SULYOK, MÁRTON:[1]

NATION, COMMUNITY, MINORITY, IDENTITY – THE ROLE OF NATIONAL CONSTITUTIONAL COURTS IN THE PROTECTION OF CONSTITUTIONAL IDENTITY AND MINORITY RIGHTS AS CONSTITUTIONAL VALUES[2]

1. Introduction

The papers published in this volume by distinguished Hungarian, Serbian and Serbian-Hungarian colleagues delve into questions motivated by the four

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[2] Support for a research project by this name was awarded by the Ministry of Justice of Hungary for a period of two years, to realize the goals and objectives described herein. Members of the research group formed under a cooperation between the Faculty of Law and Business Lazar Vrkatic of the UNION University in Novi Sad and the Faculty of Law and Political Sciences of the University of Szeged are: Prof. Dr. László Trócsányi, Prof. Dr. Tamás Korhecz, Dr. Petar Teofilovic, Dr. Attila Varga, Dr. Anikó Szalai, Dr. Márton Sulyok, Dr. Katinka Beretka, Dr. Noémi Nagy, Dr. Zsuzsa Szakály and Dr. Norbert Tribl.

"The research has been carried out and financed as part of the programs of the Ministry of Justice (of Hungary) enhancing the level of legal education."

words in the title: nation, community, minority and identity.

We could very well say that in the "age of constitutional identity" any identitarian inquiry is well brought to the foreground of academic discourse and political activism.

In the opening essay of his book, János Martonyi writes about the "age of identities" and asks the following questions in the context of global processes: *"Now that community identities built on a common cultural, linguistic and spiritual heritage and the role of national and European identity apparently and recognizably increases in the network of connection between the great civilizations of the world, wouldn't it be time to recognize the community rights of autochthonous national minorities and some forms of their autonomy?"*[3]

At this point, the litigation in front of the CJEU regarding the so-called Minority SafePack stirs some waves on the level of the European Union, in the context of the mildly successful direct democratic channel of ECI (European Citizens' Initiative) calling

[3] See: MARTONYI, János: Nyitás és identitás. Pólay Elemér Alapítvány, Szeged, 2018, 22-23.

"*on the EU to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity in the EU through the adoption of a series of legal acts.*"[4]

Against this background, the authors of the papers in this book concentrate on different perceptions and contexts of the above four elements (as constitutive of identity) on their own and on their possible connections and contexts in the jurisprudence of national constitutional courts in Hungary and in some of the countries of the Western Balkans region.

In 1902, one of my paternal ancestors, Ignácz Kuncz, wrote that *"the nation is the active collective subject of the state in thought, will and act."*[5] This thought perfectly describes the efforts in this book. The active collective subject that is represented by our thoughts as well as our mutual will and acts that have

[4] Cf. Press release on T/391-17, Romania v. Commission, p. 1. [online] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-09/cp190120en.pdf

[5] Original in Hungarian: *"A nemzet az activ államalany gondolatban, akaratban és tettben."* KUNCZ, Ignácz: A nemzetállam tankönyve, Stein János M. Kir. Könyvkereskedése, Cluj-Napoca, 1902, 4.

been poured into the joint research project detailed hereunder.

The project itself bears title of this introductory paper and focuses on examining those collective subjects (i.e. the nation and communities as in autonomies and minorities) that have an important bearing on how identity, and more importantly, constitutional identity is being framed in the judicial practice of those national high courts that have the power to interpret the constitution.

Obviously, given their nature, the exact mapping of these concepts through constitutional jurisprudence inherently entails and necessitates an inquiry into many non- or extra-legal factors. However, the papers in this book do not primarily intend to analyze the host of cultural, sociological, ethnic and political science viewpoints that arise but focus on constitutional interpretation and its role in the "ensoulment"[6] of the concepts of nation, community, minority and identity.

