

Márton Sulyok:¹

Nation, Community, Minority, Identity

– Reflective Remarks on National Constitutional Courts Protecting Constitutional Identity and Minority Rights²

1. Nation, Community, Minority, Identity: Escaping Prisons of Circumstance Together?

The authors of a closing paper of any research project usually have their work cut out for them. This task is all the more complicated with research projects that have taken more years to complete. While this is an introductory paper for the present volume, it also serves the purpose of an ‘epilogue’ for our two-year research, that was many times obstructed, diverted and prolonged by the COVID-19 pandemic. I now have undertaken the task of summarizing whether all the research that has been conducted by my distinguished Hungarian, Serbian and Serbian-Hungarian colleagues as part of our research team has reached its intended goals.

The project originally rested on two interconnected approaches that could be best described by the following headings:

- (i) *Minority identity and rights – Protecting nationalities as constitutional values*
- (ii) *National and constitutional identity – Protecting achievements of the legal order*

In the following, I shall stand on these two legs when introducing the results of the second phase of our effort and summarize our overall results, with references to previous findings. Last year, in the prologue for the previous book³ publishing the results of the first milestone of our research project I referred to an “age of constitutional identity” brining identitarian inquiries in the foreground of legal academic discourse and political activism.

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3 See: Márton Sulyok: *Nation, Community, Minority, Identity – The Role of National Constitutional Courts in the Protection of Constitutional Identity and Minority Rights as Constitutional Values*. In: Petar TEOFILOVIC (ed.): *Nation, Community, Minority, Identity: The Protective Role of Constitutional Courts*. Innovariant, Szeged, 2020, p. 6. Available online: <https://www.researchgate.net/project/NATION-COMMUNITY-MINORITY-IDENTITY-THE-PROTECTIVE-ROLE-OF-CONSTITUTIONAL-COURTS>

Since then, a major win for minorities in European politics has been the recent (17 December 2020) adoption by the European Parliament of a resolution⁴ supporting the European Citizens Initiative famously called *Minority SafePack* with 524 votes cast in favor. The resolution marks an important milestone in the 7-years-long struggle for EU-level support to national and linguistic minorities. Normally, at this point it is on the European Commission to provide a proposal for EU legislation on the matters of establishing an agency dedicated to dealing with linguistic diversity, supporting media services behind linguistic minorities and cultural actors operating in regional or minority languages – among others. The answer came not long after the beginning of the new year, when in their response, the European Commission halted the initiative by stating that no legislative proposal will be put forward to the EU legislator because “[w]hile no further legal acts are proposed, the full implementation of legislation and policies already in place provides a powerful arsenal to support the Initiative’s goals.”⁵

Besides this “lopsided” win⁶ for those in favor of “access to identity”, the COVID-19 pandemic has also shown us in many ways that an inward-looking, identity-focused discourse might just sometimes provide the necessary boost in many contexts to strengthen our stamina in facing the consequences of the “new normal”, of the way we are forced to live in the prison of our current circumstances. Just as the concept of “constitutional identity” is oftentimes found to be locked up in its own prison of circumstances due to an increasing reliance on the concept by national constitutional courts in the context of European integration and its undeserved association with populist or Euro-pessimist overtones, the realization of many minority rights and identities also have their own prisons of circumstance on their respective national levels.

In this book, building on the findings of the first phase of the research, Tamás Korhecz and Petar Teofilovic present a detailed review of Serbian, Croatian and Slovenian constitutional case law. Korhecz examines whether Serbian court has thus far failed in establishing the fair balance between the competing (concurring?) constitutional values (principles) of a unitary nation state and constitutional minority rights. Teofilovic looks at whether the interpretation of affirmative action regulations by the Slovenian and Croatian constitutional court serves as one of the many possible proper means to introduce balance into the constitutional regulation of majority and minority rights.

A well-rounded comparative approach – as originally intended – is *prima facie* apparent from these two papers, which resonate well with each other in terms of the absence or presence of positive legal or interpretive means to introduce a fair balance into the protection of minority rights. All this also corresponds to many of the questions initially raised as part the introduction of our research project, such as:

4 See: European Parliament resolution of 17 December 2020 on the European Citizens’ Initiative ‘Minority SafePack – one million signatures for diversity in Europe.’ Available online: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0370_EN.html

5 See: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_81

6 Cf. Balázs TÁRNOK: Widening the gap between the EU and its citizens – On the European Commission’s decision rejecting the Minority SafePack Initiative. *Constitutional Discourse*. 10 March 2021. <https://www.constitutionaldiscourse.com/post/balazs-tarnok-widening-the-gap-between-the-eu-and-its-citizens>

- *What is the relative importance of minority rights in establishing the fair balance 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?*
- *What can the different systems learn from each other – is there any ‘cross-fertilization’?’⁷*

Korhecz identifies a significant problem regarding the Serbian practice already in the title of his analysis wherein he refers to the fact that minority rights in Serbian constitutional case law seem to be reflected as ‘constitutional rights without protected substance’,⁸ thereby referring to an apparent discrepancy between the letter of the law and the relevant practice and alluding to the necessity of the simultaneous inquiry into law in books as well as into law in action (famously attributed to Roscoe Pound⁹).

