 13 May 2005 and the FCNM was ratified by Latvia on 8 June 2005.

<sup>69</sup> Latvian Constitutional Court, judgment of 13.5.2005, at 8.2. (English translation provided by the Court).

<sup>70</sup> *Ibid*, part I, at 9. For a reading of the judgment in light of the FCNM see See Francesco Palermo, “Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of

arguments to support the overall minority policy of the government and, more generally, the spirit of the (drafters of the) Constitution, reducing to the greatest extent the scope of minority rights, including in education.

A perhaps less significant but still interesting case of endorsement of the overall minority policy by the central government is a decision of the Russian Supreme Court in 2008, when the judges gave a somewhat restrictive reading of the principle of territoriality for the enjoyment of linguistic rights of national minorities in the field of education. The case was brought by a Tatar student, who challenged the obligation to take the school-leaving exam in Russian as imposed by a recent decree of the Federal Ministry of Education and Science aimed at unifying the procedures for that exam. For the Court, it is within the powers of the Ministry to establish nation-wide rules on school-leaving exams and this power extends to the language issue as far as it does not unduly limit the rights of persons belonging to national minorities. For the Court, such unduly limitation was not given in the case at stake, since Russian is in any case a compulsory subject including in minority schools and the nation-wide language of the country.<sup>71</sup> This implies a duty for all Russian citizens, even if belonging to a national minority, to have command of the Russian language, which is in fact official in Tatarstan as well. Here again the formal-equality argument clearly comes to the fore and again it cannot but operate to the detriment of the rights of national minorities.

In several other cases, however, the courts played a significant role in safeguarding the linguistic rights of national minorities in education, including by challenging laws and policies aimed at weakening those rights. Three cases exemplify this trend.

The first one is again a Russian case originating from Tatarstan. This time the Constitutional Court and not the Supreme Court was addressed and constitutional judges have shown, at least in this case, much bigger awareness of the nuances of the principle of equality. The Court was called to assess Tatarstan's policy of mandatory bilingual education: according to the educational laws in Tatarstan, all students shall study Tatar (and, obviously, Russian) as the state language of the Republic. In other words, Tatarstan imposes a bilingual education system, whereby not only schools with Tatar as the main language of instruction had to teach a minimum amount of hours in Russian, but also Russian-speaking schools were forced to teach some Tatar. The Court ruled that the study of both Russian and Tatar as state languages of the Republic does not violate the principle of equality prescribed by the federal constitution nor the constitutional right to receive education in the language of one's choice (Articles 26 and 43 of the Russian Constitution).<sup>72</sup> For the Court, as long as measures aimed at developing the teaching of Tatar as

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National Minorities. On the Judicial Implementation of the (Soft?) Law of Integration", in: AnneliesVerstichel, AndreAlen, Bruno de Witte, PaulLemmens (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia, Antwerp et al., 2008), 187-214.

<sup>71</sup> Supreme Court of the Russian Federation, judgment no. GKPI09-317 (2008).

<sup>72</sup> Constitutional Court of the Russian Federation, judgment of 16.11.2004, no. 16-P.

state language of Tatarstan do not interfere with or limit the study of Russian as the state language of the Russian Federation, they do not violate the principle of equality.<sup>73</sup>

A further quite significant decision that stopped a restrictive language policy in education was adopted by the Ukrainian Constitutional Court in February 2010. This decision is particularly relevant as it represents the first important case when the Ukrainian Court has not been deferential to the overall nationalistic linguistic policy of the government and struck down a governmental provision on the use of language in schools. The Court declared unconstitutional a governmental decree of 2009 which banned the use of languages other than Ukrainian (*i.e.*, *de facto*, Russian) by school personnel outside of classrooms. In practice, the decree intended to stop the quite widespread practice of school employees of schools with Ukrainian as language of instruction (teachers, administrative staff, cleaners, etc.) from talking to each other in Russian within the school building, including outside of classes and official meetings (for example during coffee breaks and alike).<sup>74</sup> The case was brought by fifty-two members of Parliament and the Court ruled only on the competences, without dealing with the substance. In fact, the constitutional judges found that the power to regulate the use of languages in schools belongs to the Parliament and it was not for the Government to adopt the decree. In other words, the governmental decree has violated the prerogatives of the Parliament, but not necessarily the linguistic rights of school personnel. While based on the division of powers between the Government and the Parliament and not addressing the substance of rights, the decision nevertheless represents an important step in marking a certain degree of independence by the judiciary from the governmental policies in linguistic issues. It remains to be seen whether this decision will remain an isolated case or whether it will open up a new phase of greater judicial independence in such a delicate area like linguistic rights. Needless to say that the developments will also depend on the overall changes in the political climate, especially after the change in government after the 2010 elections, who empowered a more—so to say—“pro-Russian” political majority.