As identity was specified above as the leading motive for current legal and political debates on social or regional cohesion in Europe, I would like to start out

[6] Ensoulment is a religious doctrine referring to the point where the human being gains a soul. Here it is used to describe the moment the examined concepts are given specific and essential normative content through constitutional interpretation.

of the importance of this concept for this research and for contemporary academic discourse.

States and constitutions choose different paths to reflect on their own national, even constitutional identities. In this effort, they inadvertently channel emotions (and adjacent values and narratives) into constitutional design. *"Constitutional sentiments are particularly effective where they affirm an emerging national identity* [and successfully offer] *values for public identification."*[7] If we address this issue, we instantly think of Jürgen Habermas' theory on constitutional patriotism and how the people need to be able to identify with the value-choices of the constitution, which leads right back to certain aspects of the identity debate on "constitutional identity".

In the context of European integration, Leonard Besselink put forward already in 2010, that the infamous Article 4(2) of the TEU (the "identity-clause") creates interesting approaches to national (constitutional) identity in multinational (multi-ethnic) states because of the wording of the Article, as it specifies an obligation on the part of the EU to "respect the national identities of the Member

[7] See: SAJÓ, András: „Emotions" in constitutional design, ICoN, vol. 8, No. 3. 2010, 354-385

States". He framed it as a cultural aspect of national identity.[8]

Cutting the inquiry back to the current context, we should not forget that states hosting large diasporas as minority populace need to actively provide them – for lack of a better expression – with "an access to identity",[9] i.e. the means to exercise their rights as minorities.

The existence of such channels might eventually become a key element in a strategic partnership (especially within regions that are burdened with historical conflict and – from time to time – flammable neighborhood dynamics, such as the one affected by the research presented in the following chapters.)

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[8] BESSELINK, Leonard F.M.: National and constitutional identity before and after Lisbon. Utrecht Law Review, 3/2010, 36-39, esp. 43-44.

[9] The Constitution of Slovenia e.g. sets forth that the state „*shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities.*" In parallel, the Spanish Constitution, sets forth (in its preamble) to "*protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, and of their languages and institutions.*" For more on this issue see: SULYOK, Márton: Priorities for Kin-State Policies within Constitutions. Minority Studies, Special Issue (Trends and Directions of Kin-State Policies in Europe and Across the Globe) 16/2013, 231-237.

As a matter of fact, national self-definition – besides being the embodiment of the integrative function of constitutions (and preambles therein) – is a fundamental political decision. A choice reflected in proclaiming constitutional identity, and whether communities and minorities are considered emphatic elements therein – reflecting on public sentiment. However, *"constitutionalizing the dictates of public sentiment helps to* […] *extend the cultural environment that, in turn, provides for interpretive schemes for these sentiments."*[10]

Since we have invoked interpretive schemes, we should address the role of constitutional courts in looking at the constitutional text and defining elements of identity, be it national, collective, minority or constitutional.

There are many opportunities for these courts to do so, as the identity debate intensifies and they grasp at more and more target areas within the constitution to support their findings. One such area is that of preambles, from which the level of responsibility of the constitutional legislator toward elements of identity can be deduced. These provisions are interpretive tools (providing context and narrative) for the normative constitutional text as well and may

[10] SAJÓ: op. cit, 363.

set the tone of how these courts interpret the aforementioned emotions in constitutional design.

Should any sense of legal responsibility follow from the preambular text, courts may look at the constitution in terms of (i) whether it classifies certain minorities as constituent parts of the state (or maybe even provides them with parliamentary representation), or (ii) whether certain rights exist for those communities that identify as minorities (together with the contexts of their exercise), etc.

