Nationalities Papers (2024), 52: 3, 661–684
doi:10.1017/nps.2023.94

ARTICLE

The Achilles Heel of Constitutional Jurisprudence: Conceptualization of Minority Rights by Constitutional Courts in Central and Eastern Europe

Tamás Korhecz[1,2] and Noémi Nagy[3]

[1]Constitutional Court of Serbia, [2]UNION University, Serbia and [3]Ludovika University of Public Service, Hungary
Corresponding author: Noémi Nagy; Email: nagy.noemia@gmail.com

Abstract
The minority question has long been a hot topic in Central and Eastern Europe. Whereas most CEE countries guarantee the privileged position of the dominant nation, they also recognize the existence of national minorities and provide special rights for them. Hence there is an apparent contradiction between the values of the nation-states: unity and diversity. This article proposes that to resolve this contradiction, it is necessary to define the concept, scope and limitations of group-specific minority rights, as well as their relationship with other human rights and the nation-state. Constitutional courts are appropriate candidates for this task. However, based on our analysis of the relevant constitutional jurisprudence of five CEE countries – Croatia, Hungary, Romania, Serbia, and Slovenia – it seems that constitutional courts in the region have failed to properly conceptualize minority rights. Instead of developing appropriate tests for assessing the constitutionality of legal regulations, they have only superficially touched upon the conceptual issues of minority rights, using incidental, case-by-case arguments to justify the (un)constitutionality of the legal provisions. Therefore, this article also attempts to outline a constitutionality test that may be suitable for constitutional courts to consistently evaluate submissions that challenge the constitutionality of laws on minority rights.

Keywords: national minorities; conceptualization of minority rights; CEE region; constitutional courts; constitutionality tests

Introduction

The Conflictual Nature of the Minority Issue in the CEE Region

The overall position of national minorities, including their legal status, has long been a sensitive and emotional issue in many Central and Eastern European post-socialist states, and continues to create tensions in the region. Illustrations of the explosive nature of the topic are abundant, with the most recent example of minority- and language-related conflicts behind the current Russia-Ukraine war. Just like during the occupation of Crimea, one of the many justifications of Russia for its ongoing aggression is the alleged need to protect Russians and Russian-speaking citizens in Ukraine (Csernicskó 2022; Grigas 2016, 57–93). We may also think of the "sign war" that broke out in 2013 in Vukovar, Croatia, where war veterans used hammers to smash public signs displayed in the Serbian language, in Cyrillic (*BBC* 2013) – or the case of Romania, where Hungarian mayors were fined for displaying the Sekler flag (*The Economist* 2013), and where a demonstration related to the issue of which county has jurisdiction over the possession of a cemetery escalated into violence (Palfi, Asbóth, and Musaddique 2019).

National-ethnic diversity frictions are also present in the western part of Europe – Catalonia's ongoing secessionist claim, Scotland's recently failed independence referendum, and post-Brexit protests in Northern Ireland easily come to mind – yet, historical and social factors make the nationality issue special in the CEE region (Kymlicka 2001). Among these we find the delayed and incomplete process of nation-building and national self-determination, the dominant presence of the ethnically based concept of nation and nation-state, the existence of national minorities that belonged to an oppressive nation-state prior to the establishment of the present state borders, the strong attachment of national minorities to their kin-states, and the aspirations of the kin-states and kin-nations toward their compatriots living in the neighboring countries (Kymlicka – Straehle 1999, 74; Kymlicka 2004, 155; Sadurski 2014, 304–307; Sajó 1993).

Tensions around the nationality issue largely stem from the contradiction that countries in the CEE region (and elsewhere) identify themselves, also at the constitutional level, as nation-states, where the borders of the state and nation overlap, meaning that the population of the state is composed of inhabitants belonging to one nation and sharing the same language, culture and traditions. Such a fiction simply does not correspond to reality, since nation-states are usually inhabited by diverse ethnic groups that use different languages and share different cultures and traditions (Kymlicka and Straehle 1999, 73; Pan, Pfeil, and Videsott 2018, 3; Žagar 2002, 82–85). This fiction results from the German model of ethnic nation-state, which is based on "the recognition and legal institutionalisation of ethnic differences in terms of belonging to linguistic or religious communities conceived as socially closed and culturally homogenous" (Marko et al. 2019, 149). Here, the foundational concept is the nationality principle requiring the "right to national self-determination based on the Herderian equation of one language as the objective basis for the definition of one people with a right to form its own national state." Cultural diversity is "redefined into ethnic difference providing the ground for the categorical distinction between the majority population and ethnic minorities" (Marko et al. 2019, 149–150). The spread of the ethnic nation-state model in Central and Eastern Europe during the 19th and 20th centuries resulted in a situation where "myths of common ancestry, language, culture, and history created by linguists and historians were turned into politically decisive and divisive factors" (Marko et al. 2019, 155).

From the late 19th century onward, CEE states have pushed forward various drastic and soft nation-state building policies – accompanied with a corresponding legislative framework – to achieve homogeneity of the population, to ensure that the titular majority nation gradually achieves a dominant influence on state institutions. The suppressed ethnopolitical conflicts came to the fore, at times violently, after the collapse of the Communist Bloc (Agarin and Cordell 2016, 35). Even today, notwithstanding decades of coercive nation-state building policies, national and ethnic minorities inhabit the CEE countries in significant numbers (see Table 1), and serious challenges persist in their integration (Agarin and Brosig 2009).

Modern states generally, but the nation-state especially cannot be neutral from an ethnic point of view. The selection of language for the conduct of states affairs (language of instruction in public schools, state services, court trials, and so on) has real advantages for the members of one group (dominant group) and disadvantages for the members of other groups (de Varennes 1996, 126). Nation-states are facing the challenge of how to accommodate two competing and conflicting forces: nation building, centralization and ethnic homogenization, on the one hand, and respect for the rights of individuals belonging to national, ethnic, or linguistic minorities, protecting diversity, on the other hand (de Varennes 1996, 126).

There are two different approaches for the protection of national minorities at the constitutional level. The so-called liberal-neutralist-individualistic approach is based on the strong protection of individual human rights of the members of national minorities, backed by the robust non-discrimination principle. The other approach guarantees special or group-based rights to national minorities and individuals belonging to them (Sadurski 2014, 311). Although both models aspire to achieve the ideal of equality between persons belonging to the majority and minorities, CEE states overwhelmingly opted for the special rights approach, mainly because the nationality question often

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

Table 1. Ethnic diversity in the five analyzed CEE countries, according to 2011 census data

State	Titular ethnic group and its proportion in the total population	Most numerous minorities with their overall number
Croatia	Croats – 90.4%	Serbs (186,633), Bosniaks (31,479), Italians (17,807), others and no indication (84,962)
Hungary	Hungarians – 85.6 %	Roma (315,583), Germans (185,696), Romanians (35,641), no indication (664,401)
Romania	Romanians – 83.3%	Hungarians (1,229,159), Roma (621,573), Ukrainians (50,920), others and no indication (1,257,351)
Serbia	Serbs – 83.3%	Hungarians (253,899), Bosniaks/Muslims (167,579), Roma (147,604), others (320,450)
Slovenia	Slovenians – 83.1%	Hungarians (8,328), Roma (6,009), Italians (3,388), others and no indication (82,746)

(source of data: Pan, Pfeil, and Videsott 2018, 97–194).

divides the society, and national minorities required explicit constitutional guarantees and recognition (Aukerman 2000, 1029–1030).

Constitutionally guaranteed special rights usually include the right to education in the mother tongue, the right to public and official use of the minority language, the right to establish national organizations and parties, the right to use national symbols, and the right to parliamentary representation. These rights (or part of them) are protected by the constitutions of post-socialist CEE states (Korhecz 2022, 404–410), and also by multi- and bilateral international agreements they ratified. However, the basic characteristic of these rights is that they often expose active duties upon states; their enjoyment requires the activities and contribution of the state: detailed legal framework, institutions, and budgetary resources (Sadurski 2014, 308–309).

Such a constitutional arrangement often leads to internal conflict and tension, since national diversity, on the one hand, and unity and homogeneity of the nation-state, on the other hand, are competing values. Moreover, the protection of national minorities and their distinct identity may restrict the individual liberty of the persons belonging to such groups. The preservation of diversity inevitably comes into conflict with the ideal of the nation-state, according to which the boundaries of the nation and those of the state must overlap, where the state is the nation's property, instrument, and expression of its will. In our opinion, however, there is no insurmountable antagonism between the two principles of state organization – that is, diversity and unity. The key is to strike a fair balance between them. For a sustainable and functional state, a balance must be created between the goals and protection of the majority nation, the nation-state, as well as the rights of national minorities and ethnic diversity. As a precondition, it is necessary to define minority rights guaranteeing the preservation and equality of national minorities. The purpose, nature, content, and limitations of minority rights, as well as their relationship with other human rights and the imperatives of the nation-state, must be clearly delineated.

Constitutional Courts and the Conceptualization of Minority Rights

Whose task is it to conceptualize (define the concept and scope of) minority rights guaranteed in the constitution? Who is to determine their content, limitations, and relationship to other rights? Are there any restrictions on the legal regulation of minority rights by the legislation, and if so, what are these? We argue that all branches of power can contribute to the conceptualization of constitutionally guaranteed minority rights, but constitutional courts should have a central role in this process. After all, these bodies are the main actors in determining the exact content of constitutional provisions, they can establish the relationship of constitutional rights to each other, and they have

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

the last word on the conformity of laws with the constitution (constitutionality). The most important tool for doing that is judicial review, which secures the supremacy of constitutional provisions, including human and minority rights, in the legal order of states. The former socialist states of the CEE region usually implemented the centralized European model of judicial review, inspired by Austrian legal scholar Hans Kelsen (Stone Sweet 2012, 818). This involves a special tribunal – a constitutional court – outside the regular judiciary to provide a "constitutional defense" against unconstitutional legislative actions. In addition, through the institution of constitutional complaint, constitutional courts in the CEE region are also empowered to interpret and protect human rights against individual acts of the state, including courts' decisions.

Since constitutional provisions have a principled character, exclusive interpretation conferred on constitutional courts makes them powerful actors within the state. Through well-founded legal reasoning, they can provide a valuable contribution to public debates and dialogue, enhance political participation by calling attention to matters of principles (Goldsworthy 2001, 80), and facilitate the tasks of the legislator.

