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Constitutional principles and ethno-regional parties

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This paper surveys the norms and procedures adopted in a number of European countries to facilitate representation and participation of ethnic minorities in the political process. The emergence of regional parties is the result of a process of mobilization of new constituencies in places in which local ethnic realities possessed little political weight or national influence. *Ad hoc* political parties were created to redress a strong majoritarian bias and allow minorities into the political process.

We begin our survey by observing two principal varieties of constitutional design in Europe. Systems of principles and norms concerning the status of ethno-regional parties range from the Bulgarian constitution forbidding ethnic minorities to create *ad hoc* political parties (Art. 11 Par. 4, and Art. 12 Par. 2), to constitutional norms providing specific clauses and warrants granting representation to ethnic minorities. We believe that the genesis of these two varieties depended on specific historic circumstances and we offer a historical time frame for the dynamics of inclusion and integration of national minorities. We believe that the year 1990 is a historic watershed in the process of inclusion of ethno-regional realities in democratic processes.

The democratic constitutions introduced after WWII were mainly concerned with the functional integration of the nation-state. Regions were considered administrative units within a broader entity endowed with political authority; they did not pose an immediately perceptible threat to the post-War democratic design of European States. The furthering of democratization throughout Europe, the collapse of communism in Eastern Europe, and the process of integration contributed to the transformation of regions into contested areas and generated a new kind of discourse: “regionalism” became a banner for the political claims laid by regions and by the ethnic minorities residing in them, concerning specific rights and demands for recognition.

Constitutions drafted before the impact of the regionalist trend on European politics were unprepared to address the claims and demands of ethnic realities that had lain dormant during the post-War years. Significant reforms (either at the constitutional level or in the form of legislation) were often needed to update the system and make it more relevant for today's challenges. Constitutions drafted after 1990, instead, acknowledged the regionalist trend in world politics and had specific clauses for the operation of ethno-regional parties.

We wish to insist on this distinction between a) constitutions drafted before 1990, that stick to the general principle of territorial integrity and hardly provide representation to local ethnic realities (e.g. Art. 1 of the French Constitution and Art. 14 of the Turkish Constitution) and b) constitutions drafted after that date, that were designed to acknowledge the political mobilizations of ethnic realities.

New political entities emerging from the debris of Communism faced to a varying extent the challenge of harmonizing regionalist claims with the standards (occasionally dictated by the western half of the same sub-continent) of democratic rule. But what we find impressive is the extreme variety of attitudes and approaches towards the integration of ethnic realities into the democratic process. And it is difficult to find a 'typical' success story that can be used as a normative blueprint for further experiments in integration. In other words, the EU does not seem to provide specific guidelines on how to handle ethnic diversity, with the possible exception of the European Convention on Human Rights.

This paper examines first the historical background, namely, the timeframe that defines the main lines of development of constitutional thinking in Europe. Then we shall focus attention on the pre-1990 arrangements. Section 3 of the paper will take into consideration post-1990 solutions, in which the claims to historic community status are worked into the constitution. Section 4 focuses on our case study and addresses the position of the European Union relative to both political integration and regionalization. In Section 5 we concentrate on what seems like the principal policy instrument in Europe in setting the agenda and boundaries of ethnoregionalism, namely the European Court of Human Rights (ECtHR). By means of cases and provisions the ECtHR has shaped the post-1990 (and for that matter post-2004) trend in constitution-making and reforming.

1. Background: From Class to Identity

Since the very inception of political parties, political aggregation and mobilization was based on a discourse of class and inequality. Supporters of more equitable social arrangements on the left, and advocates of the old, hierarchical order on the right. *Class* was the spur of political mobilization and party politics until the late 1970s, when a mechanism of mobilization focusing more on *identity* issues emerged. Class, though, was a major national issue, that allowed political aggregations across regional cleavages. Think of Belgium, in which national parties (e.g. parties structured around major ideological issues) have virtually disappeared, leaving the national parliament occupied by regionalist parties.¹ It is identity now—and not only in Belgium (which is certainly a powerful case in point)—a major force in mobilizing electorates. Regionalism is shaping (and re-shaping) constitutions, legislatures and administrative structures. After 1990, regional patterns of voting behaviour emerged throughout Europe, forcing the existing dynamics of political aggregation to undergo a major reorganization. And the attendant decline of class and equality was clearly connected with the decline of traditional centralist parties, traditionally insensitive to regional claims.

Equality (of income and social treatment) was no longer the principal polarizer, and social change brought about a dramatic restructuring of the cleavage line. In the 1950s and 1960s people's sense of position within the symbolic-political space was challenged by new stimuli. Race and gender turned out to be new powerful pull-factors that gave intelligibility and meaning to politics. It was *identity* now, more than wealth and welfare, that determined the political orientation of people.² And interestingly, at the same time, scholars began to acknowledge the different political climate, and an interest in regions and regionalism was revived through a wide culturalist approach to political phenomena.

The so-called third wave of democratization has created a spiral of demand for recognition and representation that was the primal spur of a new major political development, namely, the creation of a type of party based on the mobilization of an ethno-territorial

¹ P. Peeters, "Multinational federations: Reflections on the Belgian State" in M. Burgess and J. Pinder (eds.), *Multinational Federations* (London: Routledge, 2007), pp. 31-49.