Sometimes, minorities and autonomies might even be enumerated as integral parts of a nation's self-proclaimed constitutional identity as interpreted by the constitutional court. This was what happened most recently in 2016, in the so-called 'identity-decision' of the Hungarian Constitutional Court (HCC). In HCC Dec. 22/2016 (XII. 5.) AB, regarding the division of competences between the EU and Hungary, the Court argued that Hungarian constitutional identity is a fundamental value acknowledged by the constitution. The decision also held that the elements of constitutional identity listed were "*identical with the constitutional values generally accepted today"*.[11] (i) The respect of autonomies under public law, (ii) equality of rights,

[11] Justification [65], HCC Dec. 22/2016 (XII. 5).) AB. [online] https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf

and (iii) the protection of the nationalities living with us were mentioned, and I only refer to these as they will have bearing on several aspects of the research laid out in the different papers of this book.

The 'identity-decision' of the Hungarian Constitutional Court evidences our presupposition that our four notions (nation, community, minority, identity) are interrelated, and we have defined the goals of our research in addressing these connections, as well as the individual notions.

Based on the above examples and introductory thoughts, in the following I shall outline the frames of the research undertook, through shortly presenting the main lines and directions of each of the chapters.

2. National and constitutional identity – Protecting achievements of the legal order?

The so-called identity debate, which examines the theoretical, jurisprudential and practical trends related to the issue of constitutional identity represents a quite popular current strand of academic literature in constitutional law and constitutional theory. Based on what has been concluded above regarding the Hungarian 'identity-decision', holistic identity research can in principle be tied to the

research of the rights of nationalities and minorities, representing one of the pillars of our research.

However, in the framework of problem determination it shall be examined and described what guiding principles in the theoretical and practical aspects of the constitutional identity debate define European and EU legal discourse. The reason for this is that these will orient the examination of the role and placement of minorities and minority rights, e.g. based on samples drawn from tests and doctrines developed in the practice of the HCC.

Regardless, at the origins of the identity-debate lies the long-standing discussion within the framework of European integration regarding the conflict of EU law and the constitutional rules of the Member States. The Member States and the Court of Justice of the European Union naturally have different approaches to this topic, leading to different emphases in the interpretation of the notion of constitutional identity.

Independent of this clash of points of view, the concept of constitutional identity is in and of itself a divisive phenomenon, given the difficulties of conceptual demarcation and the different interpretations of the different states and regions. This is especially true in those regions where for historical reasons identity was lost in transition from political regime to political regime, and where it gets

lost in translation,[12] communicating current priorities towards the international community or international organizations accompanied by heightened international scrutiny in the current state of globalization.

At a minimum, though, there is consensus among the legal scholarship of European states that the concept of constitutional identity should be interpreted by those high courts that have the power and competence to interpret the constitution. In the context of European Union countries, some standout opinions exist, however, which consider judicial applications and interpretations of constitutional identity as 'nuclear weapons', foreseeing a 'judicial cold war' and violent reactions from both sides in all contexts where Member States "*wish to protect the*

[12] From a historical-political aspect, in the context of Macedonian constitutional identity, member of the Venice Commission, KARAKAMISHEVA-JOVANOVSKA Tanja writes in her paper titled "Macedonian constitutional identity: Lost in translation or lost in transition" that constitutional identity is the „*institutionalized and collective political identity of* [a] *country that all citizens identify or bond with within the national constitutional order*.." [online] https://www.academia.edu/8372637/Macedonian_constitutional_identity_Lost_in_translation_or_lost_in_transition

national legal order from European constitutional spillovers".[13]

As the Hungarian Constitutional Court has stated in its deservingly famous 'identity decision', constitutional identity *"is not a universal legal value, it is a feature of specific States and of their communities, of the nation, that does not apply (the same way) to other nations."* Thus, according to the HCC, constitutional identity derives, on the one hand, from the historical events; and, on the other hand, from the peculiarities defining the nation (in the case of Hungary, the achievements of the historical constitution). As such, the Court considers the protection of nationalities a historical feature of Hungary and an achievement of the historical constitution. In addition, in the catalog of (constitutional) values established in the identity decision, the HCC defines the protection of nationalities as one of the constituent elements of constitutional identity.