Of course, constitutional courts are also part of the (nation-)state machinery, so they cannot be completely neutral in ethnic matters; they are necessarily biased to a greater or lesser extent. Nevertheless, in our opinion, they are better equipped to conceptualize minority rights and create a balance between these rights vs. the protection of the nation-state, since they must primarily protect the law and the legal order, not the public interest, and judges do not have to constantly fight for the support of the electoral body and the popularity of their decisions.

Furthermore, constitutional courts are irreplaceable actors in conceptualizing minority rights because international judicial case-law on the standards of minority rights is scarce and often inconclusive, at least compared to general human rights. While the European Court of Human Rights (ECtHR), the Court of Justice of European Union, the Inter-American Court of Human Rights, the African Court of Human and People's Rights, and even the International Court of Justice made enormous contributions to the determination of the content and limits of human rights and freedoms, including the human rights of persons belonging to minorities (Pentassuglia 2009, 2013; Weller 2012), no international court has so far done the same in relation to special minority rights. This is understandable because the international treaties that these organs monitor do not contain such rights. In contrast, Article 27 of the International Covenant on Civil and Political Rights contains three special minority rights, so interpretations of the UN Human Rights Committee are highly relevant. Furthermore, in Europe there are two multilateral treaties that guarantee special rights of national minorities and that are binding on the examined states: the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML).[1] The Advisory Committee of the FCNM and the Committee of Experts of the ECRML cannot adopt binding decisions, yet through their opinions, evaluation reports, and thematic commentaries, they participate in international standard setting. The same applies to advisory organs working within major intergovernmental organizations in Europe, such as the Venice Commission or the OSCE High Commissioner on National Minorities. We consider that building upon the jurisprudence of international human rights bodies would be essential in the conceptualization of minority rights. Yet, this does not diminish the task of constitutional courts, since the primary responsibility for the protection of human and minority rights lies with the states. Also, international bodies are not empowered to provide guidelines for deciding whether a law on minority rights conforms with the constitution.

The Approach and Contribution of This Article

Notwithstanding the vast literature on minority studies, only few articles have ever been written about the constitutional jurisprudence on minority rights (examples include papers published in Teofilović 2020 and Tribl 2021), let alone from a comparative perspective. To our knowledge, our article is the first to offer a comparative analysis of the case-law on minority rights of constitutional

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

courts in Central and Eastern Europe. Therefore, it provides a unique contribution to both minority studies and constitutional law research. Specifically, the first part of our article explores the constitutional jurisprudence of five CEE countries – Croatia, Hungary, Romania, Serbia, and Slovenia – in order to answer the question of whether and to what extent constitutional courts succeeded in conceptualizing minority rights guaranteed in the constitution and in defining their protected essential content and the limitations of legal regulation. We have screened the full jurisprudence of the five constitutional courts in order to identify minority-related cases. Our focus has been on submissions that challenge the constitutionality of laws on minority rights. It is important to note that minority rights laws take a variety of different forms, including but not limited to specific legislation focused on the rights of national minorities, as well as the constitutional protections that are most invoked in such cases.

Our choice of the above five states was not arbitrary, although space restriction did play a role. Nevertheless, the following five aspects are common to all selected countries, thus making their comparison a sensible one: 1) *Similar history and functions of constitutional courts*: The constitutional courts of these states were created on the basis of the Kelsenian model, they have similar powers, and they have been operating for at least three decades. 2) *Similar state organization and majority-minority relations*: Per definition these countries are all unified nation-states (confirmed so in their constitutions), but a significant proportion of their citizens belong to national minorities with a distinct national identity. 3) *Similar legal commitment to minority rights*: These states provide for minority rights in their constitutions (Korhecz 2022, 404–410), and they all ratified the two Council of Europe treaties on minority protection (the ECRML, and the FCNM). 4) *Similar ideological background*: All five states were under the influence of communist ideology for more than four decades after the Second World War with a one-party system and authoritarian practices. 5) *Similar legal tradition*: They were created in whole or in a significant part on the territory of the former Habsburg Monarchy (after 1868: Austria-Hungary), the legal institutions and traditions of which significantly influenced their legal systems.

We claim, upon the analyses of the constitutional case-law in the five CEE states, that constitutional courts provided modest contribution to conceptualizing minority rights. Thus, in the second part of the article, we propose a constitutional test that could be suitable for the conceptualization of minority rights, with the aim that constitutional courts would be able to determine the constitutional – lowest and uppermost – limits of the (statutory) regulation of minority rights, the protected essential content of minority rights, and their relation to other human rights as well as the rights of the national majority. When preparing the test, we have built on the experiences of international human and minority rights bodies, but in its totality the test is novel and, to our best knowledge, the first of its kind ever offered in literature. With that, we hope to generate academic and political debate on the content and limits of minority rights, and help constitutional courts to develop their case-law on minority rights. This, in turn, may contribute to the more efficient handling of interethnic relations in the respective societies, as well as improving the level of constitutionalism and the rule of law in the CEE states.

Constitutional Adjudication of Minority Rights in the CEE Countries

This part explores how the constitutional courts of Croatia, Hungary, Romania, Serbia, and Slovenia have addressed the conceptual issues of minority rights, including their nature, minimal essential content, possible limitations and relationship to other fundamental rights. The analysis aims to verify or refute our hypothesis that constitutional courts of the CEE states have only superficially dealt with the above-mentioned issues. We pay particular attention to examine whether constitutional courts use appropriate tests for assessing the constitutionality of the specific legal regulations regulating and implementing constitutional minority rights, or on the contrary, in the absence of such tests and general standards, they rely on *ad hoc* arguments to justify why the given legal provision is constitutional or unconstitutional.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

Before the analysis of the case-law, by way of providing context, we briefly discuss the national legal frameworks on minority rights, as well as the position and competences of the five analyzed constitutional courts.

Overview of Legal and Institutional Frameworks

In accordance with the ethnic nation-state paradigm explained above, the constitutions of all analyzed states declare the dominant position of the titular majority nations. This privileged status is further supported by provisions declaring the language of the titular nation as the exclusive or the first official language of the state (Korhecz 2022, 406–407).

All five analyzed states ratified the Council of Europe FCNM, and the extent of their minority protection has been scrutinized during the accession process to the European Union. Accordingly, the constitutional frameworks pertaining to minority rights share similarities, with certain distinctive aspects specific to each country. Regarding terminology, "national minority" is used in the constitutions of Romania, Croatia, and Serbia, "autochthonous national communities" in Slovenia, "national and ethnic minorities" in Hungary's former constitution, and "nationalities" in Hungary's current constitution (Korhecz 2022, 405). The different terms convey the same meaning: ethnic groups with historical presence in the territory of the respective state and unique characteristics that differentiate them from the majority population, endowed with group-specific rights, aimed at preserving their distinct ethnic, cultural, religious, or linguistic identity. The constitutions of Croatia and Slovenia specifically enlist these groups.[2] In all analyzed countries, constitutions explicitly guarantee the right to express and preserve the specific identity of persons belonging to national minorities. Four out of five constitutions provide for the right to education in minority languages (with the exception of Croatia), while the official use of minority languages is constitutionally guaranteed in Slovenia, Croatia, and Serbia (Korhecz 2022, 407–408). The right to preferential parliamentary representation is constitutionally guaranteed in Slovenia, Hungary, Croatia, and Romania, whereas minority self-governance is ensured in the constitutions of Serbia, Hungary, and Slovenia (Korhecz 2022, 408–409).

The position, composition, and competences of the five analyzed constitutional courts are also quite similar, with minor specificities (Tóth 2022, 381). Judges (9 to 15 judges per court) are appointed for an 8–12-year period, usually by the political branches of power (parliaments and heads of states). Judges are traditionally law professors, career judges, public prosecutors, attorneys, and sometimes former politicians with adequate legal training. All constitutional courts have the power to annul provisions of the legislative acts through abstract judicial review, and all (except the Romanian one) can protect constitutional rights against violations by individual acts of authorities via constitutional complaints.

Croatia

The approximately 30 minority-related cases[3] of the Constitutional Court of Croatia have primarily focused on representation (in the public administration, the judiciary and representative bodies) and the official use of minority languages. Regrettably, the Court demonstrated little consistency in interpreting and protecting these rights. In some cases, it expansively interpreted constitutional provisions to protect minority rights. In other cases, when faced with contradictory legal provisions, it gave advantage to the provision that was less favorable to the rights of national minorities.

In its cornerstone 2014 decision[4] the Court rendered unconstitutional the popular initiative to hold a referendum in order to increase the threshold for the official use of national minority languages in local municipalities from 33% to 50%. In the Court's view, the language and script of national minorities are part of the constitutional identity of Croatia, and their restriction is acceptable only if it has a legitimate aim, if it is necessary in a democratic society, and if it is proportional (Toplak and Gardaševic 2017, 278–279).

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

The municipality of Vukovar, a site of siege in 1991 in the war between Croatian and Serbian forces, featured in two cases where the Court reached contradictory conclusions. In 2014, the Court annulled a provision of the statute of Vukovar, which exempted the entire territory of the city from the implementation of the Law on the Use of Languages and Scripts of National Minorities in the Republic of Croatia. Although according to census data Serbs made up more than one third of the local population in Vukovar, and thus the city was obliged to introduce the Serbian language and Cyrillic alphabet in equal official use, this did not happen. The Court confidently pronounced that the contested provision is "in direct conflict with the highest values of the Constitution and the constitutional order of the Republic of Croatia and as such cannot exist in a democratic state governed by the rule of law."[5] The amended statute was once again referred for a constitutionality review, which the Court completed in July 2019.[6] Here, the Court chose a restrictive interpretation of minority rights. Although it did repeal several provisions limiting the language rights of the Serbian minority, it upheld the rule whereby the application of some language rights were to be postponed until the city council would see fit "in accordance with the achieved level of understanding, solidarity, tolerance and dialogue among the citizens of Vukovar."[7] The Court saw "no reason why this provision should be repealed under the circumstances of the present case," although it did warn that the rule "must not be abused in such a way as to be a mere promise of the rights of persons belonging to national minorities."[8] Far from giving a thorough legal analysis of relevant constitutional provisions or applying its own constitutionality test, the Court simply declared that neither the content nor the time frame of the disputed provisions regarding the collective rights of Serbs in Vukovar are inconsistent with the Constitution.[9]

Beretka (2021, 114) points out that, especially in the first case, the Court tried hard to create a balance between the interests of the majority and the minority. It called on the city to ensure minority rights that correspond to "the factual circumstances in the City of Vukovar, to the extent that does not threaten the very essence of those rights, while at the same time respecting the needs of the majority Croatian people, which stem from the still living consequences of the Great Serbian aggression in the early 90s of the 20th century, and the need for fair and proper treatment of the Serbian national minority."[10] Beretka (2021, 114) rightly criticizes this type of political correctness by the Court as it calls into question its principled judicial position. As the Court itself stated, "it is not a participant in political debates, nor is it an arbiter in resolving political disputes that arise in Croatian society. There is no other way to solve the problems that have arisen than an all-round political dialogue conducted in good faith, no matter how unpleasant that dialogue may sometimes be."[11] Furthermore, the Court implicitly allowed that the enjoyment of minority language rights may be delayed and subjected to limitations, depending on the current level of tolerance in society, thus degrading constitutionally guaranteed minority rights from the legal level to a mere political category (Teofilović 2021, 133).