² This was by no means the end of the "class cleavage." Anthony Giddens has described 'the polarizing effects of what, after all, remains a class society'. A. Giddens, *Beyond Left and Right: The Future of Radical Politics* (Stanford: Stanford University Press, 1994), p. 18. The tensions produced by a class cleavage still exist, although they are reframed in terms other than class. Issues that were a hallmark to the (old) left, such as welfare, are now shared more or less ecumenically by both left and right. Involvement with issues of welfare and basic social services by right-wing government coalitions is especially noticeable in Germany, Italy, and France.

community within a state. No longer class defined the terms of sociability but a more general claim to ‘historic community status.’

We believe that this general timeframe—describing the shift from class to identity as the principal mechanism of legitimization and mobilization of political parties—needs to be taken into consideration when analyzing the development of arrangements designed to either describe and contain this claim to ethnic community status. Policy-makers faced this new challenge right after the emergence of the first spurs of globalization, but we distinguish two different trends in this general development. On the one side full-fledged democracies with stable and durable constitutional sets that needed to restructure themselves in order to accommodate a challenge that, back at the time of the drafting of the constitution, was difficult to anticipate. And then we have democracies on the making, by-products of the “third wave of democratization,” that were in the process of deciding how to accommodate the claims to ‘nation status’ of ethnic minorities. Admittedly, pre-1990 systems had to find constitutionally suitable ways to accommodate the new pushes and challenges from ethno-regional realities. Pre-1990 (e.g. post-1945 constitutions) were designed to integrate *individuals* (with scarce reference to political parties, cited once in the Italian constitution and twice in the German one), and not ethnic realities, into the political process. Constitutions reflecting the imprint of the nation-state, such as the Italian constitution or the Belgian constitution, needed to go through major constitutional changes in order to accommodate new arrangements. Other systems faced the same challenge in a different way, by introducing *ad hoc* statutory laws (not major constitutional changes), in order to provide representation—and thereby grant a fair share of democratic recognition—to ethnic realities.

2. The choices of pre-1990 systems on the ethnic minorities’ political representation

We believe it would be interesting to consider how this new challenge (e.g. ethnic minorities seeking recognition and representation) was handled by pre-1990 systems. In particular we would like to present a number of cases of how different systems adapted the principle that each elected official represents the body of the nation (and not its distinct social and ethnic fragments)³ to the “multiculturalist turn” illustrated in the earlier section of this paper.

³ Article 67 It. Const.

There are situations in which adaptation to these new dynamics has involved the enactment of ordinary legislation (including in particular electoral laws). In such cases, constitutional law is limited to recognizing and guaranteeing the right of political association, whilst ordinary legislation regulates the involvement of ethnic minority groups within representational bodies⁴.

If we consider the Italian and German constitutional systems, the differences between the regulation of political parties under constitutional law and ordinary legislation⁵ nonetheless gives a voice in both cases to the calls for participation and representation of ethnic minorities living within each country. In Italy, the broad recognition of the right of political association has clearly enabled political parties that seek to represent and promote the claims of ethnic minority groups to be formed.⁶ Their formation has been favoured by the inclusion of the protection of linguistic minorities amongst the fundamental principles of the Republic (Article 6 of the Constitution). Precisely this principle has provided the constitutional base for the

⁴ It is the case of Italy and Germany. Article 49 of the Italian Constitution provides that any citizen has the right to freely establish parties to “contribute to determining national policies through democratic processes”. It thus asserts a broad openness towards political pluralism and the exclusion of any limitation of an ideological nature on the establishment of political parties. As subversive as any ideology may be, any political party that promotes it will have full citizenship rights if the activity carried on by it conforms to democratic methods. Consequently, all forms of control over the goals and ideological orientation of parties have been excluded. However, associations that directly or indirectly pursue political goals through military-style organisations or the reconstruction of the Fascist Party are banned. The German Basic Law provides for more detailed regulation of political parties both with regard to the ideological goals as well as the democratic nature of internal organisation. In fact, Article 21 of the Basic Law (Grundgesetz, GG) provides that “they may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds”. The second paragraph brands as unconstitutional political parties that “by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany”. Jurisdiction over such matters is vested in the Federal Constitutional Court (Article 21(3)).

⁵ See the Gesetz über die politischen Parteien - Parteiengesetz, of 22 December 2004. Italian law has been limited to regulating the restricted field of the reimbursement of electoral expenses, with other matters being subject to the rules applicable to associations. See the recent Decree Law no. 149 of 28 December 2013, converted into Law no. 13 of 22 February 2014.