Korhecz then looks at the protections offered to minority rights under the light of examining the Constitutional Court of Serbia (CCS) as a counter-majoritarian check protecting the rights of national minorities as a form of constitutional tolerance, or toleration, which he mentions in reference to Sadurski.¹⁰ Not to dwell for too long on the disputed semantic and semiotic distinction between the two terms but there seems to be a thin but noteworthy line separating the two in our context. This issue was already approached by Murphy in 1997, who stated that

*“[t]he tendency to use tolerance and toleration as roughly interchangeable terms has encouraged misunderstanding of the liberal legacy and impeded efforts to improve upon it. We can improve our understanding by defining “toleration” as a set of social or political practices and “tolerance” as a set of attitudes”.*¹¹

Some definitions – while failing to address its difference from ‘tolerance’ – approach ‘toleration’ in a negative fashion, arguing that it equals

*“the conditional acceptance of or non-interference with beliefs, actions or practices that one considers to be wrong but still “tolerable,” such that they should not be prohibited or constrained.”*¹²

7 Sulyok 2020, pp. 33-34.

8 Tamás Korhecz: *Constitutional Rights without Protected Substance: Critical Analysis of the Jurisprudence of the Constitutional Courts of Serbia in Protecting Rights of National Minorities*. In Present Volume, pp. 21-46.

9 Roscoe Pound: *Law in Books and Law in Action*. In: *American Law Review*, 1910/44, pp. 12-36.

10 Korhecz 2021, p. 25.

11 Andrew R. Murphy: *Tolerance, Toleration, and the Liberal Tradition*. In: *Polity*. 1997/4, p. 593.

12 Cf. <https://plato.stanford.edu/entries/toleration/>

I would certainly argue that the protection of minority rights should not be considered “wrong but still tolerable” in a modern democracy, the emphasis should much rather be on their conditional acceptance as it is reflected in many statutory regulations in the examined countries, some of which are specifically mentioned in his examination of the Central and Eastern European (CEE) legal systems contextualizing the Serbian case study he presents.

As part of this, Korhecz structures the problems of the Serbian regime around overregulation and inconsistency juxtaposed with the formally very extensive and generous provisions on minority rights, with special focus on the constitution, wherein references to the spirit of (interethnic) tolerance, intercultural dialogue and affirmative action also appear. The criticism of the legal framework based on the constitution laid out by Korhecz is structured around its unambiguity due to well-intentioned ‘overregulation’, leading up to an important question regarding the extent to which the constitutional text can limit the legislator in defining the scope of minority rights.

The inquiry at this point turns toward the role of the CCS in providing guidance through interpretation, shaped by a culture of deference and restraint argued based on findings from Serbian authors. This restraint is illustrated by the number of cases dealing (even if tangentially) with minority rights issues during the 30 years of practice of the CCS (1990-2019) examined. This number is 45, which seems quite low in contrast to what is written regarding the complexity and importance of relevant constitutional and sectoral regulation and to the latest publicly available statistical numbers (from 2013), according to which the CCS has an annual 24.791 cases in front of it.¹³

Regarding the success of initiatives, Korhecz points to a form of bias towards subjects of minority rights deduced from – among others:

- (i) the CCS’s attitudes toward the petitioning (minority vs. state) entities, and
- (ii) their preferred unwillingness to declare unconstitutionality of a challenged regulation for violations of minority rights (depending on the nature of the above entity)

Turning to actual jurisprudence, Korhecz picks up the examination with an eye on cases focusing on the constitutionality of Serbian laws regarding minority rights and on important issues of methodology (stating the imbalance between the grammatical interpretation or legalism preferred over theoretical interpretation or doctrinarism or a larger reliance on ECtHR case law as a form of comparative reasoning in individual complaints then in petitions for constitutional review.) From a methodical and methodological approach to

13 Cf. 2016 Serbian Report on the Current State of the Judiciary, by the Anti-Corruption Council of the Serbian Government, p. 18. Available online: <http://www.antikorupcija-savet.gov.rs/Storage/Global/Documents/izvestaji/REPORT%20ON%20THE%20CURRENT%20STATE%20IN%20THE%20JUDICIARY.pdf>. Minority rights issues, possibly due to their delicate nature, seem to share this fate (of low occurrence) in other countries’ constitutional court practices as well. Noémi Nagy has already made this argument in her paper on Hungary regarding the findings of the first phase of this project, and she also relies on this in her contribution to this book. Cf. Noémi NAGY: *Pacing around hot porridge: Judicial restraint by the Constitutional Court of Hungary in the protection of national minorities*. In Present Volume, p. 51.

cases lying before the CCS follows a verdict on the consistency of such practice, which will turn out less flattering in light of the empirical research carried out.