There are many difficulties in applying the concept of constitutional identity, which can mostly be traced

[13] e.g. FARAGUNA, Pietro: Taking Constitutional Identities Away from the Courts. Brooklyn Journal of International Law. 2/2016, 492-578, citation from 572.
[online]
https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1422&context=bjil

back to the multifaceted nature of the concept: the difficulty of delimiting constitutional and national identity, and the difficulty of identifying the values to be protected and the related legal consequences. When we talk about constitutional identity, we shall ask ourselves who or what is the identity-bearing entity, what is the community whose identity we want to protect? Who form this community and how can we identify and determine the identity of the community to be protected?

In the papers dealing with the meaning and implications of constitutional identity, the authors Norbert Tribl and Zsuzsa Szakály will lay out some relevant results of their 2018 survey research mapping national constitutional court case law across the EU.[14] In this survey, national responses have

[14] In more detail, see: SZAKÁLY, Zsuzsa – TRIBL, Norbert: Örökkévaló identitás? Lehetséges kapcsolat az alkotmányos identitás és az örökkévalósági klauzulák között. In Pro Futuro, 2018/4, pp. 9-25. The questions of the survey read as follows and are cited here for context:
(1) Addressing "constitutional identity", our research has revealed that the very notion remained far undefined across the integration. Consequently, our aim is to map out what the Member States understand under this concept. We approach "constitutional identity" as the "self-definition" of the constitutional systems of the respective Member States; as the ensemble of fundamental constitutional provisions and institutions with historical origins that define the constitutional system. We consider these to be untouchable by EU law.

been collected and analyzed within the following subject matter:

(i) The connection of constitutional identity and eternity clauses: Whether the states examined apply eternity clauses or similar constitutional provisions, and whether national constitutional court case law refers to constitutional identity providing room for the inference that eternity clauses are somehow understood as manifestations of constitutional identity.

(ii) The importance of references to constitutional identity (and its relevant interpretation) in cases where a collision between the constitution and EU law has been identified.

In his article, Norbert Tribl, will also present samples from the constitutional case law of many EU Member States, reaching beyond the above-specified territorial scope. The reason for this is that not all

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(2) As the inherent attribute of the constitutional system, constitutional identity embodies "constitutional uniqueness", which is reflected through the national constitutions and acts of constitutional magnitude (e.g. organic laws in France).

(3) In our point of view the concept of national identity under Article 4 (2) TEU shall be matched up with the notion of constitutional identity. Throughout our research, we apply the definition of national identity as "the Lisbon-concept" of constitutional identity under Article 4 (2) TEU.

constitutional courts from the research area have given answers to the questionnaire, and the ones that did outside of the territorial scope of this research provide fertile ground for comparative examination when considering possible paths of interpretation concerning the case law of the courts pertinent to the geographic scope of our research.

Responses from the Croatian constitutional court cite that fundamental constitutional principles and values, the structure of the state, the idea of the social state, the protection of national minorities and democratic exercise of power are considered priorities, while their Slovakian counterparts make reference to some decisions dating back as far as 2005, placing the person of the president of the republic representing statehood and sovereignty, the republican form of government, rule of law, democratic exercise of power, and protection of fundamental rights and freedoms within the realm of constitutional identity.[15]

It is interesting to observe that the protections of fundamental rights and freedoms, the rule of law, democratic exercise of power and the form of government are key components of some well-known eternity clauses as well. This begs the question whether constitutional identity is like the ‘emperor’s

[15] Consider Constitutional Court decisions no. II. ÚS 171/2005, III. ÚS 427/2012 és PL ÚS 7/2017

new clothes' or it does actually add protections to what has previously been known as eternity clauses. Some argue that they cannot be completely equated, but there is certainly a mutual effect they have on each other.[16]
This is the issue that is at the center of the paper written by Zsuzsa Szakály, who examines the possible roles of eternity clauses in the context of constitutional identity in EU Member State constitutions.