⁶ Examples are the Union Valdôtaine in Valle d’Aosta Region and the Sudtiroler Volkspartei in the Province of Bolzano. Their nature as ethnic parties is clear from their respective charters. Article 1 of the Charter of the Union Valdôtaine defines it as a “Mouvement politique qui se rattache aux principes du fédéralisme global, a comme finalité d’assurer l’épanouissement du caractère ethnique et linguistique du peuple valdôtain; d’en servir les intérêts culturels, politiques, sociaux et économiques; de favoriser la coopération entre les communautés ethniques”. Analogously, Article 1(1) of the Charter of the SVP provides that it “...ist die Sammelpartei der deutschen und ladinischen Sudtiroler/innen aller sozialen Schichten”.

incorporation into the electoral law for the two Houses of Parliament of mechanisms intended to guarantee representation for minorities, as an exception from the general rules.⁷

In Germany, the provision for control also over the ideological goals of parties has not precluded the adoption of measures intended to guarantee political representation for ethnic minorities. In fact, the Federal Electoral Law provides that the threshold clause of 5% shall not apply to lists comprised of national minority parties, in order to facilitate the election of candidates from the minority.⁸

Constitutional law maintains a stance towards ethnic and/or regional political parties which we may define as neutral. It is under ordinary legislation – including in particular electoral law - that mechanisms have been established in order to favour the representation of ethnic minorities in national parliaments.

The allocation of this task to ordinary legislation (which is to be considered here as being juxtaposed to constitutional law *stricto sensu*) is also found in constitutional systems characterized by a rejection of openness towards the representation of ethnic minority interests within institutions. This is the case in France. The 1958 Constitution recognises the freedom of association, without imposing legal restrictions to the establishment of an association or requiring any previous authorization; but it rather subjects political parties to a generic duty to respect the principles of national sovereignty and democracy.⁹ Restrictions on the formation of ethnic and regional parties have been laid down under ordinary legislation, and thus not under constitutional law. With effect from 10 January 1936,¹⁰ the sanction of dissolution has applied

⁷ Current legislation (as amended by Law no. 270 of 2005 and, more recently, by judgment no. 1 of 2014 of the Italian Constitutional Court) provides for exceptions to the 4% threshold clause for the election of the Chamber of Deputies and a special system for the Senate (the previous system with single-member constituencies has been retained both for Trentino-Alto Adige and Valle d’Aosta).

⁸ Article 6 (6) of the Federal Electoral Law 1993: “Only parties that have obtained at least five per cent of the valid second votes cast in the electoral area or have won a seat in at least three constituencies shall be taken into consideration when the seats are distributed among the Land lists. Sentence 1 shall not apply to the lists submitted by parties representing national minorities”.

⁹ Article 4 Fr. Const.: “Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy. They shall contribute to the implementation of the principle set out in the second paragraph of article 1 as provided for by statute. Statutes guarantee the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the Nation”.

¹⁰ Loi du 10 janvier 1936 sur les groupes de combat et milices privées. The 1936 Law has been gradually repealed and its provisions incorporated into ordinary legislation: Articles 431-15 to 413-21 of the Code pénal, introduced by Law no. 92-686 of 22 July 1992 and Article 212-1 of the Code de la sécurité intérieure, introduced by Ordinance no. 2012-351 of 12 March 2012. We may therefore say that the legislation has only changed in formal terms.

to political and non-political associations that risk compromising the integrity of the national territory.¹¹ The application of this legislation has resulted in the dissolution of political parties pursuing a policy of separatism.¹²

In Turkey too, the lack of openness towards political parties representing minority interests is due to the emphasis placed on the principle of territorial integrity. In this case however, the principle is enshrined within constitutional law and not solely under ordinary legislation.¹³ Its breach by the charters and programmes of political parties will result in their dissolution.¹⁴ Attempts may thus be observed in more recent constitutional documents (the 1982 Constitution) to engage with questions relating to the political participation of minorities, even though actual implementation of the principle is left to ordinary legislation.¹⁵ In the specific case, Law no. 2820 of 1982 on political parties stipulated that parties must not promote or represent any culture or language other than the Turkish culture or language and cannot assert that minorities exist within the country, the existence of which is based on specific features relating to culture, nation, religion, race or language (Article 81). On the basis of these indications, the Turkish Constitutional Court has ordered the dissolution of various political parties.

This tendency to emphasize the principle of territorial integrity and not to leave the rules on the political participation of minorities exclusively in the hands of ordinary legislation may also be observed in other countries, such as Spain. The concise wording of the Constitution¹⁶ has been supplemented more recently by *Ley organica* no. 6 of 2002 which established the

¹¹ The President of the French Republic, by decree, can, in fact, dissolve any association which might put the territorial integrity of France in danger.

¹² For the party dissolution the mere declaration of objectives like regional separatism is sufficient. As has occurred for Alsatian, Basque, Breton, Occitan and Corsican associations or movement. To the contrary, in Italy, the lack of any external controls on the ideological goals of parties has political formations to be established that expressly include secession from the national territory amongst their objectives. Freedom of political association has thus prevailed over the protection of the principle of the unity and indivisibility of the Republic, even though it is listed as one of the supreme principles of the Italian constitutional order (Article 5 of the Constitution).

¹³ Article 68 of the Turkish Constitution (1982) expressly provides that “the statutes and programs of political parties shall not be in conflict with the indivisible integrity of the State with its territory and nation, human rights, national sovereignty, and the principles of the democratic and secular Republic”.

¹⁴ Pursuant to Article 69, the dissolution of a party is a matter for the Constitutional Court.