The eventual presentation of what he calls “cornerstone cases”, Korhecz sheds light on the CCS’s attitudes capriciously shifting between restraint and activism when faced with important issues on minority rights. He arrives at the conclusion that the consensus reached by authors on the Serbian ‘law in books’ coincides with an empirical analysis of Serbian law in action and this points to the existence of a ‘dysfunctional marriage’ between the positive and the negative legislator, i.e. they coexist without proper communication on the issues of importance examined and despite many considerable efforts taken by the CCS in its “cornerstone decisions”, a ‘culture of prevention’ dominates the CCS’s relationship with the National Assembly to the detriment of lasting outcomes in favor of the constitutional values represented by minority rights.

In his paper,¹⁴ still in this context, Petar Teofilovic also focuses on issues of constitutional interpretation undertaken by constitutional courts in the domain of ‘positive discrimination’, otherwise more widely known as “affirmative (or positive¹⁵) action”¹⁶ in Slovenia and Croatia (between 1990 and 2020, effectively until 2016, based on available data). The preferential treatment of minority groups, e.g. through the introduction of quota systems is a widely applied tool to foster equal opportunities, but are not necessarily subject to non-derogation in a goal-oriented approach, as argued by Teofilovic. Constitutional courts’ responsibility in these terms lies, according to him, in their argumentation regarding any challenged affirmative action.

After a broad-ranging enumeration of the different minority rights provided for by Slovenia and Croatia¹⁷ and their individual and collective nature, Teofilovic carries out the comparison of the two countries’ constitutional jurisprudence in illustrative detail, focusing on three main areas:

- (i) representation and holding public office,
- (ii) use of minority language,
- (iii) education (also extending to minority language) and other “special” rights (regarding constitutional remedies for minorities).

14 Cf. Petar TEOFILOVIĆ: *The Interpretation of Positive Discrimination in The Practice of Constitutional Courts of Slovenia and Croatia*. In Present Volume, pp. 114-135.

15 See e.g. Section 11 of Act CXXV of 2003 on equal treatment (Hungary). It is available in English at the website of Hungarian Equal Treatment Authority: https://www.egyenlobanasmod.hu/sites/default/files/content/torveny/J2003T0125P_20190415_FIN%20%281%29.pdf

16 First introduced in the United States, the expression stood for a remedy introduced by the 1964 Civil Rights Act against those violating the Act, i.e. for actions affirming that no discrimination takes place. (See: Title VII of the 1964 Civil Rights Act, e.g. Section 706 (g) (1). Available: <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> Since then, it is more widely used for any preferential action or positive steps taken to provide certain minorities with advantages.

17 This chapter also provides the necessary background information of the national legal frameworks examined by Anikó SZALAI from the point of view of the CoE mechanisms in this domain. Anikó SZALAI: *Mapping the implementation of minority protection in Central European countries by the Council of Europe*. In Present Volume, pp. 70-90.

Teofilovic connects the categories of special rights and positive measures in his comparison of the two countries' relevant practices focusing on the methodological segment of the courts' understanding of affirmative action.

Ad (i) most importantly, the „model of reserved seats” is mentioned and the ensuing controversies decided by the two constitutional courts are analyzed – among others – in light of equal suffrage. To resolve the disputes, as it will be presented, the Croatian Constitutional Court (CCC) looked to the fundamental values of the constitution to declare the unconstitutionality of the challenged electoral measures with the exception of positive measures taken to ensure the effective participation of smaller minorities against larger ones. While this decision took place in 2011, the Slovenian court examined the same issue already in 1998 (however, with regard to the members of autochthonous communities enjoying a special status in the country: the Italians and the Hungarians).

Ad (ii) the collision of territorial and constitutional norms is brought to the foreground in the context of official documents and direct democracy and their afterlife, with due regard to the absence or respect of the duty of balancing undertaken by the respective courts. In other instances, consumer protection and fair trial arose in a linguistic context where constitutional review was directed at examining pressing social needs, necessity in a democratic society and the possible arbitrariness of any challenged affirmative action.

Ad (iii) “access to identity” issues are discussed in relation to education and fair trial (in terms of access to constitutional remedies enforcing minority rights) that are – as expected – heavily influenced with local specificities such as the special status of autochthonous communities in Slovenia or the unique interpretation of the concept of “those entitled” to file constitutional complaints in Croatia, excluding organizations unaffected by the alleged violation but acting to remedy them on behalf of victims (as a possible form of affirmative action in the earlier discussed original (American) sense of the word as a remedy against discrimination).

A comparative summation of these different paths leads Teofilovic to distinguish between the two models of affirmative action: one (that I now call the active priority model applied by Slovenia), consciously and actively prioritizing affirmative action to support the special status groups of the two autochthonous communities, and a second (that I now call restrictive conditionality applied by Croatia) viewing minority rights in concurrence with the needs to the majority, imposing conditions for their applicability, and also applying a restrictive approach in any interpretive task aimed at their active development.