Her paper looks at the practice of the Constitutional Courts of the Member States regarding eternity clause, where it has bearing on limiting constitutional amendment. Based on many examples from the EU28, from among the countries included in our research area, e.g. the constitution of Romania includes what is called an explicit eternity clause, while Slovakia and Croatia possess implicit (or implied) eternity clauses that have been unveiled by respective the constitutional courts.[17] Her analysis

[16] Cf. POLZIN, Monika: Constitutional Identity as a Constructed Reality and a Restless Soul. German Law Journal 7/2017, esp. 1607-1610.
[17] For a brief note on the Serbian case see, pondering upon the relation of unamendable provisions within the constitution and constitutional identity, see: KORHECZ, Tamás: Az alkotmánymódosítás eljárásjogi és anyagi jogi korlátai – különös tekintettel Szerbia hatályos alkotmányára. In: Közösség, Kutatás, Kihívás, Vajdasági Magyar Tudóstalálkozó

also refers to the actual problem of having to interpret these issues in the context of EU integration. As more and more Member States define their constitutional identity, elements of these definitions interact not just with each other, but after a while also with the content of eternity clauses.

At one point, Szakály reaches an interesting conclusion regarding the above-mentioned Hungarian 'identity-decision', which implicates the achievements of the Hungarian historical constitution as a basis of reference for constitutional identity. This conclusion is that the achievements of the historical constitution prescribed under Article R) of the Fundamental Law as interpretive tools when the courts look at the constitution are in fact implied, implicit eternity clauses in as much as they have been "found" by the Constitutional Court through interpreting the text.

This assertion becomes even more interesting in light of the fact that when tautologically describing the "constitutional self-identity" of Hungary, the Hungarian Constitutional Court mentions that the respect of public law autonomies and the protection of national minorities living in Hungary (along with every other enumerated element of identity) are all

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2018 Konferenciakötet, Vajdasági Magyar Tudományos Tanács, Újvidék, 2019. 53-64.

such achievements of the historical constitution, upon which the legal system rests.[18]

Whether this is true or not, remains a question to be answered by Hungarian constitutional scholarship, but here we turn to those aspects of our research, which deal with protections for minority rights.

3. Minority identity and rights – Protecting nationalities as constitutional values?

One of the central social, geostrategic and political issues of the Central and Eastern European region is that of (national) minorities. This can be traced back to the questions raised above: who form the community and how the identity of the community to be protected can be identified and determined.

The issue became a priority through the aspirations of nation- and nation-state building in the 19th century, often as a driving force for wars and genocide. Nation-building, as a violent solution to the 'minority issue' was a popular tool throughout the 20th century[19]; however, the international

[18] See: Justification [65], HCC Dec. 22/2016 (XII.5.) AB

[19] More recently, we are faced with abhorring examples from outside of Europe, e.g. in the case of the Rohingya religious minorities in Myanmar, Bangladesh and India, among others,

expectation is and continues to be that minorities should be dealt with respecting human rights, through the constitutional protection of minority rights, as well as without redrawing state boundaries.

The framework for managing the issue has already been formulated in several international conventions and political documents, especially after the end of the Cold War, in the Council of Europe, the OSCE, but also in the process of the continuous and gradual expansion of the European Union.[20] Conventions and recommendations made within the framework of international organizations have gradually been incorporated into the constitutions of the countries of the region, as well as into their legal system. Although certain national features can be discovered in this area, minority rights can now be found in the constitution of all multiethnic countries in the region.

Several states also recognize collective rights as constitutional rights, but individual minority rights, such as the right to preserve and express identity; the right to the establishment and operation of national minority self-government and other organizations,

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but Hungary and its neighboring countries have seen their fair share of violence in this regard as well in the past.