¹⁵ Law no. 2820 of 1982 on political parties.

¹⁶ After recognizing their role as a fundamental instruments for political participation, Article 6 is limited to requiring political parties to abide by the Constitution and the law.

possibility to suspend and dissolve political parties that pursue separatist goals through violence.¹⁷

We thus observe that in the Constitutions adopted before the 1990s, it was ordinary law and not constitutional law that dealt with any questions relating to participation by minorities, above all through electoral law. The tendency of various sources of ordinary legislation to harden their stance has more recently, and almost exclusively, been associated with the need to contrast separatist tendencies *tout court*.

3. After 1990

An evolution may be observed in the process referred to above from 1990 onwards, even though it is far from unequivocal and linear. As is known, the 1989-90 two-year period marked the fall of the Communist regimes in eastern Europe and the start for many of those countries of genuine constituent phases characterized by an openness towards democratic principles shared with the rest of the continent. In various countries there was lively engagement in more or less intense terms – which was in some cases even dramatic – between the various ethnic and linguistic minorities. This made it necessary to make political choices, which then flowed into constitutional provisions on the incorporation of the interests of minority groups into the circuit of political representation. Although these choices may be understood in the various countries in the light of internal factors, we consider that it is possible to identify a general shared tendency, in addition to specific points of discontinuity compared to previous constitutional arrangements.

When confronted with the issue of political participation by ethnic and linguistic minorities, the post-1990 constitutional systems appear to have followed two diametrically opposed approaches. In some cases, the stance has been one of extreme caution, if not a rejection of minority interests, whilst others have provided guarantees and enabled minority ethnic groups to participate in representative bodies. The former option was justified by the requirement to protect national unity and independence, which had only just been won back, and in some countries led to a need to limit access to citizenship rights and the right to stand for election. Latvia and Estonia are emblematic cases,¹⁸ where the legislation on the acquisition

¹⁷ The legislation was applied in 2003 to the Basque party Herri Batasuna y Euskal Herritarrok and the successor party Batasuna, which were regarded as the political arm of the terrorist organisation ETA .

¹⁸ Independence in these two countries transformed the former Russian majority into a minority, albeit a numerically significant one: 36.9% in Latvia and 25% in Estonia.

of citizenship has imposed limitations on the members of the Russian minority, which has had obvious repercussions on voting rights.¹⁹ Again ordinary legislation imposed specific linguistic requirements on members of Parliament and candidates for elected office, which were absolute prerequisites for eligibility to stand.

These measures have been relaxed more recently following criticisms by international organizations.²⁰ Whilst these provisions have undoubtedly conditioned the opportunities for political representation of the Russian minority, they have not prevented the formation of political parties with an ethnic focus, amongst other things due to the broad recognition *under constitutional law* of the right of political association.²¹ The situation is different in Bulgaria, where the refusal to engage with the demands of minority groups has affected their very ability to form political parties in order to defend their rights and interests. Whilst the Bulgarian Constitution refers generically to the principle of political pluralism, it nonetheless prohibits political parties that are based on ethnic, racial or religious criteria (Article 11(4)). In addition, it has also prohibited organizations that jeopardize the unity and territorial integrity of the nation or that incite racial, national, ethnic or religious hatred (Article 44(2)). However, the scope of these provisions has been partially limited – since they were first applied by the Bulgarian Constitutional Court by a Judgment of 21 April 1992²² – with the constitutional prohibition applying only to parties that seek to recruit members exclusively from minority ethnic groups or religions.

¹⁹ In particular, at the time the two republics were reconstituted in 1991, citizenship rights were granted only to those who had been citizens of the respective Baltic states before the Second World War, along with their descendants. On the other hand, citizens of the former USSR who had settled in those countries after 1940, along with their descendants, could apply for naturalisation which required, amongst other things, that they pass an exam to ascertain their actual knowledge of the national language.

²⁰ Challenges have concerned the arbitrary and disproportionate manner in which linguistic checks are carried out. In themselves however, such provisions can be justified in the light of the legitimate requirements for the efficient operation of the parliamentary system. Council of Europe, *Case of Podkolzina v. Latvia*, 9 April 2002 and communication of the United Nations Human Rights Committee from July 2001 concerning the case *Ignatane v. Latvia*, no. 884/99.

²¹ In fact, the Latvian Constitution grants to all parties – thus including non-citizens – the right to establish and join political parties (Article 102: “Everyone has the right to form and join associations, political parties and other public organisations”). On the other hand, the Estonian Constitution only allows citizens to join political parties, and also outlaws parties that seek to change the constitutional order through the use of force (Article 48).

²² In October 1991, the Bulgarian Constitutional Court was called upon to rule on the constitutionality of the Movement for Rights and Freedoms (MRF), a party comprised almost exclusively of Turks and Muslims.

However, in the first case ruled upon by the Constitutional Court, the Movement for Rights and Freedoms, comprised almost exclusively of Turks and Muslims, was found to be constitutional on the grounds that, according to its charter, it had not been founded on the basis of ethnic or religious criteria, and also because voters of Bulgarian origin had voted for it, and it had also elected candidates of Bulgarian origin. Leading aside the actual solution in this specific case – which came within a hair's breadth of a ruling of unconstitutionality as six judges out of twelve had voted in favour of such a ruling (whilst an absolute majority of at least seven votes is required for such a declaration) – parties that seek to recruit only members of minority ethnic groups or religions continue to be outlawed in Bulgaria.