Katinka Beretka joins this line of research with her detailed analysis¹⁸ of linguistic rights of what she calls “new minority groups”, through the presentation of the linguistic rights of the Serbian minority group in Croatia. Linguistic rights are traditionally attached to the use of one's native (in this case minority) language when participating in public affairs. In those countries where this might exacerbate the peaceful coexistence of majority and minority populations due to its role in people's “access to identity”, courts will step in to

18 Katinka BERETKA: 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 Present Volume, pp. 91-112.

decide the resulting legal disputes. The prison of circumstance in which Beretka analyzes these issues is constituted by the break-up of the Socialist Federal Republic of Yugoslavia and the ensuing changes in the “*ethnic-linguistic-religious structure of the respective [successor states] population.*”¹⁹

Since this is a given, a categorization is introduced by distinguishing old and new minorities also in terms of the success of their efforts to secure their rights in correlation with the duration of their political and legal struggle to reinforce the enjoyment of their rights. Soon after, Beretka moves on to a line of argument looking at the features and the content of constitutional and sectorial regulation of minority rights in Croatia, analyzing issues regarding the hierarchy of legal norms, based on some core determinations made by the CCC.

In the case law examined by Beretka issues of cultural autonomy, language use, proportional representation in general, minority representation in local and regional bodies are most often touched upon. Regardless of the motivation behind the petitions bringing these issues in front of the CCC (also dissected as part of the research), the role of the court is assessed in a functional approach (focusing on an analysis of its powers and competences, with a special focus on constitutional complaints) and the consistency of the relevant practice is evaluated through ten key cases (decided between 2005 and 2019) regarding e.g. proportional representation, cultural autonomy, language rights in general, including the bilingual use of identity documents.

Continuing along the lines of mapping out constitutional courts’ relevant practices, the research carried out by Noémi Nagy²⁰ analyzes the causes and the effects of judicial self-restraint in the practice of the Hungarian Constitutional Court (HCC) regarding these rights. The first “prison of circumstance” she identifies is the factual minority of relevant cases in the overall caseload of the HCC (1%)²¹, however, this also facilitates a clearer delineation of the topical focus of jurisprudence around questions regarding the concept of “constituent part of the state”²² (and who qualifies for such a classification).

Based on this, another issue Nagy examines is “access to identity”, i.e. legal channels for minority self-identification, leading directly to the question of the scope and extent of minority rights, elaborated in this book. Starting out from various legal aspects of the majority-minority counterbalance dilemma, the parliamentary representation of nationalities²³ (minorities) is addressed (specifically provided for by the Fundamental Law), the extent

19 BERETKA 2021, p. 94.

20 NAGY 2021, pp. 48-67.

21 For comparison, in this aspect, Beretka comes to the conclusion that from almost 100.000 cases decided by the CCC over the course of 30 years about 10 dealt with violations of minority rights and most of these were not constitutional complaints but requests for review of constitutionality (norm control). Cf. BERETKA 2021, p. 102.

22 Alluding to nationalities, the renewed Hungarian terminology for minorities after the Fundamental Law.

23 For a brief review of different models of kin-state policies of Hungary’s neighboring countries and the relevant theories regarding the loyalty of nationalities and their parliamentary representation in Hungary, see: ÁGNES M. BALÁZS: *Kötődés és identitás. – A nemzetiségek országgyűlési képviselője, az identitás fogalma az anyaországhoz való viszony tükrében.* [Belonging and identity – The parliamentary representation of minorities and the notion of identity in light of their relationship to the kin-state.]. In: *Kisebbségkutatás, Minority Studies*, 2018/1, pp. 7-27. Available online: http://epa.oszk.hu/00400/00462/00078/pdf/EPA00462_kisebbségkutatás_2018_01.pdf

of which varies from symbolic recognition (like the long-lasting debate²⁴ regarding Australia's indigenous minorities) to providing actual veto rights in legislative matters directly concerning national minorities (e.g. under Article 64 of the Slovenian constitution²⁵).

Nagy remains pessimistic regarding any early release from this prison of circumstance as she moves on to address the right to self-governance (with all its corollaries) and its pitfalls identified in HCC case law. A main take-away from her relevant analysis in this regard is that HCC case law seems to have failed to stick to a conceptual framework when it analyzed petitions regarding the issue of "consent" of minority self-governments and flailed between approaches of participation, empowerment, consent and consultation when trying to grasp the essence of self-governance rights in this context.

Moving on to another "prison of circumstance", language rights are addressed, with the many aspects that – according to Nagy – have gotten lost in translation (regarding name usage for localities and individuals, procedural language rights), based on review of the constitutional case law. She finishes her paper by introducing HCC Decision 3192/2016 (X. 4) AB, where the HCC – while rejecting the petition – interpreted the right of minorities to use their native language as a human right, with Justice Czine concurring, calling attention to the relevance of the issue in minority protection arguing that a substantive examination of the claims for violation of language use rights should have been carried out, but it was not warranted by the claims introduced by petitioners with regard to their rights.