When faced with collision of laws, the Court sometimes gave preference to the law containing more favorable provisions to minorities, and, in other cases, the one with less favorable rules. For example, in two cases related to electoral disputes, namely to the guaranteed seats for national minority representatives, the Court applied the more generous provisions of the Law on Local Elections and not those of the Constitutional Law on the Rights of National Minorities, which were more restrictive concerning the conditions for a guaranteed seat in the local assembly. According to the Court's explanation, the constitutional law only prescribes the minimum level of rights that members of national minorities must have in representative bodies of municipalities and counties (if they constitute more than 5% but less than 15% of the local population); however, this right may be extended by a special law, in this case by the Law on Local Elections.[12] In both cases the Court understood the importance of positive discrimination for minorities, unlike in the context of general elections. There, the Court annulled amendments to the Constitutional Law on the Rights of National Minorities that wanted to give three seats in the parliament for each minority that exceeded 1.5% of the total population of Croatia (in practice, the Serbs), whereas members of minorities who did not reach this ratio were to have two deputies. In the Court's view, both solutions

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

are unconstitutional because they violate the equal voting rights of citizens. In addition, the Court considered that giving three deputies to the largest national minority would divide the people of Croatia into two parts based on their (non-)belonging to a particular minority. Such a solution would primarily contribute to a political goal instead of a constitutional one (that is achieving equality of the minority with the majority) and as such is unacceptable.[13]

In theory, the Court's approach to positive discrimination is supportive if certain requirements are met. The constitutional law prescribes that national minorities shall be guaranteed representation in the state and local executive bodies and in the judiciary. If the candidates equally satisfy the conditions, precedence in filling the given post is to be given to persons belonging to national minorities. This provision was challenged before the Court as allegedly discriminating against the Croat majority. The Court emphasized that the contested advantage is a special positive measure introduced to favor minority groups with the aim of eliminating their actual inequality and enabling them to effectively participate in public affairs. The legislator was authorized to apply the challenged measure, which is justified as long as the reasons for its introduction exist and it does not violate the principle of proportionality.[14] However, in practice the above-mentioned advantage rarely applies. Members of national minorities who were not selected for a public post filed applications with the Court arguing that their special right to precedence under equal circumstances was violated by the selection of majority candidates. The Court restricted its review to the legality of the procedure before competent bodies, while refraining from the analysis of other potentially relevant aspects of the concrete case. It upheld decisions on the selection of majority candidates in all instances. As a general rule, it accepted the findings that the majority candidate had some advantage over the minority candidate, so the candidates did not equally satisfy all conditions for the post. Therefore, their national belonging was irrelevant, and there were no grounds to apply positive measures.[15]

Another example of such a restrictive approach is related to the conflicting provisions of the constitutional law on the Constitutional Court vs. the constitutional law on national minorities. While the first one excludes minority councils from actors empowered to submit constitutional complaints on behalf of persons belonging to a minority whose rights were violated, the second empowers them. The Court gave advantage to the more restrictive provision.[16]

In sum, the Constitutional Court of Croatia has often given exemplarily well-founded arguments but overall demonstrated little consistency in the protection and interpretation of group-specific rights (Beretka 2021, 115; Teofilović 2021, 138). The Court tried to balance the legitimate interests of the majority and the minority, but in the process, it sometimes left the ground of judicial neutrality and constitutional reasoning, and engaged in political discussions (contradicting its own declared role perception). Although it developed an elaborate constitutionality test for restricting minority rights, it did not consistently apply it in practice, and it construed positive discrimination measures restrictively.

Hungary

The general approach of the Constitutional Court of Hungary toward minorities is characterized by a complete lack of judicial activism. In the 30 or so minority-related cases (less than 1% of the overall caseload), the Court avoided to address head-on petitions whenever possible, usually on the grounds that the regulation of the matter belongs to the legislator's competence, that the petition did not contain a specific constitutional problem, or that it is not up to the Court to deal with practical issues. Although the Court many times had the opportunity to exercise its power to conduct *ex officio* examination or to extend the scope of the petition because of the factual context, it very rarely did so (Nagy 2021, 69–70). As part of the democratic backsliding and illiberal constitutionalism in Hungary since 2010, the regulation concerning the Constitutional Court underwent a drastic transformation (Herman 2016; Drinóczi 2022). The new legislation increased the numbers of the judges of the Court, altered the nomination rules in favor of the ruling party, restricted the Court's powers, and incorporated mandatory constitutional interpretation criteria

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

into the constitution. Interestingly, the Constitutional Court's approach toward minority rights appears to have been unaffected by these developments; there has been little emphasis on the protection of minority rights in the Court's practice, both before and after 2010.

Most of the minority-relevant cases that the Constitutional Court of Hungary dealt with are related to the right to representation, including the status and powers of minority self-governments and representation in the parliament. Strictly connected to these issues and to the exercise of minority rights in general, the major conceptual questions the Court should have answered are as follows: what is a minority (that is, the definition of national minorities, which groups can request their recognition as such, and the exact content of the legal status of minorities as "constituent parts of the State"),[17] and who belongs to a minority. In fact, the most problematic part of Hungary's law on minorities is the indeterminacy of the subjects of minority rights – that is, who can exercise minority rights guaranteed in the constitution and other legislation (Majtényi and Pap 2006, 103).

Hungary's pre-2005 regulation on minorities was severely criticized for the fact that, in the absence of formal identification or registration, not only persons belonging to the given minority but practically anyone could participate in the elections of minority self-governments. In its cornerstone Decision no. 45/2005 of December 12, 2005, the Court upheld the constitutionality of the new provisions that introduced registration as a precondition for voting. According to the reasoning of the Court, the decision on minority self-identification and the communication thereof to others fall within the scope of the right to identity and informational self-determination derived from human dignity. Use and disclosure of personal data related to minority affiliation is subject to the consent of the individual. However, within the limits set by the constitution, the right to informational self-determination may be restricted: by law, in accordance with the requirements of the necessity-proportionality test. Thus, the Court considered it constitutionally permissible that individuals be obliged to declare their affiliation with a minority group if this restriction is justified by compelling reasons in the protection of other constitutional rights and values, and if the least possible amount of restriction is used, along with the most appropriate means.[18]

The Court also established here that the constitution regulates the right of national and ethnic minorities to participate in public life and to representation as a fundamental right, a form of which is the right to establish local and national self-governments.[19] The right to establish minority self-governments can be the basis for restriction of the right to self-determination in connection with the declaration of minority affiliation. Making false declarations about minority affiliation on a mass scale may indeed interfere with the establishment of minority self-governments; and to prevent the development of such practices (ethnobusiness), appropriate legislation may be required. However, the Court saw no single solution following from the constitution; through constitutional interpretation, it was not able to determine what restriction can be accepted as constitutional in order to confirm the authenticity of declarations about minority affiliation. In the Court's opinion, it is for the legislator to regulate on what basis, by whom, and in what procedure may the verification take place, and the legislator's task cannot be taken over by the Constitutional Court.[20] Nor did the Court establish a legislative omission in breach of the constitution, although there were no legal provisions for verifying the declarations of minority affiliation and for sanctioning false declarations. While the Court acknowledged that the lack of these rules may indeed be a source of abuses in practice, it also emphasized that filling the regulatory void would entail a restriction of the right to human dignity and the right to informational self-determination. As it is, the Court cannot oblige the legislator to adopt specific legislation entailing restriction of fundamental rights – says the judgment.[21] In this decision (and elsewhere), the Court refrained from engaging in theoretical discussions beyond what was minimally necessary (Majtényi and Pap 2006, 95); and instead of examining in depth the relationship between the right to establish minority self-governments vs. the freedom of self-identification, the Court was satisfied with asserting that the constitution does not specify the precise content of these rights or the rules governing the exercise thereof.[22]

Concerning the right to representation, the Court declared in its very first minority-related decision that

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

> the assertion of the Constitution that recognizes national and ethnic minorities as constituent parts of the State makes the statutory regulation of the rights of minorities extremely important. Among and in addition to these rights, the Constitution specifically mentions the representation of national and ethnic minorities. Representation is a necessary prerequisite for national and ethnic minorities to fulfill their role as constituent parts of the State.[23]

Yet, in several cases, the Court decided that affirmative measures for the special representation of minorities in the parliament and in municipal self-governments are not constitutionally permitted or necessary, including direct delegation,[24] preferential mandate,[25] or lowering the general 5% electoral threshold.[26] The Court found that a departure from the principle of equal suffrage constitutes a restriction on fundamental rights, which cannot be justified even with the protection of constitutionally guaranteed rights of minorities.[27] Nevertheless, it failed to determine what the constitution requires from the legislator in order to implement the right to representation.