The third important decision was recently adopted by the Macedonian Constitutional Court and mirrors in many ways the just mentioned Ukrainian case. In 2009, the Ministry of Education and Science in Skopje adopted a decree according to which, from the following school year, the Macedonian language had to be taught in schools with minority language of instruction from the first grade. So far, Macedonian language had been introduced in minority language schools as a compulsory subject from the third grade and in practice several schools with Albanian as a language of instruction provided instruction in English already from the first or the second grade, thus making Macedonian, the official language of the state, *de facto* the third language for the pupils. The decree was motivated, by the Minister, on integration needs.

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<sup>73</sup> Ulasiuk, *Europeanization of Language...*, 196.

<sup>74</sup> Decision of the Constitutional Court of Ukraine of 4.2.2010, no. 2- pn/2010.

The argument was that pupils belonging to minority communities (notably Albanians), especially those living in the West of the country where they form the overwhelming majority, would have had too little and too late exposure to the state language, thus making their integration into the wider Macedonian society more difficult and hampering their chances for professional success in their own country. Such decision by the Ministry upset a large number of Albanian parents and worried the schools with Albanian as language of instruction, which challenged the provision. In July 2010, the Constitutional Court struck down the decree.<sup>75</sup> Like in the mentioned Ukrainian case, the Court based its decision on the violation of the prerogatives of the Parliament rather than on the substance of the right. According to the Macedonian Constitution (as amended after the Ohrid agreement), laws that directly concern culture, use of languages, education, personal documents, and the use of symbols must be approved by Parliament by a special majority: the majority of votes of the present members of Parliament that belong to the communities which are not the majority in the country (amendment X, item 2 of the Constitution, so called “Badinter” majority). The parliamentary procedure thus represents a special guarantee for the minority (*i.e.*, Albanian) community, since it is vested with a veto right on bills affecting its vital interests. Against this background, the decision by the Court is even more understandable and correct. At the same time, it represents somehow a missed chance to address the substance of a very fundamental question: to what extent do minorities have the right to “be let alone”, and to what extent can the obligation to learn (properly) the state language be imposed? Put differently, where does the line lie between segregation and integration? The Court has (deliberately?) abstained from tackling such questions, which are essential in a multiethnic society.

#### 4. Concluding remarks

In Central, Eastern, and South-Eastern Europe minority rights, including the right to use minority languages in public, are experiencing extraordinary albeit complex developments. This is the case particularly having regard to constitutional and legislative provisions, as well as where the incorporation of international standards into the domestic legal system is concerned. The adjudication of minority rights in courtrooms, instead, is somehow lagging behind: rights that are far developed on paper and often scarcely implemented in practice are not so frequently enforced by courts, at least not to the extent one could expect. If this is true in general terms, a careful analysis of the judicial decisions presents more nuanced outcomes and provides some explanation for such a situation.

First of all, court rulings on (linguistic) rights of national minorities are quite numerous. The overall amount might be less than one could expect, given the widespread legislation on the topic and the problems with the

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<sup>75</sup> Macedonian Constitutional Court, decision 14.7.2010, U. 70/2010-0-1.

implementation of several provisions, but it is, in absolute terms, quite remarkable. Although no statistic is available on the subject, it can be easily estimated that the judicial cases involving linguistic rights of persons belonging to national minorities are by far more numerous than in Western Europe.