The last chance for the HCC to address the issue of language rights in administrative and civil proceedings presented itself via the 2020 HCC Decision No. 2/2021 (I.7.), based on (prima facie) judicial initiatives petitioning the ex post constitutional review of legislation relevant to language use in the Civil Procedure Code and in the General Administrative Procedure Code. (In reality, as the HCC argued the judge initiating the proceedings "missed the mark", because in reality the initiative petitioned for a declaration of legislative omission, which was not possible under the circumstances, so the petition was denied.)

Since this decision was adopted and published after closing the manuscript for this book, Nagy could not include it in her analysis, but if I were to apply her approach to characterize it, it could easily be considered another missed opportunity, with Justice Czine this time in dissent. However, we should not forget that this time a constitutional requirement was also specified by the HCC, with the intent to orient future judicial practice on the issue of language rights. Reading point 1. of the operative part of the decision specifying this requirement (as follows), one might think that Justice Czine's previous concurring opinion was heard loud and clear by the majority:

"The Constitutional Court – acting ex officio – determines that in the course of applying para. (3) of Article 113 of the Act CXXX of 2016

24 Summarized by: Murray GLEESON: *Representation in keeping with the Constitution*. A worthwhile project. Uphold & Recognise, 2019. (online) https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5d30695b337e720001822490/1563453788941/Recognition_folio+A5_Jul18.pdf

25 Cf. <https://www.us-rs.si/media/constitution.pdf>

on Civil Procedure, it shall be considered a constitutional requirement arising from the fundamental right to use one's native language under para (1), Article XXIX of the Fundamental Law that all parties required to be present in front of the court, and who are residents of Hungary and members of the nationalities recognized under the Nationalities Act, shall be entitled to the oral use of their nationality language under the same conditions."²⁶

We should bear in mind that the possibility to provide for constitutional requirements is a tactical weapon in the hands of the HCC (courtesy of the new Act on the Constitutional Court²⁷), but applying it does not absolve the HCC from under the constitutional responsibility to reinforce the protection of minorities in their jurisprudence. This decision can certainly be considered as a step toward more effective protections for minorities in judicial proceedings, but I am sure that future case-law along this path will provide fertile ground for continued research in this field as well. What we learn from Noémi Nagy's elaborate analysis of the HCC's minority rights jurisprudence is that there is always room to improve. Her detailed historical review of constitutional case-law from the 1990 transition sheds light on many omissions, myths, ideas, misnomers and misconceptions regarding the missed opportunities in law-making and constitutional interpretation.

Justice Czine's dissent in the above-mentioned language-use case also makes reference to the European Charter of Regional and Minority Languages and missed opportunities in this regard, which takes us directly to the next paper compiled and published as part of this second book on our research findings. In it, Anikó Szalai focuses on the Council of Europe (CoE) as the regional, external framework of protecting minority rights and directs her inquiry to Central and Eastern European countries. This system of protections is built on a dual foundation (two prisons of circumstance) comprising the Framework Convention for the Protection of National Minorities (FCNM, 1995) and the European Charter (ECRML, 1992).

Szalai's research outlines a contemporary map of implementation measures introduced in Serbia (2002-2019), Croatia (1998-2019), Slovenia (2000-2017), Romania (1999-2018), Slovakia (1998-2019) and Hungary (1999-2020) as evaluated in reports by the respective states and by the Advisory Committee (AC). During these approximately 20 years, all countries have relied on a "similar legal heritage" after Trianon, nonetheless with significant differences in terms of minority protection, but within very common problems regarding the integration of the Roma community – argues Szalai.²⁸ Two well-constructed geographic clusters are created for the assessment based on geopolitical considerations and proximity.

In the first cluster (Serbia-Croatia-Slovenia), the following issues are apparent impediments for significant change:
in Serbia, the AC points to lacking inter-ethnic tolerance in general (realized and fostered through education) and citizenship status discrimination regarding the Roma that

26 and without additional costs (as per point [135] of the justification of the HCC Decision quoted)

27 Cf. Article 46, para. (3), Act CLI of 2011. Available in English: <https://hunconcourt.hu/act-on-the-cc>

28 Szalai 2021, p. 70.

remained unresolved during the 16 years that have passed between the first and the last AC opinion.

in Croatia²⁹, the AC's most recent opinion (2015) points to lacking inter-ethnic tolerance and dialogue in general. It needs to be added that – among other international monitoring mechanisms – the 2020 cycle of UPR on Croatia refers to a National Roma Inclusion Strategy in education (2013-2020)³⁰ intended to bridge these gaps, but no results are yet at our disposal to evaluate its success. Efforts towards the reduction of discrimination of the Roma have also been made, but problems of ethnic profiling and segregation in education still persist after four cycles of AC assessment.

in Slovenia, the emphasis is on the differences between the realization of minority rights for the Italian and Hungarian communities versus the Roma communities. Despite all this, based on the AC assessments' conclusions, Slovenia seems to be the outlier of the group, where inter-ethnic tolerance has been successfully reinforced through education and media.