A second completely different approach may be discerned in other post-1990 constitutional systems. This approach has involved the provision of specific instruments with the goal of favouring and/or guaranteeing political participation by ethnic and linguistic minorities. Whilst there is no lack of examples relating to the previous constitutional systems (including for example Poland²³), the new feature compared to previous constitutional arrangements is their codification – at least as regards their essential features – *in constitutional law*. For example, the Slovene Constitution (1991) requires the state to protect and guarantee the rights of the autochthonous Italian and Hungarian-speaking national communities (Article 5). This generic commitment is specified first and foremost in the Constitution itself, which guarantees special rights to the two autochthonous communities. These also include the guarantee of direct representation on local level and in the National Assembly (Article 64(3)), to which the Italian and Hungarian minorities are entitled to elect at least one deputy each (Article 80).

The guarantee of representation under constitutional law has been implemented in electoral law, which grants citizens who are members of the Italian and Hungarian national minorities the right to cast two votes in elections to the National Assembly. The first vote is strictly political and national in nature, whilst the second is based on ethnic criteria, for a list of candidates from the same minority. This instrument of “guaranteed seats” for minority representatives has also been adopted in the 1991 Romanian Constitution.²⁴ In particular, it

²³ The electoral law exempts lists of election committees comprised of voters who have joined registered organisations of national minorities from the application of the threshold clause (Article 197 of the Election Code 2011).

²⁴ Article 62(2) expressly provides that: “Organizations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organization only”

provides for the allocation of at least one parliamentary seat to organizations of citizens who belong to national minorities that do not achieve the target number of votes, as an exception to general electoral law.²⁵

The same features (guaranteed seats and protection under constitutional law) may be observed in the Croatian system. In this case, the inclusion of ethnic minorities in the parliamentary assembly (Sabor) has been reinforced through subsequent constitutional amendments. Alongside the general prohibition on discrimination based (*inter alia*) on national identity, the 1990 Constitution was limited to providing for equal rights for members of national minorities (Article 15). The “Constitutional law on human rights and freedoms and the rights of national and ethnic communities or minorities” enacted in 1991 regulated the political representation of national groups, establishing various guarantees in line with the relative size of the relevant electorate.²⁶ The need for effective representation of ethnic minority groups also resulted in a rule subjecting members of Parliament elected by minorities to a duty to protect their interests when performing their official duties. This accordingly amounts to the first express derogation from the prohibition on binding mandates, even though it is provided for under the Constitution (Article 74). The constitutional reform of 2000 established the possibility for ordinary legislation to grant members of minorities the special right to elect their own representatives in the Assembly, alongside the general right of suffrage. This amounted to a legitimation, at least as a matter of principle, of the rule of dual political and ethnic suffrage according to the Slovene model. Indeed, no provision was made for such an instrument under the Constitutional National Minority Rights Act of 2002, which was limited to confirming the guarantee for members of national minorities of the right to representation in the Croatian Parliament (Article 19(1)), specifying the maximum and minimum number of members of Parliament representing minorities, on the basis of relative representative weight.²⁷ It is only more recently (2010) that minorities comprising less than 1.5% of the population²⁸ have been granted an “additional vote”, whereby members of the minority are granted an additional vote in parliamentary elections by which they may elect a representative of the minority to which they belong to one of five seats in the Assembly that are reserved for smaller national groups.

²⁵ The details relating to the application of this rule are laid down in the 1992 Electoral Law.

²⁶ In particular, Article 18 provided that the members of minorities representing more than 8% of the population nationwide would be entitled to representation in Parliament in proportion with their share of the population, whilst the members of smaller minorities could elect five deputies.

²⁷ Article 19(2), (3) and (4).

²⁸ All except the Serbian minority.

The constitutionalization of instruments intended to guarantee the political participation of minorities against a backdrop of historical conflict between ethnic groups is a fundamental instrument of political stabilization. Belgium and Bosnia-Herzegovina represent two different historical paths, although they share the common feature of the profound impact of ethnic pluralism on the formation of governments. The Belgian constitutional reform of 1993 not only redesigned the structure of the state within the Kingdom, but also altered the composition of the Senate by subjecting it to criteria of ethnicity, rather than representation of the different territories. Article 67 of the Constitution specifies the number of senators to be allocated to the three ethnic groups and specifies the procedure for their election.²⁹ The Constitution of the Serb Republic of Bosnia and Herzegovina provides for a still greater form of pluralism. According to the terms of the Dayton Agreement (1995), the Republic is comprised of two “Entities” (the Federation of Bosnia-Herzegovina and the Srpska Republic: Article 3) and has an extremely diverse ethnic composition.³⁰ Thus, a number of constitutional provisions seek to guarantee political representation for the three principal ethnic groups and to secure the peaceful cohabitation which has been lacking in the recent past. Alongside the general prohibition on non-discrimination, the composition of all constitutional organs complies with requirements to respect ethnic balances. The same applies to the composition of the two Houses of Parliament: the House of Peoples³¹ and the House of Representatives.³² Similarly, the Presidency of the Republic is comprised of three members, the President and two Vice-Presidents, who are members of the three ethnic groups. Representation on the basis of ethnic quotas is also stipulated in the Parliaments of the sub-state entities, namely the National Assembly of the Srpska Republic and the Chamber of Representatives of the Federation.