The Court also delivered a handful of decisions on language rights,[28] without providing any substantial contribution to the protection of minorities in this respect. In one of these cases, when Russian- and Ukrainian-Ruthenian-speaking petitioners claimed that the right to use their mother tongue had been violated in an administrative proceeding, the Court did not even recognize the relevance of the case for minority rights. It quickly rejected the petition without examining it on the merits, because it did not see "a matter of fundamental constitutional importance" in the connection between the legal interpretation of the contested court decisions concerning the use of the mother tongue and the provisions of the Constitution referred to by the petitioners (including human dignity, fair procedures, and non-discrimination). For the Court, "from these constitutional provisions it does not follow that the petitioners should have the fundamental right to use their mother tongue in official and judicial proceedings free of charge in all cases."[29]

Romania

The minority-related case-law (18 cases) of the Constitutional Court of Romania primarily focuses on the right to identity and the right to use the mother tongue in education, local administration, and justice. Whereas the nation-state is consistently interpreted by the Court as an almost sacred, taboo concept, the constitutional jurisprudence is contradictory as to the relationship between the nation-state and the various minority rights. This at times turns to the advantage of the national minorities, at other times to their disadvantage – largely depending on the current political situation (Varga 2020, 133–134).

An exemplary decision of the basic pro-majority stance of the Court is reflected in its preliminary review of a constitutional amendment (which the parliament eventually did not adopt) to Article 6 on the right to identity. This article was to be supplemented with a new paragraph prescribing for public authorities to consult with the organizations of national minorities in relation to decisions regarding the preservation, development, and expression of their ethnic, cultural, and religious identity. According to the Court, the regulation of the ways in which the state guarantees the right to identity of national minorities does not belong to the domain of the Constitution, but to the competence of the legislator. If, however, the amendment is to be maintained, it is essential that authorities should consult with the organizations of other Romanian (that is, majority) citizens, in order to respect the principles of equality and non-discrimination.[30]

The Court opposed other supportive measures for minorities, too. In a 2014 decision,[31] it declared unconstitutional several constitutional amendments that would have made it possible for traditional landscape units to be recognized by law as administrative subdivisions (possibly including Seklerland); for national minorities to create their own decision-making and executive bodies; for minority organizations to be consulted by central and local authorities when making decisions concerning their identity; and for national minorities to freely use their own symbols. According to the Court, these provisions would violate the eternity clause of the constitution,

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

because they challenge the very character of Romania as a unitary nation-state. Furthermore, ensuring decision-making and executive powers for national minorities, even in matters affecting their identity, would create a privilege that violates the principle of equality between citizens.

In contrast, the Court rejected several initiatives against the legislative provisions enlarging the rights of minorities in the area of minority language education, claiming that those provisions violate neither the rights of the Romanian people nor the status of the Romanian language.[32] For example, it stated that "the possibility of organizing higher education units in the languages of national minorities, as well as the establishment of multicultural higher education institutions, do not create discrimination in relation to other Romanian citizens, on the contrary, are intended to ensure the equality of citizens belonging to national minorities with those of Romanian ethnicity regarding the existence of an appropriate educational institutional framework."[33] However, in each case the Court was quick to point out – in accordance with the landmark judgment of the European Court of Human Rights in the 1968 Belgian Linguistic Case – that the right to education does not entail the obligation for the state to comply with linguistic preferences, and that education in the minority language cannot under any circumstances affect the learning and teaching of the official language.[34] The Court has never gone as far as embracing positive discrimination; instead, it prefers formal equality. For example, it considers that holding entrance exams and graduation exams in Romanian is completely justified and does not affect the principle of equal opportunities, since training in the Romanian language is ensured for everyone.[35]

In the area of official language use, the Court has applied a much more restrictive interpretation, promoting the exclusive use of the Romanian language in written communication before courts and administrative authorities. Despite explicit constitutional provisions allowing the use of minority language before local authorities and courts, the Constitutional Court upheld legislative provisions requiring that written submissions of parties shall always be submitted (also) in the Romanian language, making the use of minority language practically impossible.[36]

Another example for the restrictive approach of the Court is the decision on the constitutionality of the 2003 amendments to the constitution.[37] One of the challenged provisions required that the use of the language of the respective national minority be ensured in the administrative-territorial units where citizens belonging to a national minority have a significant proportion – both in writing and orally in relations with local public administration authorities and decentralized public services. The Court based its reasoning on Article 6 (2) of the constitution, according to which the protective measures taken by the state to preserve, develop, and express the identity of persons belonging to national minorities must comply with the principles of equality and non-discrimination in relation to other Romanian citizens. In the Court's view, when in an administrative-territorial unit the national minority has a significant proportion, an imbalance can be created between them and the citizens of Romanian ethnicity or members of another ethnic group who do not have the opportunity to be elected in local councils. In order to eliminate the alleged discrimination inherent in this situation, the Court suggested that the proposed amendment be changed in a way that provides persons belonging to a minority ethnic group in an administrative-territorial unit with the right to be represented in the local council. This term would also include citizens of Romanian or another nationality in a local minority status; they would thus also have the opportunity to access public positions and preserve their ethnic identity.[38]

The above "nation-state reflex" (Varga 2020, 138) is quite typical for the reasoning of the Constitutional Court of Romania, where the protection of the majority is a permanent reference point during the implementation and interpretation of constitutionally guaranteed (minority) rights. A recurring argument of several decisions is that the rights of national minorities cannot violate the rights of the majority, the principle of equality, or lead to discrimination. We agree with Varga that this somewhat twisted logic suggests that every measure for the protection of minorities carries the risk of discrimination for the majority, that somehow the national minority as such poses a threat to the majority, and that in fact it is the majority who necessitate more effective protection (Varga 2020, 140). What is then the point, one might ask, of the very concept of minority rights?

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

Serbia

Notwithstanding the formally high standards of minority protection in the country, the Constitutional Court of Serbia has only rarely been willing to interpret and protect minority rights in an expansive manner. Despite its strong competences, the Court has demonstrated no will or capacity to become a positive actor in the process of democratic consolidation, actively shaping the institutional and legal framework, maintaining a balance between branches of power, or protecting human rights (Beširević 2014, 966). The Court's traditional deference toward the acts of the actual political majority in the legislation (Beširević 2014, 972–973; Papić and Djerić 2018, 59; Tripković 2011, 744–745) is also detectable in its case-law related to minority rights (around 50 cases).

Since the establishment of the multiparty system in Serbia (1990), the Constitutional Court invalidated no provision of any law on the ground that it restricted a minority right, nor did it ever uphold an initiative submitted by persons belonging to national minorities or their organizations seeking the protection of a minority right against a violation by law (Korhecz 2021, 37). Such initiatives were generally rejected on the grounds that the legislature (National Assembly) is constitutionally empowered to determine the conditions for exercising minority rights, and it has wide discretion in doing so, whereas the Court has no power to control legislative policy choices. This reasoning was repeated in cases related to the constitutionality of laws regulating the rights of national minorities to mother-tongue education,[39] preferential representation in the National Assembly[40] and in local assemblies.[41] Nowhere did the Court make any reference to the constitutional provision that prohibits the limitation of the basic content of a minority right by law, nor did it apply any proportionality test.

In contrast, the Court declared many provisions of the law unconstitutional because they allegedly provided too great a degree of minority rights or they were not harmonized with the provisions of other (sectoral) laws regulating the same questions. In doing so, the Court interpreted minority rights restrictively, giving preference to other constitutional provisions over minority rights.[42] For example, in its cornerstone Decision IUz-882/2010 of January 16, 2014, the Court annulled several provisions of the Law on the National Councils of National Minorities, which made possible the exercise of the constitutional right of national minorities to self-governance in areas of culture, education, information, and official language use.[43] The Court used two major lines of reasoning: first, the provisions were not in harmony with sectoral laws regulating the area of electronic media, administrative procedure, public broadcasting, educational system, and so on, thus violating the unity of the legal order; second, the legislator went beyond the scope of measures for the implementation of additional rights of persons belonging to national minorities.[44]

As for the first argument, the Constitutional Court stated that when assessing the constitutionality of a contested provision, the first step is to see what the law that systematically regulates the given issue says in the matter. However, the Court added that it must also be examined whether the relevant provisions of that law respect the essential content of the collective rights of national minorities.[45] However, the Court did not apply this latter constitutional test to any specific consideration. For example, the Law on the National Councils prescribed the participation of national councils in the administrative bodies of public media. The Constitutional Court annulled this provision because it was not in accordance with the relevant rules of the Broadcasting Act, but it did not examine at all whether the rules of the Broadcasting Act – which did not grant any power to the national councils in the management of public media – were in accordance with the constitution, and whether the essential content of the collective right of national minorities to self-government was limited.

The other basis for annulment (the legislator went beyond the scope of measures for the realization of minority rights) reflects a restrictive interpretation of minority rights. Alas, the Court did not determine the scope (the constitutional limits) of these rights.[46] An apt example is the invalidation of the provision, which stipulated that national minority councils are to participate in the appointment of school directors via preliminary consent. In the Court's view, participation in

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

decision-making cannot amount to veto power, as allegedly confirmed by Article 15 of the FCNM and its Explanatory Report.[47] However, the Court completely neglected to analyze the opinions of the Advisory Committee monitoring the FCNM which would suggest a completely different conclusion (Tóth 2017, 235–236).[48]

The 2014 decision contains many principled statements on the protection of national minorities. Most importantly, the constitutionality of many legal provisions guaranteeing special minority rights was upheld on the basis that without them full and effective equality between the members of the ethnic majority and national minorities is not possible.[49] Thus, the Court made a clear difference between formal and material equality; however, this principle was not consequently applied in resolving the concrete constitutional dispute at hand.

Another problem with the minority-related jurisprudence of the Court is its inconsistency. The Court changed its opinion in relation to certain minority rights often in short periods of time, without providing valid arguments for this change in the interpretation of constitutional provisions. For instance, in the field of official use of minority languages, the Court revised its position on the constitutionality of the empowerment of the multiethnic Autonomous Province of Vojvodina to regulate in detail the official use of minority languages. This power of the province is based on Article 79(2) of the constitution, which states that "the additional rights of members of national minorities may be determined by provincial regulations." In 2010, the Court had no objection whatsoever against the power of the Vojvodina Assembly to regulate the official use of minority languages,[50] while in 2012[51] and 2013,[52] it claimed that the Law on the Official Use of Languages and Scripts regulates the official use of minority languages; therefore, the constitutional principle of the unity of the legal order provides no possibility for the National Assembly to delegate such a power to the multiethnic province via other laws.

Slovenia

The Constitutional Court of Slovenia in six major cases often expansively interpreted provisions of the constitution to uphold challenged provisions implementing constitutional minority rights, protecting the rights of the Hungarian and Italian autochthonous national communities. Yet, important elements of conceptualization are missing, such as balancing the interests of the minority against those of the majority, establishing the uppermost limit of minority rights, and considering the proportionality of the contested provisions.