In the second cluster (Romania-Slovakia-Hungary) the obstacles that remain seem to be the following:

- (i) in Romania, the existence of an actual and effective legislative framework is brought into question,³¹
- (ii) in Slovakia, effective access to education (combined with language use), health care, employment and investigation of alleged violations thereof in terms of the Roma minority (and their children) is identified (noting that access to education in one's native language is constitutionally bound to national citizenship, which generally and persistently limits all minorities' relevant rights.)
- (iii) in Hungary, an issue that will possibly have effects on the next monitoring cycle regarding the thus far positively assessed rights protection is the impending merger of the Equal Treatment Authority with the Office of the Commissioner for Fundamental Rights (effective as of 1 January 2021) that was unknown to the AC at the time of the adoption of the latest report (26 May 2020). Besides this, discrimination against the Roma minority in terms of access to education (segregation), employment and health care is mentioned as a persisting obstacle.

29 Some aspects of Croatia's accession to the EU are also mentioned by Beretka regarding the status and application of the Charter and the Framework Convention, see: BERETKA 2021, pp. 97-98.

30 https://www.upr-info.org/sites/default/files/document/croatia/session_36_-_may_2020/compilation_of_un_croatia_english.pdfhttps://www.upr-info.org/sites/default/files/document/croatia/session_36_-_may_2020/compilation_of_un_croatia_english.pdf, §41

31 Cf. the website of the lower house of the Romanian parliament lists the debate of the latest 2005 draft on the status of national minorities as being in progress, with the last development listed to have happened in 2012. (http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=6778) Some sources mistakenly identify this as a law in effect, but more evidence is found, also by international monitoring bodies that the law has not yet been adopted. Regardless, the most recent Romanian national report contains an admission in this respect, stating that in their view „there is no obligation under the Framework Convention to adopt such general legislation on the protection of the rights of persons belonging to national minorities. The Consultative Committee did not evaluate in its previous reports on Romania that the lack of a general law on the status of national minorities hampers the promotion and protection of the rights of persons belonging to national minorities in Romania (especially those considered as numerous in the total population). The Government of Romania is also unaware of the existence of a general policy of the Advisory Committee to recommend to all States Parties the adoption of a general law in the field as a condition for the fulfillment of the obligations under the Framework Convention.” (Cf. Fifth Report submitted by Romania pursuant to Article 25, paragraph 2f the Framework Convention for the Protection of National Minorities, ACFC/SR/V(2019)013, p. 11. Available: <https://rm.coe.int/5th-sr-romania-en/16809943af>)

Now, rounding up the protection of minority communities and their rights at the national level as reflected in constitutional jurisprudence and in the assessment of the CoE, we shall again change course for a bit. As the geographic focus of the studies presented so far shifted from Hungary toward the neighboring countries, another shift in focus is necessary to include the entirety of the Western Balkans into our inquiry as per our originally defined research objectives. Some on the brink of establishing formal ties with the European Union, some being tangled in complicated relations with their neighbors, the countries of the Western Balkans also exist within their own prison of circumstance.

As Tim Marshall, author of the New York Times bestselling geopolitics book *“Prisoners of Geography”*³² puts it, we are as nations and communities all prisoners of our geography and the circumstances they brought about. Therefore, all decisions and policies flow from such a pre-determined environment and this has been the case, historically too, not just for the superpowers but for all the countries subject to our research as well. Marshall also uses Churchill’s infamous quote, which goes like this: *“It is a riddle wrapped in a mystery inside an enigma; but perhaps there is a key.”*³³ Churchill made this comment in trying to explain to his fellows the actions of Russia, and the key he alluded to was focus on national interest.

The key to successfully reconciling the notions of nation, community, minority and identity (as part of their respective constitutional arrangements and national interests) in all of the countries subject to our research remain “mystery-wrapped riddles inside an enigma” due to the very complicated historical and geopolitical entanglements they are bound together by. However, scientific inquiry can hopefully help untangle some of the ingredients of success and provide a key.

The same goes for the Western Balkans, and in this book Zsuzsa Szakály examines the connected application of the notions of nation and identity in the constitutions of the countries of the Western Balkans (as understood geographically, not for the purposes of European Union enlargement and neighborhood policy). Szakály examines the constitutions of Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, North Macedonia, Serbia and Slovenia (all former Member States of Yugoslavia) and their terminology describing their minority communities and their nation-concepts, as well as references to the sources of sovereignty and identity.

Besides the different national interests that guided these nations in adopting their national constitutions on common historical roots, Szakály reflects on the “international factors”³⁴ that have influenced these processes, e.g. in terms of EU enlargement negotiations and the like. We shall first and foremost bear in mind that the reconstruction period after the South-Slavic Wars (Yugoslav Wars) saw the adoption of constitutions for the newly emerging state entities causing large minority populations being amassed in each of the countries. What is this, if not a prison of circumstance? Remedying the effects of

32 Cf. Tim MARSHALL: *Prisoners of Geography – Ten Maps That Tell You Everything You Need To Know About World Politics*. Elliott and Thompson, 2016.