In this case, the constitutional system has not attempted to counter the dynamics of the political process, but has adapted to it in depth, regarding such adaptation as necessary in order to guarantee peaceful cohabitation. The calls for representation of the different cultural and ethnic identities have led to the drafting of constitutional texts (or far-reaching changes to

²⁹ 41 Walloon, 29 French and one German.

³⁰ 48% Bosniaks; 37.1% Serbs; 14.3% Croats and 0.6% others.

³¹ It is comprised of 15 members belonging in equal numbers to the three principal groups: five Croats, five Bosniaks (elected by the Chamber of Deputies of the Federation of Bosnia-Herzegovina) and five Serbs (elected by the National Assembly of the Srpska Republic). The Constitution itself provides that resolutions of the assembly shall only be valid if made in the presence of at least nine members, including three from each ethnic group (Article IV (2)(b)).

³² It is comprised of 42 members, two thirds of whom are elected in the territories of the Federation and one third in the territory of the Srpska Republic.

Constitutions), which are conceived of as the sole instruments capable of ensuring effective protection that is not subject to the arbitrary choices of the majority.

4. Is there a European approach to ethno-regional parties?

Where does the European Union stand relative to both political integration and regionalization? Is there, in other words, a distinctive European policy orientation that may prescribe a line of action for prospective constitutional solutions?

We argue that a powerful instrument to influence the political orientation of both member States and prospective members of the EU is the European Court of Human Rights through to its jurisprudence. This circumstance is, today, even clearer in the light of new Article 6 of the EU Treaty, as amended by Lisbon Treaty, which, on one hand, provides for the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are part of the Union's law as general principles, and, the other hand, that the Union shall accede to the ECHR³³. Thus, on the ground of the approach to ethno-regional parties, the European Union reflects the trends in the standards of the other international institutions.

The ECtHR acts by means of direct intervention, by appointing 3 out of nine members of the constitutional court of BiH³⁴. But there is also a less noticeable, and non-direct, style of intervention.

As is known, Article 11 of the European Convention on Human Rights protects the freedom of assembly and association, including the right to form trade unions, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society" ("democracy test"). Although the article refers explicitly to trade unions, the scope of it is not limited to this type of organisation. The Court had no doubt in its jurisprudence whether to include political parties among the organisations protected by the article. In fact, they play "an

³³ EU law provides for "Political parties at Union level contribute to expressing the political will of the citizens of the Union" (Article 12, subsection 2, Charter of the fundamental rights of the European Union).

³⁴ More precisely, the three judges are appointed by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina. These judges must not be citizens of Bosnia and Herzegovina or of any neighbouring State.

essential role in ensuring pluralism and the proper functioning of democracy”³⁵, thus placing them firmly within the scope of Article 11.

The case of *United Communist Party of Turkey v. Turkey Case* created a precedent that has been upheld in all following cases related to political parties. The TBKP, formed in June 1990, was dissolved by an order of the Turkish Constitutional Court in July 1991 on the grounds that it had incorporated the word “communist” into its name, which was against law, and, in particular, that it had encouraged separatism and the division of the Turkish nation. The ECtHR ruled that the dissolution of the United Communist Party was a disproportionate penalty. It underlined that one of the principal characteristics of democracy was the possibility it offered of resolving a country’s problems through dialogue. There could thus be no justification for hindering a political group solely because it sought “to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned”. The same principle was expressed in the case of *Socialist Party and others v. Turkey* (25 May 1998); in particular the Court ruled the fact that a federal political programme “was considered incompatible with the principles and structures of the Turkish State at the time did not make it incompatible with the rules of democracy. It was of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that called into question the way a State was currently organised, provided that they did not harm democracy itself”.

As the Court stated in other case:

“Territorial integrity, national security and public order were not threatened by activities of an association whose aim was to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a “democratic society” had to tolerate and even protect and support according to principles of international law.”³⁶

For the ECtHR the dissolution of a political party represents a breach of Article 11 when nothing in party’s programme can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. It’s not relevant the mere reference to the right to self-determination of the “national or religious minorities”³⁷.

Principles, “such as the right to self-determination and recognition of language rights, are not in themselves contrary to the fundamental principles of democracy. ... if merely by advocating

³⁵ *United Communist Party of Turkey and other v. Turkey*, 30 January 1998.

³⁶ *Sidiropoulos and Others v. Greece*, 10 July 1998.

³⁷ See *Freedom and Democratic Party (ÖZDEP) v. Turkey*, 8 December 1999.

those principles a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. That in turn would be strongly at variance with the spirit of Article 11 and the democratic principles on which it is based” (*Yazar and Others v. Turkey*, 9 April 2002).