In a 1999 case,[53] the Court upheld the constitutionality of the law allowing the usage of national minority symbols, which might be identical to the symbols of a foreign state. The Court stated that the constitutional term "national symbols" means symbols of the Italian and Hungarian nation "to which Italian and Hungarian communities belong" and added that national symbols of the Italian and Hungarian nation are "well known and cannot be matter of choice." In the absence of a clearly worded constitutional restriction, these communities can use their symbols irrespective of whether they are identical to the symbols of the Italian and Hungarian states.[54]

In another significant case, the Court declared that the double voting right of autochthonous national communities is not inconsistent with the constitution.[55] The Act on the Elections to the National Assembly and the Local Elections Act allowed for members of the Hungarian and Italian national communities to cast two votes in the parliamentary and municipal elections – one for the election of the representative of the national community (special voting right) and another one for the election of other delegates or members of the municipal council (general voting right). The petitioners claimed that this double voting right violates the constitutional principle of equality before the law, that it is an inadmissible form of discrimination and in no way contributes to the protection of the national communities.[56] The Court admitted that double voting entails a departure from the principle of equal suffrage but this form of positive discrimination is required by the constitution itself:

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

> As the Constitution does not limit the general right to vote of the members of the national communities and, at the same time, it gives them the right to elect a deputy of the national community, the enactment of the right to only one vote with the possibility to choose (option) would result in the members of the national communities being forced to choose between two constitutional rights: the general right to vote and the right to direct representation. By opting for one of these two rights, they would automatically renounce the other. Such regulation would be inconsistent with the Constitution.[57]

In the same decision, the Court, with similar reasoning, also upheld the constitutionality of the statute of Koper municipality providing that a deputy mayor must be of Italian nationality if the mayor is not. In the view of the Court, the provision does not interfere with equality before the law because the restriction on who may be elected to the office of deputy mayor – which puts those persons who are not of Italian nationality at a disadvantage – is objectively justified with the aims of positive discrimination and the special protection of the national communities.[58] The Court devoted a long section to the conceptualization of minority rights in general and the right to participation in public affairs in particular. It pointed out that the level of respect and protection afforded to minorities is an important indicator of a democratic society, where the protection of minorities is guaranteed in two forms: through the prohibition of discrimination on the basis of nationality, language, religion or race, and through special rights that appertain only to the minority. The latter form of protection is referred to as the positive protection of minorities, which results in positive discrimination as members of minorities are guaranteed rights that are not available to the majority.[59]

The Constitutional Court of Slovenia has also decided several cases related to language rights. The Court was ready to annul legislative provisions favoring the Slovenian language over the languages of national communities in the context of freedom of assembly and association. The Societies Act provided that the name of associations must be in Slovenian; and if their seat is in the area where a language of an autochthonous national community is in official use, the name may also be in that language as a translation of the Slovenian name. The applicant deemed this provision inconsistent with the equality of languages in official use. The Court reiterated that guaranteeing special rights and positive protection to national communities is not contrary with the constitution – quite the opposite, it is "a prerequisite for the preservation of the identity and equal integration of both autochthonous national communities and their members into the social life."[60] It also pointed out that for national communities and their members, the freedom of assembly and association must be understood more broadly than is the case for other individuals, because it guarantees the preservation of their national identity. This is also served by the name of an association, which carries an important symbolic message to the broader public. The legislator cannot treat the languages of national communities as foreign languages, as mere translation languages. However, the challenged provision did not provide for the possibility of the exclusive use of the minority language in areas where it is in official use; thus, it is inconsistent with the constitutionally guaranteed rights of minorities.[61]

The Court has also been keen to protect the educational rights of minorities. The essence of the education system in Slovenia is as follows: the language of instruction in pre-primary, primary, and secondary schools is Slovenian; in multiethnic territories inhabited by the Italian community, Italian-language schools are established with Slovenian as a compulsory subject and vice versa; whereas in multiethnic areas inhabited by the Hungarian community, all educational institutions are bilingual (Slovenian and Hungarian) (Teofilović 2021, 135). The applicants challenged the constitutionality of the bilingual education system, arguing that it violates the principle of equality before the law because it requires the Slovenian children to spend more effort on studying to achieve the same results as those who attend schools in the Slovenian language. The applicants required that bilingual education in those territories be replaced with the Italian model. They also claimed that the law regulated education differently in Italian vs. Hungarian territories, which is also contrary to the

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

constitution.[62] The Court pointed out that national communities have a constitutional right to be educated in their own language, while the territories with compulsory bilingual education are set by the law. Applying the same model as in nationally mixed Italian areas would remove bilingual education completely, and the Court could not support that. It emphasized that the aim of bilingual education is to provide mother-tongue education to Hungarian children and the level of education in Slovenian and Hungarian that enables the students to pursue their future education and life in both Slovenia and Hungary.[63] Importantly, the Court stated that the principle of equality before the law does not mean that the position of different groups may not be regulated differently; however, the differentiation must not be arbitrary but must pursue a constitutionally allowed and rational goal, and must be an appropriate means for achieving that goal. Bilingual schooling is required by the constitution itself, and because of historical circumstances it was imposed in the areas inhabited by Hungarians, but not in those inhabited by Italians. The obligation of Slovenian children to learn a minority language applies in all areas inhabited by members of autochthonous national communities, so they are in the same position in bilingual areas as in those where Italians live. With regard to the quality of education, the applicants did not demonstrate that children in bilingual schools are discriminated against. Also, bilingual schooling does not hinder the right of Slovenian children to use their language and script. Accordingly, the Constitutional Court decided that the challenged statutory provision was not unconstitutional.[64]

Based on the overview of the relevant case-law, the Constitutional Court of Slovenia has consistently interpreted minority rights and the scope and applicability of measures of positive discrimination broadly – as a legitimate means for achieving full equality and preventing the discrimination of minorities. The Court went so far as asserting that the special rights of minorities as vulnerable social groups are so important that they may prevail over other constitutionally guaranteed rights and principles; at the same time, minorities need and deserve stronger protection than the rights guaranteed to all (Teofilović 2021, 129, 137–138). One might even say that the Court has been positively biased toward national minorities, since it examined all issues from a minority perspective, and the constitutionality of all measures relied on their appropriateness to protect the identity of minorities. However, the Court has not endeavored to balance the interests of the minority against those of the majority; it has not established the uppermost limit of minority rights; and it has not considered the proportionality of the contested provisions.

Common Features in the Analyzed Jurisprudence

Based on our analysis, four out of the five examined constitutional courts have not fulfilled their duty to properly conceptualize the rights of national and ethnic minorities. Instead, they have only superficially dealt with the nature, content, and limitation of minority rights, and their relationship to other fundamental rights. Instead of developing appropriate tests for assessing the constitutionality of the specific legal regulations, the constitutional courts used *ad hoc*, case-by-case arguments to justify the constitutionality or unconstitutionality of the given provision, and either conveniently referred to the legislator's wide margin of appreciation in minority issues, or vehemently opposed the pro-minority legislation. We concur with Sadurski: the constitutional courts of the CEE region have been "neither intellectually equipped nor morally and politically prepared" to interpret minority rights in an expansive, generous manner and have not played a significant role in shaping the "toleration regimes" (Sadurski 2014, 289, 328). The only refreshing exception from the above tendencies is the Constitutional Court of Slovenia, which – for reasons not examined in this paper – often interpreted constitutional provisions expansively to uphold and validate challenged legislative provisions implementing constitutional minority rights, thus protecting the Hungarian and Italian autochthonous national communities. However, not even this Court developed a complex constitutionality test that includes all necessary aspects to decide about the constitutionality of a provision.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

We consider that there is a great need for a constitutionality test that may be suitable for constitutional courts to consistently evaluate submissions that question the constitutionality of laws on minority rights, either because they violate other constitutional provisions, or because they violate the essential content of a minority right. In the next part of this article, we propose to outline such a test.

Proposal for a Test Assessing the Constitutionality of Laws on Minority Rights

Special minority rights are very similar to economic, social, and cultural rights in terms of the related state commitments. States are not merely required to refrain from interfering with the rights of minorities (negative obligation) but also to ensure effective protection by establishing institutions, providing financial support, and other affirmative measures (positive obligations). Furthermore, minority rights, just like economic rights, "remain less well articulated conceptually than civil and political rights, less accurately measured, and less consistently implemented in public policy" (Hertel and Minkler 2007, 1). That said, international bodies (courts and quasi-judicial bodies) monitoring the most important human rights conventions have significantly contributed to setting international standards of human rights, including minority rights. Most importantly for constitutional courts in Europe, the ECtHR has delivered a number of decisions on language use (Nagy 2018), identity (privacy), religion, participation, and other issues relevant for minorities (Gilbert 2002); and the Advisory Committee of the FCNM accepted four thematic commentaries that are key for the conceptualization of minority rights.

Most universal principles that have been crystallized in the decisions of international monitoring bodies have their traces in national legal systems and constitute key elements in the multilevel system of human rights protection, where national constitutional law, international law, and – in the case of EU member states – EU law are interacting in a complex way.[65] These globally accepted principles include (i) the doctrine of proportionality; (ii) the need to strike a fair balance between competing rights and interests (balancing or proportionality *strictu sensu)*[66]; (iii) the protection of public interest with the least possible intrusion; (iv) the specific protection of the essential content of a right; (v) the 4-A approach to economic, social, and cultural rights (availability, accessibility, acceptability, and adaptability in relation to the right to education, and availability, affordability, accessibility, and cultural adequacy in relation to the right to adequate housing); (vi) as well as the concept of "minimum core obligations" – the latter two have been developed by the International Committee on Economic, Social, and Cultural Rights (Kalantry, Getgen, and Koh 2010, 270–279). These were instrumental to us in developing a test for assessing the constitutionality of laws on special minority rights.

The realization of constitutionally guaranteed minority rights usually requires detailed legal regulation (parliamentary acts, statutes, laws, decrees, etc.). In practice, it is not uncommon that a constitutional dispute arises as to whether the legislator fulfilled its obligations, and whether it did so in an appropriate, constitutional manner. When examining this, the first question is whether a law has been enacted at all to implement the constitutionally guaranteed minority right. If not, then the constitutional court can establish a legislative omission violating the constitution. Such a case existed in Hungary for twenty years regarding the parliamentary representation of national minorities – and still exists in Romania in connection with the lack of a comprehensive minority act, although the adoption of such law is prescribed by the constitution.