[20] For a most recent summary of these international instruments see: SZALAI, Anikó: Nemzeti kisebbségek védelme, in: Lamm, Vanda (szerk.): Emberi Jogi Enciklopédia, HVG-Orac, 2018, 523-530.

institutions; the right to education in one's native language; or private and public language use rights are generally recognized in the countries of the region.

However, minority rights enshrined in constitutional documents often lack effective legal protections, and through various monitoring procedures it can be found that many rights exist only in theory, without any actual footing in national policies on minorities. For instance, in the field of policies on education and language use, the most recent case of the infamous Article 7 of the Ukrainian language law can serve as an excellent example of how daily politics is able to relativize these rights and their effective enforceability. Some problems remain regardless the protections enshrined in international conventions, and even despite some explicit protections in the national constitution as well.

When such events unfold, the expectation is that the highest courts of utmost importance, notably constitutional courts step up and invoke protections for these rights. However, in light of all of the above, it remains a question whether constitutional courts are ready, willing and able to perform this task properly? If their competences and powers allow, to what extent do they rely on the results and approaches of foreign constitutional or international courts? What intrinsic or extrinsic factors can

influence them? Is their approach influenced by the existence of judicial and/or constitutional dialogue or by any other "cross-fertilization"[21] resulting in the betterment of constitutions?

In her paper, Katinka Beretka has examined the case law of the Constitutional Court of Croatia from the point of view of protecting the rights of national minorities since the turn of the millenium. Through the identification of general and common patterns in relevant jurisprudence, she argued that the Court has consistently respected these in adjudicating on constitutional complaints and in the review of conformity of norms with the constitution in the domain of minority rights. This inquiry obviously necessitates a brief presentation of the powers and competences of the Court before presenting any concrete legal approach they might have taken to the cases without "politicizing" the debate too much, as it has been argued above as well.

Turning to another national constitutional court, this time the Hungarian, Noémi Nagy points out that from the altogether 10.000 cases decided by the HCC since its establishment in 1989, about 1% of the cases

[21] cf. e.g. HALMAI, Gábor: Constitutional Transplants. Roger Mastermann, Robert Schütze (eds.): The Cambridge Companion to Comparative Constitutional Law. Cambridge, University Press, 2019. Halmai uses the expression on p. 580.

deal with minority rights issues. Agreeing with her that the burden of protecting these rights ultimately rests on the shoulder of the Court, we should not disregard the fact that the Court is bound to the content of the petitions filed to it. Consequently, if the subject matter of cases eventually reaching the quorum of the HCC is not overloaded with minority rights issues, does not exclusively signal that the protections afforded for these rights are not a priority for them. In this context, Nagy classifies the case law of the Constitutional Court along three questions addressed: 1. What is a minority? 2. Who belongs to a minority? 3. What are minority rights?

While we will find out from Norbert Tribl's paper that the Slovenian Constitutional Court has so far remained silent on constitutional identity, their extensive case law regarding the protection of minority rights provides fruitful grounds for analysis for Petar Teofilović. In his paper, the Serbian expert will detail how Slovenia guarantees special status and special rights to the autochthonous national communities (Italians and Hungarians). He argues that although these national communities are not the only, nor the biggest ones in the country they are singled out for reasons of protecting their identity and their rights as a form of positive discrimination (affirmative action). Regarding constitutional court case law, he identifies several cases on the above grounds and others having to do with the abstract review of conformity of laws with the constitution.

On this note, Prof. Tamás Korhecz, a Serbian Hungarian expert examines the decades-old and rich traditions of the Serbian constitutional and legal framework protecting the rights of national minorities on both the individual and collective level. He offers an in-depth insight into the specific provisions of the Serbian constitution protecting these rights and examines the role of the Constitutional Court in upholding these and in creating safeguards and guarantees for their protection. Korhecz seeks answer to the question of how big of an actual practical weight these constitutional guarantees protecting minorities have within the Serbian legal system, and how effective is the protection and enforcement of these rights in front of the Constitutional Court. For this purpose, he relies on the interpretative powers of the Court and the resulting case law, with specific focus on several cases that lead him to conclude that the Serbian Constitutional Court proved to be activist in very few exceptional cases while exhibiting traditional judicial self-restraint in engaging with the issue of extending constitutional protections minority rights.