Instead, in case of *Herri Batasuna and Batasuna v. Spain* (30 June 2009), the Court found no violation of Article 11 of the Convention. It held in particular that the Spanish courts, after a detailed study of the evidence before them, had arrived at the reasonable conclusion that there was a link between the applicant parties and ETA. In view of the situation that had existed in Spain for many years with regard to terrorist attacks, those links could objectively be considered as a threat for democracy. Thus the inclusion of self-determination principles in parties’ program is not a sufficient evidence to equate the party with armed groups carrying out acts of violence; but it is necessary to prove an objective link.

If we consider the case-law of the ECtHR based on art. 11 of ECHR, dedicated to freedom of assembly and association, we realize that most of the violations against ethnic parties are committed by States with Constitutions which protect the principle of territorial integrity and/or express a negative attitude towards ethno-regionalist parties. In most of the cases, these parties are denied registration by administrative authorities or dissolved. It is the case of Bulgaria, where some political parties representing the Macedonian minority were declared as unconstitutional and disbanded, on the ground that they had advocated separatist ideas so that they presented a threat to the territorial integrity of the State: not only their meetings represented a possible threat to public order, but its membership was reserved to ethnic Macedonians only (*Case Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 2 October 2001). In addition, the regional Court from Blagoevgrad went as far as to deny the existence of a Macedonian minority in Bulgaria.

An approach similar to Bulgaria has been taken by Turkey, which, as we said, has been the object of a growing number of judgments by the ECtHR, even recently. Also Greece is a good example of a country whose Constitution does not contain specific clauses for minorities protection. The ECtHR has thus found that the decisions of Greek authorities to ban ethno-regional parties infringed art. 11 ECHR. This was so in the case *Sidiropoulos and Others v. Greece*, 10 July 1998, concerning the refusal to register an association whose aim was to promote the culture of the Macedonian minority on the ground that, once it was established, it might engage in activities liable to undermine the country’s territorial integrity, national security and public order.

The Court noted that the aims of the association were exclusively to preserve and develop the traditions and folk culture of the Florina region. Such aims appeared to the Court to be perfectly clear and legitimate: “the inhabitants of a region in a country are entitled to form associations in order to promote the region’s special characteristics, for historical as well as economic reasons” (§ 44). The Court held that even supposing that the founders of an association like the one in the case asserted a minority consciousness, the “Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV)” of 29 June 1990 and the “Charter of Paris for a New Europe” of 21 November 1990 – which Greece had signed – allowed them to form associations to protect their cultural and spiritual heritage (§ 44). Such conclusions were reiterated by the Court in the case *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, 27 March 2008, there it considered that “freedom of association involved the right of everyone to express, in a lawful context, their beliefs about their ethnic identity. However shocking and unacceptable certain views or words used might appear to the authorities, their dissemination should not automatically be regarded as a threat to public policy or to the territorial integrity of a country”.

No major judgments from the ECtHR are to be found for States that recognize in their Constitution the positive role of ethno-political parties and regulate their role in a very specific way, such as Slovenia, Croatia, or Bosnia-Herzegovina.

An interesting case has instead been decided in favour of Poland (*Gorzelik and Others v. Poland*). While the Polish Constitution recognizes ample rights to minorities in the field of education, culture, and language, it however does not refer specifically to the issue of political representation (arts. 27 and 35 Polish Const.). Notwithstanding this, Polish electoral law allows an exemption for the electoral threshold for national minorities. This means that they can be represented in the Chambers by reaching a lower number of votes than required to other parties, a system which has been declared compatible with the principle of equality by the Constitutional Court. This time, the Polish authorities denied the registration of the political party on the ground that such request represented an abuse of electoral rights: the registration would have entitled the party to make use of the exemption for the electoral threshold established for national minorities and would have infringed other parties’ rights.

In the *Gorzelik* case the ECtHR appreciated the balancing evaluation made by the Polish authorities: they did not deny the existence of an ethnic group (the Silesians), but balanced carefully the ethnic group’s claims with the other parties’ rights, according to the principle of equality. In fact, they rejected only the automaticity of the system, which would have allowed the new party to claim exemption from the electoral threshold.

5.

The EU approach to ethno-regional parties is strongly influenced by the jurisprudence of the ECtHR, mentioned above. Its content and requirements are taken into account in order to evaluate the congruence of the member States decisions with the standards of ethnic minority protection.

Each Member State of the EU is thus not only subject to the values enshrined in art. 2 TEU³⁸, but also to the fundamental rights guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) applied by the ECtHR, which is part of EU Law as general principles (art. 6 TEU).

To be sure, the obligation to democratic rule, including protection of minorities, had an even stronger impact in the States that became members after 2000. The so-called Copenhagen criteria, dictating the rules that need to be obliged by the States applying for membership in the EU, were established only in 1993 and strengthened by the Madrid European Council in 1995 for future members only. Such criteria - including respect and protection of minorities - are now recognized by art. 49, para. 1, TEU as admission principles established by the European Council.

Countries in Central and Eastern Europe have a high level of ethnic diversity; ethno-nationalist issues are thus highly salient and a potential root of conflict in the region. And probably the EU imposed minority protection as a political condition of EU membership for these country in order to counter the potential risk of ethnic conflict and its negative consequences for democratic stability.