Secondly, the context of transition should be taken into due account in order to explain some difficulties to adjudicate (linguistic) rights of minorities in courts. After the fall of the Berlin wall, the countries in Central, Eastern, and South-Eastern Europe were (re)established or created essentially alongside ethnic borders and the markers of ethnicity (including, in a prominent position, language) have played an essential role in defining the nation-building and the very *raison-d'être* of these states. At the same time, however, they have been exposed to an unprecedented degree of international conditionality, especially in the field of minority rights. The permanent tension between international commitments (formalized in constitutional documents and legislation) and intrinsic nationalistic attitudes by the leading elites (including the judges) led to extreme politicization of minority issues. These were thus (seen as to be) resolved in the political arena rather than by courts.

Third, transition from socialism to liberal democracies implies a profound shift in the attitude towards the judicial power. It takes time and a change in the overall societal approach before trusting an independent judiciary. This means that the minority themselves have for long time privileged the political arena (and sometimes even the battleground) over the judicial litigation to affirm and execute their rights. It is only in more recent times that the judicial way is increasingly seen as the more rational means to enforce minority rights. Therefore, it can be said that many chances have been missed in the past, especially during the 1990s, to file relevant cases in the courts, while in the last years there is a considerable increase of interesting cases affecting minority rights brought to the courts. It is also interesting to note that the early cases were prompted mostly by political actors (such as parliamentary minorities), whereas the more recent cases increasingly originate from individual complaints. This shows a gradual shift from an image of the judiciary as an appendix of the political process to an idea of judiciary as an independent power.

Fourth, and not least important, transition has affected the judiciary itself. The establishment of working democracies in Central, Eastern, and South-Eastern Europe went hand in hand with the development of independent judiciary, and this, like the democratic process as a whole, happened to a very different degree in the various countries of the region and is still an ongoing process. It follows that the judiciary is, although with remarkable differences from country to country, still on its way to become fully independent. Especially the higher courts are somewhat influenced by the political climate, and in several cases they have been composed by judges appointed by the ministries, although this practice is now rather the exception. The closeness to politics regards even more the constitutional courts, whose members are all appointed, in the analyzed countries, by the

political actors (mostly by Parliaments). In such a context, it is normal that the establishment of a really independent judiciary is a long process, one that cannot be expected to take place over night.

Furthermore, even in the context of increasing judicial independence, it cannot be underestimated that the judges (particularly constitutional judges due to the procedure for their appointment) come from the majority milieu. Even if independent, they are not (nor they should be) indifferent to the overall political climate. In addition, they usually come from the elite of the society and, most importantly for our purposes, from the majority. This is to say that, also involuntarily, they bring the perspective, the approach, and the legal reasoning of the majority into their judgments. This is clearly exemplified by the many decisions mentioned in this paper that adopted a strictly formal reading of equality, that unavoidably lead to privilege the position of the majority over that of the minority. While in some of the cases analyzed in the previous pages such an approach has clearly been intentional, also the unintentional side of this interpretative attitude should not be neglected.

Having reminded all this, the contribution of the courts in developing minority rights, and particularly linguistic rights, in Central, Eastern, and South-Eastern Europe should not be underestimated. While overall deferential to the choices of the (political) majorities, the case law has, albeit timidly, forced some step forward in guaranteeing minority rights, for example in the field of education. Even though the most progressive judgments were based on procedural rather than on substantial grounds, their contribution to the safeguard of the rights of national minorities is all but irrelevant.

In addition, taking an historical perspective, there is an evident trend towards stabilization of the role of courts as independent actors. While nearly all judgments from the 1990s endorsed the restrictive governmental policies towards minorities, more recent case law shows a somewhat more careful and balanced approach and went as far as striking down some of the most repressive measures with regard to linguistic rights. If this trend will be confirmed in the years to come—as it seems likely given the overall trends outlined above—it is predictable that courts will increasingly become key actors for enforcement of minority rights in the region and for the stabilization of societies as a whole.

In sum, with regard to linguistic rights of national minorities in Central, Eastern, and South-Eastern Europe, it can be said that the “law in the courts” is still below the standards posed by the “law in the books” but is a big step forward as compared to the “law in action”.

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