More often the legal regulations guaranteeing the implementation of minority rights are adopted, but a constitutional dispute arises whether the law in question is actually capable of securing the exercise of the very right(s) it is meant to implement, or on the contrary, it violates the constitutionally guaranteed minority right(s). The essence of these legal disputes is basically the following: How much freedom should the legislator have when unfolding the scope and content of constitutionally guaranteed minority rights? Are there any constitutional limits to this freedom, and if so, what kind of test could be applied to assess the outcome of this freedom (legislation itself)? We

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

are of the opinion that the legislator does have a relatively wide margin of appreciation when regulating minority rights, but this freedom must not be unlimited, or else the constitutional rights of minorities would lose their substance. But what could these limits be? Unfortunately, in the case-law of the five constitutional courts examined in this article, we did not come across clearly formulated criteria on the basis of which the limits of legislative freedom could be drawn.

In our opinion, when it comes to the constitutional assessment of a minority law, two boundaries must be set: the lowest limit, where the legal provision still guarantees the actual fulfilment of the given minority right; and the uppermost limit, where the minority right is realized to its fullest effect, yet without violating another fundamental human right or the rights of the majority group.

Constitutionality Test, Part 1 – Lowest Limit

When looking for establishing the lowest limit of a specific regulation, the constitutional muster should take into consideration three aspects. First of all, the legal regulation must be *appropriate* for realizing minority rights, it must ensure that the given minority right can be *effectively enjoyed* by the beneficiaries, while taking into account relevant differences between the various national minority groups in the respective country. Secondly, the legal regulation *cannot restrict the very essence*, that is the *central aspect*, the *essential, minimal content* of the given minority right. Thirdly, the legal regulation must respect the previous level of realization of the given minority right, that is it should build on the concept of *acquired rights*.

The first criterion refers to *appropriateness* or *efficiency*. The constitutional court could declare a legal solution unconstitutional if, taking into account the specific circumstances, it is not appropriate for realizing the given minority right in practice, so that members of the minority group could actually avail themselves of the right. Taking the example of the right to education in the mother tongue, such could be a legal condition that would require an extremely high number of students per groups, classes, or schools in order for those belonging to the minority to benefit from mother-tongue education. With such a solution, education in the minority language would practically be inaccessible to most children belonging to the minority. The suitability of the legal regulation could also become questionable if, say, minority education were bound to a personal condition such as family name analysis. For example, only the bearers of typical minority surnames could benefit from mother tongue education, while in fact the majority of persons having a minority language as their mother tongue have surnames of a different origin. In determining appropriateness or efficiency, specificities of the different national minority groups should be duly considered. For example, in the case of the right to use one's own language in various areas of social life, the appropriateness of the regulation should correspond to the number and concentration of the persons belonging to a national minority, burdens and benefits arising from the regulation of language use, and available human resources. This is referred to in scholarship as the "sliding-scale model," providing different levels of rights depending on the relevant circumstances of various national minorities (de Varennes 1996, 247–248).[67]

The second criterion, the issue of *essential content*, could arise for example, if the law would provide education in the minority language only in the first four years of elementary school, and even there, only part of the subjects would be taught in the minority language. In this case, most students belonging to the minority would not have access to what is the essential content of the right to education in the mother tongue. The protection of essential content could include the requirement of *non-discrimination*. For example, if education in the minority language were subject to tuition fees, while education in the majority language was completely free, it could result in discrimination, violating the very essence of the right to education in the mother tongue. In this case, the general practice of non-discrimination would apply, which is well-established in the case-law of international courts (including the ECtHR; see Gilbert 2002, 738–750), and the constitutional courts of Europe, which follow the German constitutional tradition. In the case of fundamental rights, discrimination is unconstitutional when the legislation treats differently persons in the same

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

or analogous situation, without providing an objective and reasonable justification. Discrimination between persons belonging to the same group is constitutional when it is absolutely necessary: when the protection of another fundamental right or constitutional value cannot be achieved in any other way. In addition, the weight of the fundamental right violation caused must be proportional to the importance of the legitimate aim to be achieved.

The third criterion refers to the *already achieved level of minority protection*, the so-called *acquired rights*. Normally, the legislation should not be allowed to go below that level.[68] Yet, if the state adopts a new law that would reduce the existing level of a minority right, it should be examined whether this restriction has a legitimate aim and whether it is necessary and proportionate. If the regulation has no objective and reasonable justification, or the chosen solution is not entirely necessary to achieve the aim pursued, or there is an alternative, less restrictive solution, then such regulation should be considered unconstitutional. The same approach – the necessity-proportionality test – is applied by international human rights bodies and constitutional courts when assessing the legality or constitutionality of limitations on any human right (Scaccia 2019).

Constitutionality Test, Part 2 – Uppermost Limit

Constitutionality review of laws regulating minority rights is sometimes initiated by those who believe that the given law violates other constitutional rights. The examined constitutional courts did not define generally valid criteria or a constitutionality test in this regard, either. In the context of the uppermost limit of a minority regulation, we propose two criteria to be considered, both being primarily based on the notion of *proportionality* (Barak 2012). The first question to be answered is whether the legal regulation of constitutionally guaranteed minority rights disproportionately restricts other fundamental rights (either the rights of the majority or human rights in general) or constitutional values. This might be the case if, for example, the right of minorities to parliamentary representation were regulated by the legislator in such a way that persons belonging to a minority could cast two votes: elect their own representative, and vote for one of the other (for instance, party) lists. If the representation of the minority might be ensured effectively in another way, a double vote might be considered as unproportional. The question of proportionality may also arise in the case of participation in local minority government elections; if it is subject to registration, that is where one has to declare their minority affiliation in order to vote, whereas such declarations are otherwise not obligatory. In each such case, it must be assessed whether the legal solution creates a fair balance between the given minority right and another protected right (in the case of our last example: the right to informational self-determination).

Another criterion that could be part of a constitutionality test in relation to the uppermost limit concerns *the burden imposed on persons belonging to the majority*. For example, if the regulation of the official use of a minority language required state officials to know the minority language, this would place a burden on the citizens belonging to the majority, who are generally not familiar with the minority language. In such a case, the constitutional court should examine whether the burden is *proportionate to the public interest* attached to the use of the minority language, and whether that goal could be reached with a lesser burden. Here, it would be important to examine whether the obligation affected all civil servants in the country, or only those who work in areas inhabited by persons belonging to national minorities traditionally and/or in substantial numbers. In the former case, the burden would seem disproportionate, whereas in the latter not necessarily.

Summary

Despite the continuous tensions around minority-majority relations and diversity issues in Central and Eastern Europe, this article set out from the assumption that it is in fact possible to strike a fair balance between the two, seemingly contradictory state-organizing principles: unity and diversity. In order to do so, we must have a clear idea on the nature, content, and limitations of group-specific

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

minority rights, as well as their relationship with other human rights, and the legitimate interests of the majority and the (nation-)state. However, it seems that the conceptualization of minority rights remains the Achilles heel of constitutional jurisprudence in the region. Based on the analysis of the relevant constitutional case-law of five CEE countries, we have come to the conclusion that constitutional courts, which are perhaps best equipped to carry out such an important theoretical task, have failed to properly conceptualize minority rights. Instead of developing appropriate tests for assessing the constitutionality of the specific legal regulations, constitutional courts have only superficially touched upon the conceptual issues of group-specific minority rights, using incidental, case-by-case arguments to justify the (un)constitutionality of the legal provisions. The only exception is Slovenia, but even there the constitutional court lacks a complex test that includes all necessary aspects for a constitutionality review.

Therefore, we outlined a constitutionality test of our own, which is partly built on the general practice of international human rights courts and committees, arguments of legal and political theory, but also contains new, minority-specific elements. The test is to set up two limits for regulation: the lowest limit, where the regulation still guarantees the actual fulfilment of the given minority right; and the uppermost limit, where the minority right is realized to its fullest effect, yet without violating another fundamental human right, or the rights of the national majority. As for the lowest limit, the constitutional assessment should take into consideration three aspects: 1) the regulation must be appropriate for realizing minority rights; it must ensure that the given minority right can be effectively enjoyed by the beneficiaries; 2) the regulation cannot restrict the very essence (central aspect or essential, minimal content) of the given minority right; 3) the regulation must respect the previously acquired level of implementation of the given minority right. As for the uppermost limit, one aspect to be considered is whether the regulation of constitutionally guaranteed minority rights disproportionately restricts other fundamental rights or constitutional values. The other aspect is whether the burden that the regulation imposes on the majority is proportional to the realization of the given minority right. We suggest that using this test to evaluate the constitutionality of minority laws could lead to more coherent jurisprudence, thus contributing to the reduction of conflicts around the minority issue in Central and Eastern Europe.

Disclosure. None.