However the *acquis communautaire* does not include standards of minority protection beyond the principle of non-discrimination, the EU, as mentioned above, had to refer to standards of minority protection developed by the Council of Europe and the Organization for

³⁸ Among those the rights of the persons pertaining to a minority, as part of the more general obligation to respect pluralism, non-discrimination, tolerance, justice and solidarity as principles pertaining to a democratic society. These are principles that have been defined as the founding values of the European Union that need to be respected by all the member States, and whose violation if persistent and serious can give rise to the suspension of voting rights in the Council of the State's representative. The procedure, however, is lengthy and complicated, and has not produced any important result so far, if we consider for instance the behaviour shown by the Hungarian government, and the fact that the most serious sanction (expulsion from the EU) is not envisaged in the EU Treaties.

Security and Co-operation in Europe (OSCE) when it operationalized its conditions of minority protection in its progress reports³⁹.

As a consequence, we observe a further de facto distinction shaping up in the recent constitutional history of the EU between States that became members before 2004 and States who acceded to the EU after that date (basically all the Eastern countries, including Romania, Bulgaria, Hungary, and Poland). While the older member States were expected to abide by the ECHR and respect the rights of the persons pertaining to a minority as a corollary of the principle of pluralism, the more recent members had to show that they accommodate minorities also at the very moment of accession, and this implies the need to show a strong commitment towards minorities' protection granted at legal or even constitutional level.

However, the solutions adopted by new member States are not identical. The desire to be accepted in the EU, which implies the need to respect the principles established in the ECHR and the jurisprudence of the ECtHR, is probably the reason why the new member States decided to give legal and constitutional weight to political participation of ethnic minorities. But the approaches are profoundly different: while most of them decided to recognize their role in a positive way, like Slovenia and Croatia, other States like Bulgaria, adopted the opposite attitude, and rejected an active role of ethno-regional parties in taking part in political life.

Conclusions

This paper examines first the historical background, namely, the timeframe that defines the main lines of development of constitutional thinking in Europe. Then it focuses attention on the pre-1990 arrangements and takes into consideration post-1990 solutions, in which the claims to historic community status are worked into the constitution. The last part of the paper focuses on the position of the European Union and the Council of Europe relative to both political integration and regionalization. The draft paper ends up by analysing what seems like the principal policy instrument in setting the agenda and boundaries of ethnoregionalism,

³⁹ Hughes and Sasse, 2003; Sasse, 2005; Schwellnus, 2005. may be explained by the entry into force of international Treaties geared towards the protection of minorities. This is the case of two international agreements concluded under the auspices of the Council of Europe. The first one is the Framework Convention for the Protection of National Rights of Minorities entered into force in 1998, which inter alia promotes participation of ethnic minorities in public life. The second one is the Charter for Regional and Minority Languages adopted in 1992, which is however less relevant for our case, for it focuses protection on "minority language."

namely the jurisprudence of the European Court of Human Rights (ECtHR). By means of cases and provisions the ECtHR has shaped the post-1990 (and for that matter post-2004) trend in constitution-making and reforming. In fact, in 2004 entered the EU many member States, the majority of them coming from the former Communist bloc. These “new” members were subject to a more stringent standard of minorities’ protection if compared to that applied to “old” member States, considering that the accession criteria set up in Copenhagen – including the need to enshrine in the internal legislation or Constitutional text proper instruments aimed at protecting minorities – were applied only to future members. We can thus understand the reason why many constitutional texts from Eastern Europe countries take into account the role of minorities in public life, either recognizing their positive role for pluralism or, on the contrary, denying their active engagement in public life.

From our analysis of the case-law of the ECtHR we can argue that the Constitutional provisions which deny to ethnic minorities the possibility to found associations or parties with a political aim are often coupled with a vision of the State which is unitary and centralistic, like in the case of Bulgaria or Turkey. Under these constitutional conditions, minorities’ existence is often denied, and civil authorities resort to the sharp use of the exceptions provided by para. 2 of art. 11 ECHR in order to justify their decisions. The same principles apply to States whose Constitutional texts do not contain any provision aimed at protecting minorities’ rights, such as Greece. Such States did not even ratify the Framework Convention on the Protection of minorities. What is missing in all these countries is not a specific constitutional provision recognizing the political representation of minorities, but a constitutional framework favourable towards ethnic minorities and their role in channelling a different vision of the internal institutional framework, with the aim of putting into practice the principle of democracy and plurality.

A text of the Constitution which is open per se towards minorities, and delegate to electoral legislation the task of providing special exemptions for minorities representation, seems a preferable and flexible tool, as shown by the Polish case, and the fact that no infringement procedures have been addressed against old (e.g. pre-2004) member States of the EU (with the exception of Greece) by the ECtHR. In fact, such electoral legislation seems to insert ethnic minorities in a more specific framework where interests at stake are easily identifiable, and the impact of minorities participation rights should be balanced vis-à-vis the similar right of other parties, according to the principle of equality. This approach seems less linked to ideology, and more neutral, because it is based on the balance of different groups’ rights for elections, and less on abstract considerations linked to the concept of the nation State.