Our Romanian Hungarian expert, prof. Dr. Attila Varga analyzes the case law of the Constitutional Court of his home country, focusing on a triple structure in which minority rights are protected under the constitution: (i) as fundamental constitutional principles, (ii) as fundamental constitutional rights,

and (iii) as elements of the organization of the state. As we will see, through various cases, the Romanian Constitutional Court has many times interpreted the scope of application of the rights of national minorities in different contexts in constitutional review. While shedding light to interesting trends, such as the number of ex ante constitutional review of legal norms tripling in one year between 2017 and 2018, he also summarizes the case law of the Constitutional Court following a clear logical pattern, from those decisions that have touched upon the content of the constitutional revisions affecting minorities, moving n to those cases, in which the Court as part of reviewing the conformity of laws with the constitution, looked at specific questions of language use in administrative proceedings or in education or regarding the concept of autonomy, to mention a few.

In his ambivalent conclusions, Attila Varga arrives at the statement that despite a seeming lack of creative activism on the part of the Romanian Constitutional Court, one should remain positive about the fact that the Court's interpretation of minority rights stay well within the exigencies of the constitutional framework that Romania created to protect these rights. Preserving the constitutional frames of minority protection remains an important issue.

4. Learning from Each Other: Objective or Conclusion?

As part of our research, based on comparable criteria, the constitutional court case laws of Serbia, Croatia, Slovenia, Slovakia, Romania and Hungary are to be examined in the field of national and constitutional identity, extending to the protection and promotion of minority rights from 1990 to this date.

All of the selected countries are European, former Socialist countries with varying traditions and roots based in rule of law, that have developed with regional specificities even after the regime change. Constitutional and policy convergence between these countries therefore needs to be treated delicately due to regional and national characteristics. However, the selected countries forming one geographical area, being adjacent to each other. Another commonality between the countries selected for research is that, with the exception of Hungary, the indigenous Hungarian minority is the most populous minority in these countries or, based on available census data to date, is one of the most populous minorities.

Each of the countries selected was, at least in part, established in the area of the historic Hungarian Kingdom, therefore the Hungarian nation-state idea has seriously influenced and shaped legal and

political thinking about nation-concept, as well as the concept of the ethnic nation-state. This characteristic of a unified nation-state is another common denominator in the group of countries selected, where the existence, role and rights of national minorities are acknowledged and recognized on the level of the constitution and in sectoral legislation.

Regarding the international framework limiting the scope of research, it is noteworthy to point out that (the prospect of) membership in the Council of Europe and in the European Union has lead each of the selected countries to ratify the foundational documents of minority protection adopted by the Council of Europe. (To this date, Serbia is a candidate country of the EU, and negotiations regarding minorities are open to this date.[22])

[22] The "Serbia 2019 Report" aptly summarizes the status quo on p. 24, by stating: *"The legislative and institutional framework for upholding human rights is broadly in place. Amendments improving the legislative framework related to national minorities were adopted in June 2018. However, consistent and efficient implementation of legislation and policies needs to be ensured. […] Serbia needs to step up measures to protect the rights of persons facing discrimination […] and other vulnerable individuals; […] ensure a consistent implementation of legislation regarding national minorities [...] leading to a tangible improvement in the effective exercise of their rights across the country."* (For details, see: p. 30 of the Report [online] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf

The initial objective of the research team, over two years, is to present the relevant activity of the constitutional courts[23] of the region and – through evaluating these in a comparative approach – to compile a comprehensive body of the most important decisions of these courts concerning minority rights as well as national and constitutional identity.