Notes

1 The ECRML only indirectly protects the rights of minorities, since it is specifically aimed at the protection of regional or minority languages as such.
2 The constitution of Croatia enumerates the following national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, and Albanians. The constitution of Slovenia identifies Hungarians and Italians as authochtonous national communities, while the so-called new minorities (Serbs, Croats, Bosniaks), although much more numerous, are not recognized as such.
3 Decisions of the Constitutional Court of Croatia are available online at <https://sljeme.usud.hr/usud/prakswen.nsf> (Accessed November 13, 2023.)
4 Decision U-VIIR-4640/2014 of August 12, 2014.
5 Decision U-II-6110/2013 of August 12, 2014, para. 4. Cited by Beretka 2021, 112.
6 Decision no. U-II-1818/2016.
7 Decision no. U-II-1818/2016, para. 20.3.
8 Decision no. U-II-1818/2016, paras. 22 and 28.1.
9 Decision no. U-II-1818/2016, paras. 20.3–20.4.
10 Decision U-II-6110/2013 of August 12, 2014, para. 9.
11 Decision U-VIIR-4640/2014 of August 12, 2014, para. 33.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

12 Decision U-VIIA-3004/2013 of May 26, 2013, para. 3. Similarly, the Court annulled the electoral results in Brod-Posavina County, where the Serb national minority did not get adequate representation in the regional assembly, because their share in the total population (2.6%) was under the prescribed 5% threshold. According to the Court, the Regional Electoral Board erroneously applied the stricter provision of the Constitutional Law on the Rights of National Minorities, instead of the law on local elections. Decision No. U-VII-3122/2013 of June 4, 2013.
13 Decision U-I-3597/2010 (U-I-3847/2010; U-I-692/2011; U-I-898/2011; U-I-994/2011) of July 29, 2011. Cf. Teofilović 2021, 124–125.
14 Decision U-I-2767/2007 of March 31, 2009. Cf. also Decisions U-I-402/2003 and U-I-2812/2007 of April 30, 2008.
15 Decision U-III-1897/2013 of March 5, 2015 (better results in the knowledge test); Decision U-III-4681/2008 of June 30, 2010, Decision U-III-3862/2010 of May 23, 2012, Decision U-III-2989/2010 of May 31, 2012 (richer and/or more relevant previous working experience); Decision U-III-1286/2012 of December 11, 2014 (fulfilment of additional special requirements besides general ones); Decision U-III-2989/2008 of November 17, 2010 (previous work and capabilities of the minority candidate do not secure advantage in his favour in comparison with other candidates, no grounds for the application of affirmative measure). See Teofilović 2021, 127.
16 Decision U-I-1029/2007 and 1030/2007 of April 7, 2010.
17 See the cases concerning the (non-)recognition of the Jews, the Russians, the Bunjevacs and the Huns as national minorities, where the Constitutional Court refused to pronounce itself on the content of the statutory conditions for being a minority: Decision 2/2006 (I. 30.) of January 30, 2006; Decision 27/2006 (VI. 21) of June 19, 2006; Decision 148/2010 (VII. 14.) of July 13, 2010; Decision 3265/2012. (X. 4.) of September 24, 2012. Decisions of the Constitutional Court of Hungary are available at <https://www.alkotmanybirosag.hu/ugykereso/ (Accessed November 13, 2023.)
18 Decision 45/2005. (XII. 14.) of December 12, 2005, III. 5.
19 Decision 45/2005, III. 9.
20 Decision 45/2005, III. 5.
21 Decision 45/2005, IV. 2. para. 7.
22 See the more recent Decision 41/2012. (XII. 6.) of December 4, 2012.
23 Decision 35/1992. (VI. 10.) of June 2, 1992, III.
24 The delegation of elected leaders of national minorities to the Parliament violates the constitutional principle of equality and directness. Cf. Decision 34/2005. (IX. 29.) of September 27, 2005.
25 It is unconstitutional for an elected member of the local minority self-government to become a member of the board of representatives of the local government by making a declaration, when he/she obtained a certain amount of votes. Decision 14/2006. (V. 15.) of May 15, 2006.
26 The Court rejected the initiative of the minority Ombudsman challenging the constitutionality of the 5% electoral threshold applicable for minority candidates, stating that it is not discriminatory. Decision 1040/B/1999 of December 17, 2001.
27 Decision 34/2005, III.
28 Decision 36/1999. (XI. 26.) of November 23, 1999 (language of place names in official documents); Decision 58/2001. (XII. 7.) of December 3, 2001 (the right of minorities to use their names in their own language); Order 3208/2012. (VII. 26.) of July 9, 2012, Decision 41/2012 (the language of the minutes of the minority self-government); Order 3192/2016. (X. 4.) of September 27, 2016, Decision 2/2021 (I. 7.) of December 15, 2020 (use of minority languages in administrative and judicial proceedings).
29 Order 3192/2016, [28]
30 Decizie nr. 799 din 17 iunie 2011. Decisions of the Constitutional Court of Romania are available at <https://www.ccr.ro/> (Accessed November 13, 2023.)

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

31 Decizie nr. 80 din 16 februarie 2014. Cf. Varga 2020, 140–143.
32 Decizie nr. 72 din 18 iulie 1995; Decizie nr. 114 din 20 iulie; Decizie nr. 2 din 4 ianuarie 2011; Decizia nr. 118 din 19 martie 2018.
33 Decizie nr. 114 din 20 iulie 1999, II.1.
34 Decizie nr. 72 din 18 iulie 1995, I.2.
35 Decizie nr. 72 din 18 iulie 1995, I. 8.
36 Decizie nr. 40 din 11 aprilie 1996; Decizia nr. 636 din 27 octombrie 2016; Decizia nr. 633 din 12 octombrie 2018.
37 Decizie nr. 148 din 16 aprilie 2003.
38 Decizie nr. 148 din 16 aprilie 2003, II. C. c) Cf. Varga 2020, 135–138.
39 Decision IU-328/1992 of October 14, 1993, Official Gazette of RS No. 106/1993; Decision IU-7/1998 of June 1, 2000, Bulletin of the Constitutional Court, 1/2000.
40 Decision IUp-42/2008 of April 14, 2011, Official Gazette of RS No. 37/2008.
41 Decision IUz-52/2008 of April 21, 2010, Official Gazette of RS No. 34/2010.
42 Decision IU-505/1991 of April 22, 1993, Official Gazette of RS No. 47/1993; Decision IU-491/1992 of June 24, 1993, Official Gazette of RS No. 56/1993; Decision IU-111/93 of January 25, 2001, Official Gazette of RS No. 10/2001; Decision IU-350/1993 of January 25, 2001, Official Gazette of RS No. 10/2001; Decision IU-64/94 of January 25, 2001, Official Gazette of RS No. 10/2001; Decision IU-27/99 of January 11, 2001, Official Gazette of RS No. 10/2001; Decision IU-294/02 of February 24, 2005, Official Gazette of RS No. 42/2005; Decision IUp-42/2008 of April 14, 2011, Official Gazette of RS No. 37/2008; Decision IUo-360/2009 of December 5, 2013, Bulletin of the Constitutional Court 2/2012; Decision IUz-882/2010 of January 16, 2014, Official Gazette RS No. 20/2014; Decision IUz-166/2014 of May 12, 2016, Official Gazette of RS No. 62/2016.
43 Beretka (2020, 281) and Tóth (2017, 235–236) have criticized this decision for its restrictive interpretation.
44 Decision IUz-882/2010, Part VI, 35, 43–45, 57, 68, 70. Cf. Decision IUz-166/2014, Part V, 5.
45 Decision IUz-882/2010, 51.
46 It is quite probable, however, that the Court was protecting the constitutional guarantees of the ethnically based nation state and the interests of the titular nation, without explicitly mentioning them (Korhecz 2018, 572).
47 Decision IUz-882/2010, Part VI, 43–44.
48 Although the Framework Convention is not directly applicable in the states parties, and opinions of the Advisory Committee are not binding, national courts could greatly benefit from them, since they contain important guidelines for the conceptualization of minority rights.
49 Decision IUz-882/2010, Part V, 31; Part VI, 39, 45.
50 Decision IU 395/2005 of June 22, 2010.
51 Decision IUz-353/2009 of July 10, 2012, Part VI, 86.
52 Decision IUo-360/2009 of December 5, 2013, Part VII, 100–101.
53 Decision 691, Official Gazette of RS No. 14/1999. Decisions of the Constitutional Court of Slovenia are available online at <https://www.us-rs.si> (Accessed November 13, 2023.)
54 Decision 691, 1322.
55 Decision U-I-283/94 of February 12, 1998 (joined with case no. U-I-139/45).
56 Decision U-I-283/94, para. 3.
57 Decision U-I-283/94, paras. 34–37., the quote is from para. 36. Cf. Decision U-I-3597/2010 of July 29, 2011, of the Constitutional Court of Croatia which found the double vote of national minorities unconstitutional for violating the equal suffrage of all citizens.
58 Decision U-I-283/94, para. 49.
59 Decision U-I-283/94, para. 17.
60 Decision U-I-380/06-11 of September 11, 2008, para. 7.
61 Decision U-I-380/06-11, paras. 10, 12–13.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

62 Decision U-I-94/96 of October 22, 1998, paras. 1–2.
63 Decision U-I-94/96, paras. 9, 18-19, 22.
64 Decision U-I-94/96, paras. 25–33.
65 For a thorough explanation of multilevel constitutionalism, see Calliess and Schnettger 2020, 348–360.
66 The principle serves to search for solutions in cases in which constitutional norms of equal importance collide, but one norm should not take a back seat to the other. As Barak (2012, 346) put it, "at the constitutional level, balancing enables the continued existence, within a democracy, of conflicting principles or values, while recognizing their inherent constitutional conflict. At the sub-constitutional level, balancing provides a solution that reflects the values of democracy and the limitations that democracy imposes on the majority's power to restrict individuals and minorities in it."
67 The sliding scale model of minority rights was conceptualized by the judiciary in a well known case of the Supreme Court of Canada: *Mahe v. Alberta* [1990] 1 S.C.R 342.
68 See the opinions of the Venice Commission on the laws of Ukraine on education (CDL-AD(2017)030, adopted December 11, 2017), Ukrainian as the state language (CDL-AD(2019)032, adopted December 9, 2019), and national minorities (CDL-AD(2023)021, adopted on June 12, 2023, see especially para. 15. and references therein.)

References

Agarin, Timofey, and Malte Brosig (eds.). 2009. *Minority Integration in Central Eastern Europe. Between Ethnic Diversity and Equality*. Amsterdam – New York: Rodopi.

Agarin, Timofey, and Karl Cordell. 2016. *Minority Rights and Minority Protection in Europe*. London: Rowman & Littlefield.

Aukerman, J. Miriam. 2000. "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context," *Human Rights Quarterly* 22 (4): 1011–1050.

Barak, Aharon. 2012. *Proportionality: Constitutional Rights and their Limitations* (Cambridge Studies in Constitutional Law). Cambridge: Cambridge University Press.

BBC. 2013. "Croatians Tear Down Serbian Signs in Vukovar." September 2, 2013. https://www.bbc.com/news/world-europe-23934098. (Accessed November 13, 2023.)

Beretka, Katinka. 2020. "Fluid Borders of National-Cultural Autonomy: The Legal Status of National Minority Councils in Serbia," *Nationalities Papers* 48 (2): 273–288.

Beretka, Katinka. 2021. "Practice of the Constitutional Court of the Republic of Croatia in Field of National Minority Rights, with Special Regard to the Linguistic Rights of the Serbian Community in Croatia." In *Minority and Identity in Constitutional Justice: Case Studies from Central and East Europe*, edited by Norbert Tribl, 93–115. Szeged: International and Regional Studies Institute.