33 Cf. <http://www.churchill-society-london.org.uk/RusnEnig.html>

34 ZSUZSA SZAKÁLY: *Intertwined – The Notion of Nation and Identity in the Constitutions of the West Balkan*. In Present Volume, p. 137.

the long-lasting conflict, all constitution-makers in the region adopted a kin-state model and created constitutional frameworks which tried to protect minority rights and this is reflected, as Szakály argues, in the “caring attitude”³⁵ of these constitutions towards minority communities.

The adoption, imposition of a constitution to restore order in a community is undoubtedly a sovereign act of subjection of the united community to constitutional rule. The source of this sovereignty is usually traced back to the nation – as it can be familiar from many preambular constitutional texts – and this is why the concurrent presence of the notions of nation (either cultural or political), minority and identity need to be examined as Szakály comes to the conclusion between the lines.

Szakály’s textual inquiry identifies many “nationalist” constitutions that provide references to the nation, and many outliers who “avoid the question”, and along with it an actual choice between the political or cultural approach to “nationhood”. The same line of inquiry is then continued for minorities, describing the different terminological choices and their backgrounds, taking us through short case studies of Serbian and Bosnian cases in front of the ECtHR, adjudicating on the experiences of the nationalities of these countries.

Thus far, the notions of nation, community and minority have been linked with one another and with the constitution. Adding identity to this mix, Szakály rightly cites Jacobsohn’s seminal work on constitutional identity, which argues that the identity to which constitutions point is gained through experience. In the countries of the region examined by Szakály, the experiences of the past by the different nations, minorities and communities make it very hard to single out one majority identity to protect, and minority communities’ identities (and their protection) are always included in the constitutional text alongside national identity.

If there is an “age of identities”,³⁶ to which János Martonyi alludes in his latest book, then the Western Balkans is a region of identities. The same can be said nowadays about the European Union as well, which is – legally and politically speaking – way more than a region, but geographically (and in the language of European human rights protection), we are still regarding it as such.

It is time to shift our focus accordingly, and address the most recent infatuation with the “identity debate” in Europe, which focuses on a very special approach to the notion of identity, “*inherent in [Member States’] fundamental structures, political and constitutional*”³⁷, also known by European constitutional scholarship (and previously referred to) as constitutional identity. The spread of this line of argumentation – considered by many as a veritable prison of circumstance obstructing the development of a viable future of

35 SzAKÁLY 2021, p. 138.

36 See: János MARTONYI: *Nyitás és identitás*. [Opening and identity]. Pólay Elemér Alapítvány, Szeged, 2018, pp. 22-23.

37 Article 4(2), Treaty on the European Union. Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M004>

Europe – is mainly attributed to populist political pressures and trends, but the legal and constitutional dimension of this “specter” should not be neglected either.

In the second phase of our research, this aspect was further examined by Norbert Tribl based on his initial findings³⁸ about the HCC’s identity decision, linking autonomies and national minorities to the concept of constitutional identity as part of a broader survey sent to European constitutional courts in 2018-2019.

In our “age of identities” previously recalled, new political and legal impetus has been given to the “identity debate” by the May 5 2020 decision³⁹ of the German Federal Constitutional Court (GFCC) dubbed PSPP (after the public sector purchase program it concerned). Albeit this decision squarely falls outside of the predetermined geographical focus of our research, it cannot be circumvented in this field for two reasons:

- (i) Although it did not spend much time with fine-tuning the German-type ‘identity review’ of the challenged ultra vires EU legal act in the case at hand, it was heavily criticized⁴⁰ for its identitarian tone ‘against’ the idea of integration, which it chose in light of its self-proclaimed constitutional responsibility for the European integration, the so-called ‘*Integrationsverantwortung*’.⁴¹ In this light, we can agree that responsible thinking about the future of EU integration in constitutional terms requires a careful consideration of all aspects of constitutional identity on both the EU and the national levels and this also extends to the examination of scientific approaches and trends to this concept in countries that expect to soon join the integration.
- (ii) As part of such approaches, the paper of Norbert Tribl focuses on the similarities and the differences between the PSPP decision and the 2016 “identity-decision” of the Hungarian Constitutional Court, defining some of the elements of

38 Published in our first book on this research, see: Norbert TRIBL: *Alkotmányból tükröződő önmeghatározás? Szemlények a nemzeti alkotmánybíróságok formálódó joggyakorlatából*. [Self-determination reflected in the Constitution? Excerpts from the evolving case law of national constitutional courts]. In: Petar Teofilovic (ed.): *Nation, Community, Minority, Identity: The Protective Role of Constitutional Courts*. Innovariant, Szeged, 2020, pp. 83-112.