The extent to which a given constitutional court has protected minority rights so far constitutes the baseline of the criteria for the analysis to be prepared. Furthermore, it is also examined whether a specific constitutional court had in fact already taken to interpreting national or constitutional identity and, if so, how extensively did they do so.

In this context, it is important to examine the question whether there is a consistent frame of reference in terms constitutional / national identity that has been forged in national constitutional court case law, or did it remain on the level of proclamations, declarations, third-ranking references to support otherwise material argumentation?

[23] As for the activity of the courts, certain preliminary issues also need to be addressed, such as, e.g. the correlation of judicial atittudes and personalities and the contents of the decisions they promote, the depths of legal training and the general interest of legal science regarding the protection of minority rights.

If the courts apply on constitutional identity, do they differentiate between the concepts of national and constitutional identity? If so, under what criteria are distinctions made? In what areas do constitutional courts refer to national and/or constitutional identity and what meaning do they ascribe to it? How does state (or regional) history influence, if at all, the practice of the constitutional courts examined in the context of national/constitutional identity? Despite any eventual differences are there any similarities between the doctrines, values or principles declared by these courts?

On this level, points of connection can be investigated linking constitutional identity with the protection of minority identity and relevant minority rights, so the question is whether any reference to national minorities and their rights can be found in the "identity practice" of the constitutional courts examined. If so, a further question is, what is the exact function of these links in terms of the actual protections afforded for national minorities in enforcing protections for their rights.

If minority rights conflict with other constitutional rights (e.g. in the form of competing – or concurring – fundamental rights positions' – a test recently elaborated in HCC practice), what is the relative importance of minority rights in establishing the fair balance (schonender Ausgleich) between these competing fundamental rights? Can constitutional

courts be considered as activist in their approach of minority rights in any of the countries examined? If there is activism, is it affirmative in terms of minority rights or does it go against them? What does protecting constitutional values mean in upholding protections for fundamental minority rights?[24] What can the different systems learn from each other – is there any 'cross-fertilization'?

To sum up, we do not need to look too far from what has been argued – in the context of comparative constitutional law – by Rosalind Dixon and Eric Posner writing about the limits of constitutional convergence, also specifically addressing the role of learning theories.

They conclude that the main "constraint on convergence through learning […] is the inherent diversity of states, both in their social conditions and the goals of their populations."[25] Popular preferences

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[24] Cf. The part of Article I. para (3) of the Fundamental Law of Hungary relevant to this issue sets forth that „[a] *fundamental right may only be restricted to allow the effective use of another fundamental right* ***or to protect a constitutional value***" (***emphasis added***). How could similar approaches limit or expand the scope of minority rights in concrete cases if, e.g., we consider access to (or expression of) identity a constitutional value.

[25] DIXON, Rosalind – POSNER, Eric: The Limits of Constitutional Convergence. Chicago Jounral of International Law. 11/2011, 399-423, citation from 414.

aside, however, learning from other states have their limitations and caveats, and distinctions need to be made between constitutional convergence and policy convergence.

As they argue: "States that observe successful policies in other states are most likely to want to experiment with those policies before entrenching them. Otherwise, they may find that foreign practices do not translate well domestically, but are nonetheless difficult to reverse. In many cases, constitutional learning will also point to the dangers of particular constitutional choices, in which case, domestic decision-makers are even less likely to want to entrench legal changes domestically."[26]

In this context, despite the obviously very delicate regional or even national political, cultural settings in which the issues examined are embedded, one thing is certain: minority (rights) issues will continue to expose domestic (constitutional) courts and policy-makers to the same or largely similar issues over time. Consequently, relevant interpretation will continue to place burdens on the shoulders of the constitutional courts in the region examined not just due to our shared history but also, looking ahead, due to the benefits and pitfalls of intra-EU and international migration as well.

[26] DIXON, Rosalind – POSNER, Eric: op. cit. 413.