Beširević, Violeta. 2014. "Governing without Judges – The Politics of the Constitutional Court in Serbia," *International Journal of Constitutional Law* 12 (4): 954–979.

Calliess, Christian, and Anita Schnettger. 2020. "The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism." In *Constitutional Identity in a Europe of Multilevel Constitutionalism*, edited by Christian Calliess and Gerhard van der Schyff, 348–371. Cambridge University Press.

Csernicskó, István. 2022. "Nyelvi (emberi) jogok, jogsértések és biztonságpolitika összefüggései Oroszország Ukrajna elleni háborúja tükrében" [Correlations between Linguistic (Human) rights, Violations of the Law, and Security Policy in light of Russia's War against Ukraine], *Fórum Társadalomtudományi Szemle* 24 (2): 3–30.

de Varennes, Fernand. 1996. *Language, Minorities and Human Rights*. The Hague/Boston/London: Martinus Nijhoff Publishers.

Drinóczi, Tímea. 2022. "Illiberal Constitutional Courts of Hungary and Poland," *Państwo i Prawo* 10 (10): 3–25.

Gilbert, Geoff. 2002. "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights," *Human Rights Quarterly* 24 (3): 736–780.

Goldsworthy, Jeffrey. 2001. "Legislation, Interpretation and the Judicial Review," *The University of Toronto Law Journal* 51 (winter): 75–86.

Grigas, Agnia. 2016. *Beyond Crimea: The New Russian Empire*. New Haven, CT: Yale University Press.

Herman, Lise Esther. 2016. "Re-evaluating the Post-Communist Success Story: Party Elite Loyalty, Citizen Mobilization and the Erosion of Hungarian Democracy," *European Political Science Review* 8 (2): 251–284.

Hertel, Shareen, and Lanse Minkler. 2007. "Economic Rights: The Terrain." In *Economic Rights: Conceptual, Measurement, and Policy Issues*, edited by Shareen Hertel and Lanse Minkler, 1–36. Cambridge University Press.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

Kalantry, Sital, Jocelyn E. Getgen, and Steven Arrig Koh. 2010. "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: Focus on the Right to Education in the ICESCR," *Human Rights Quarterly* 32 (2): 253–310.

Korhecz, Tamás. 2018. "Ustavno-sudsko tumačenje i rasuđivanje – Sa osvrtom na praksu Ustavnog suda Republike Srbije" [Constitutional Interpretation and Reasoning – With regard to the Practice of the Constitutional Court of Serbia]. *Pravni život* 67 (12): 555–573.

Korhecz, Tamás. 2021. "Constitutional Rights without Protected Substance: Critical Analysis of the Jurisprudence of the Constitutional Courts of Serbia in Protecting Rights of National Minorities." In *Minority and Identity in Constitutional Justice: Case Studies from Central and East Europe*, edited by Norbert Tribl, 23–49. Szeged: International and Regional Studies Institute.

Korhecz, Tamás. 2022. "National Minorities – Constitutional Status, Rights and Protection." In *Comparative Constitutionalism in Central Europe. Analysis on Certain Central and Eastern European Countries*, edited by Lóránt Csink and László Trócsányi, 401–421. Miskolc – Budapest: CEA Publishing.

Kymlicka, Will, and Christine Straehle. 1999. "Cosmopolitism, Nation-States, and Minority Nationalism: Critical Review of Recent Literature," *European Journal of Philosophy* 7 (1): 65–88.

Kymlicka, Will. 2001. "Western Political Theory and Ethnic Relations in Eastern Europe." In *Can Liberal Pluralism be Exported?: Western Political Theory and Ethnic Relations in Eastern Europe*, edited by Will Kymlicka and Magda Opalski, 13–107. Oxford: Oxford University Press.

Kymlicka, Will. 2004. "Justice and Security in the Accommodation of Minority Nationalism." In *Ethnicity, Nationalism and Minority Rights*, edited by Stephen May, Tariq Modood, and Judith Squires, 144–175. Cambridge: Cambridge University Press.

Majtényi, Balázs, and András László Pap,. 2006. "Végtelen történet: a kisebbségi hovatartozásról" [An Endless Story: on Minority Affiliation], *Fundamentum* 10 (2): 93–106.

Marko, Joseph, Edith Marko-Stöckl, Benedikt Harzl, and Hedwig Unger. 2019. "The Historical-Sociological Foundations: State Formation and Nation-Building in Europe and the Construction of the Identitarian Nation-cum-State Paradigm." In *Human and Minority Rights Protection by Multiple Diversity Governance*, edited by Joseph Marko and Sergiu Constantin, 91–208. London and New York: Routledge.

Nagy, Noémi. 2018. "Language Rights as a Sine Qua Non of Democracy – A Comparative Overview of the Jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union," *Central and Eastern European Legal Studies* 2: 247–269.

Nagy, Noémi. 2021. "Pacing around Hot Porridge: Judicial Restraint by the Constitutional Court of Hungary in the Protection of National Minorities." In *Minority and Identity in Constitutional Justice: Case Studies from Central and East Europe*, edited by Norbert Tribl, 50–71. Szeged: International and Regional Studies Institute.

Palfi, Rita, Beatrix Asbóth, and Shafi Musaddique. 2019. "Diplomatic Tensions Flare between Romania and Hungary after Cemetery Incident." *Euronews*, June 10, 2019. https://www.euronews.com/2019/06/07/romanian-crowd-break-into-austro-hungarian-world-war-i-graveyard. (Accessed November 13, 2023)

Pan, Christoph, Beate Sibylle Pfeil, and Paul Videsott. 2018. *National Minorities in Europe. Handbook of European National Minorities, Volume* 1, Second Edition. Verlag Österreich – Berliner Wissenschafts-Verlag.

Papić, Tatjana, and Vladimir Djerić. 2018. "On the Margins of Consolidation: The Constitutional Court of Serbia," *Hague Journal on the Rule of Law* 10: 59–82.

Pentassuglia, Gaetano. 2009. *Minority Groups and Judicial Discourse in International Law. A Comparative Perspective*. Leiden and Boston: Martinus Nijhoff Publishers.

Pentassuglia, Gaetano. 2013. "Protecting Minority Groups Through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence." In *The Cultural Dimension of Human Rights*, edited by Ana Filipa Vrdoljak, 73–116. Oxford: Oxford University Press.

The Economist. 2013. "Flag Wars – A Row about a Hungarian Flag in Romania." February 21, 2013. https://www.economist.com/eastern-approaches/2013/02/21/flag-wars. (Accessed November 13, 2023.)

Sadurski, Wojciech. 2014. *Rights Before Courts – A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*. Dordrecht: Springer.

Sajó, András. 1993. "Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe," *The University of Chicago Law School Roundtable* 1 (1): 53–74.

Scaccia, di Gino. 2019. "Proportionality and the Balancing of Rights in the Case-law of European Courts," *Federalismi.it* 4: 1–34. https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38092. (Accessed November 13, 2023.)

Stone Sweet, Alec. 2012. "Constitutional Courts." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 818–831. Oxford: Oxford University Press.

Teofilović, Petar (ed.). 2020. *Nation, Community, Minority, Identity – The Protective Role of Constitutional Courts*. Szeged: Szegedi Tudományegyetem Állam és Jogtudományi Kar – Fakultet za Pravne i Poslovne Studije dr Lazar Vrkatic.

Teofilović, Petar 2021. "The Interpretation of Positive Discrimination in the Practice of Constitutional Courts of Slovenia and Croatia." In *Minority and Identity in Constitutional Justice: Case Studies from Central and East Europe*, edited by Norbert Tribl, 116–138. Szeged: International and Regional Studies Institute.

https://doi.org/10.1017/nps.2023.94 Published online by Cambridge University Press

Toplak, Jurij, and Djordje Gardaševic. 2017. "Concepts of National and Constitutional Identity in Croatian Constitutional Law," *Review of Central and East European Law* 42 (4): 263–293.

Tóth, J. Zoltán. 2022. "Constitutional Adjudication," In *Comparative Constitutionalism in Central Europe. Analysis on Certain Central and Eastern European Countries*, edited by Lóránt Csink and László Trócsányi, 361–383. Miskolc – Budapest: CEA Publishing.

Tóth, Norbert. 2017. "A Tool for an Effective Participation in the Decision-Making Process? The Case of the National Councils of National Minorities," In *Beyond International Conditionality: Local Variations of Minority Representation in Central and South-Eastern Europe*, edited by Balázs Vizi, Norbert Tóth, and Edgár Dobos, 225–246. Baden-Baden: Nomos.

Tribl, Norbert (ed.). 2021. *Minority and Identity in Constitutional Justice: Case Studies from Central and East Europe*. Szeged: International and Regional Studies Institute.

Tripković, Bosko. 2011. "A Constitutional Court in Transition: Making Sense of Constitutional Adjudication in Post-authoritarian Serbia." In *Constitutional Courts as Positive Legislators*, edited by Allan R. Brewer-Carias, 735–766. New York: Cambridge University Press.

Varga, Attila. 2020. "A nemzeti kisebbségek jogainak érvényesülése a román alkotmánybírósági esetgyakorlatban" [The realization of the rights of national minorities in the case law of the Constitutional Court of Romania]. In *Nation, Community, Minority, Identity – The Protective Role of Constitutional Courts*, edited by Petar Teofilović, 112–175. Szeged: Szegedi Tudományegyetem Állam és Jogtudományi Kar – Fakultet za Pravne i Poslovne Studije dr Lazar Vrkatic.

Weller, Mark (ed.). 2012. *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford: Oxford University Press.

Žagar, Mitja. 2002. Some Newer Trends in the Protection and (Special) Rights of Ethnic Minorities: European Context. In *Slovenia and European Standards for the Protection of National Minorities*, edited by Miroslav Polzer, Liana Kalčina, and Mitja Žagar, 77–104. Ljubljana: Information and Documentation Centre of the Council of Europe – Institute for Ethnic Studies, Ljubljana – Austrian Institute of East and Southeast European Studies.

Cite this article: Korhecz, T. and Nagy, N. 2024. The Achilles Heel of Constitutional Jurisprudence: Conceptualization of Minority Rights by Constitutional Courts in Central and Eastern Europe. *Nationalities Papers* 52: 661–684, doi:10.1017/nps.2023.94