39 The decision merged several proceedings in front of the GFCC – 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

40 On this decision being the prelude to a possible “Dexit”, cf.: Daniel GROS: *Voice or Exit? What other choice for Germany’s Constitutional Court*. (2020) Available online: www.ceps.eu/voice-or-exit/. For a joint open letter of many European constitutionalists arguing that such a decision by a Member State constitutional court risks destabilizing the whole of the integration process. R. Daniel KELEMEN et alii: *National Courts Cannot Override CJEU Judgments*. (2020) Available online: <https://verfassungsblog.de/national-courts-cannot-over-ride-cjeu-judgments/> (and on a critical account of the previous reaction: Maciej KRUGEL: *Is the Theory Culpable? A Response to a Statement against Constitutional Pluralism*. (2020) Available online: <https://blogs.eui.eu/constitutionalism-politics-working-group/theory-culpable-response-statement-constitutional-pluralism/>). For a French commentary arguing that the decision shall have catastrophic ripple-effects for the Eurozone and the future of Europe, while also satisfying Europeistes”, cf. François ASSELINEAU: *La décision historique du Tribunal constitutionnel allemand du 5 mai 2020*. [The historic 5 May 2020 decision of the German Constitutional Court] www.upr.fr/actualite/la-decision-historique-du-tribunal-constitutionnel-allemand-du-5-mai-2020/

41 It is a lesser-known fact in Europe that the German legislator has already codified this constitutional responsibility into law in 2009, at the time the Lisbon Treaty entered into force, relying on the protection of subsidiarity and on the necessity of a two-thirds majority decision of German legislators for any modifications of the Treaty-basis of the EU under Article 23 GG. To find the law mentioned: Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz – IntVG). Available online: www.gesetze-im-internet.de

Hungarian constitutional identity in relation to the achievements of the historical constitution and the effects of these decisions on the development of identity-theories, working toward a hypothesis that national constitutional courts might indeed have respective “constitutional responsibilities” to protect (national) constitutional identity as part of the process of European integration.

In his research,⁴² Norbert Tribl focuses the inquiry into the PSPP decision to its similarities with the “identity practice” developed in recent years by the Hungarian Constitutional Court (HCC). The judicial arena cannot be circumvented when it comes to defining the relationship of EU law and national constitutional law (more exactly the national constitution). This is the price we pay, as Tribl rightly argues, for the lack of political consensus on the European level, and as a corollary the traditional functions of centralized, Kelsenian constitutional courts are complemented by an “integrational function” guided by a sense of responsibility for the integration, very similar to that elaborated by the GFCC in the above-mentioned PSPP decision.

When tracing this change in function, Tribl goes back to 2010, starting with the introduction of the first Hungarian “Lisbon judgment” by the HCC, wherein the notion of constitutional identity first appeared. Six years later some difficult dilemmas were to be dealt with in HCC Decision 22/2016 (XII.5), the so-called “identity decision”,⁴³ which undertook the interpretation of the “integration clause” of the Fundamental Law of Hungary inspired by previous German constitutional case law. Reliance by the HCC on German constitutional jurisprudence has always been a given, many pattern- and pacesetting decisions on the GFCC have been taken into consideration regarding the development by the HCC of personal data protection or privacy jurisprudence, personality rights and self-determination, and this time, constitutional identity as well.⁴⁴

The next HCC decision Tribl examines is 2/2019 (III.5) and the choice was motivated for its different approach. It also focuses on the integration clause, but the focal point of the decision is not constitutional identity. It concentrates on the theoretical monopoly of the constitutional court to interpret the national constitution with an authoritative, erga omnes effect. The analysis also presents parallels with the German PSPP decision and the constitutional responsibility for the integration mentioned therein.

42 TRIBL 2021, pp. 158-174.

43 For this research project, the “identity decision” was already important for another reason as well, because at the outset, we could already rely on one of its most relevant conclusions, i.e. that the elements of constitutional identity are “identical with the constitutional values generally accepted today”, and among these the respect of autonomies under public law, equality of rights, and the protection of the nationalities living with us (i.e. minorities) have been mentioned. This actual link between minorities and constitutional identity reinforced our selection of the four interconnected keywords (nation, community, minority and identity) underlying our research project. Cf. SÜLYÖK 2020, pp 5-36.

44 On the use of foreign law by the HCC, cf. CSABA ERDŐS – FANNI TANÁCS-MANDÁK: *Use of Foreign Law in the Practice of the Hungarian Constitutional Court – With Special Regard to the Period between 2012 and 2016*. In: Giuseppe Franco FERRARI (ed.): *Judicial Cosmopolitanism*. Brill, Nijhoff, 2019, p. 618., Zoltán SZENTE: *A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999-2008 között*. [Using international and foreign court judgments in the practice of the Hungarian Constitutional Court between 1999-2008]. In: Jog – Állam – Politika, Budapest, 2010/2.

2. Escaping the ‘Prison of Circumstance’ Together? Impossible or Improbable – On Lessons Learned

Having reviewed how our different authors have approached the keywords defining our specific research fields, the most difficult task still lays ahead: an assessment of our success.

Our original research objective was to conduct an in-depth analysis of Serbian, Croatian, Slovenian, Slovakian, Romanian and Hungarian constitutional frameworks (regulation and jurisprudence) regarding national and constitutional identity, extending to the protection and promotion of minority rights from 1990 to this date under the keywords of nation, community, minority and identity.

All of the originally selected countries are former Socialist countries in Europe with varying traditions and roots based in rule of law, that have developed with regional specificities even after the regime change. On top of regional specificities, many different national characteristics have influenced the development of constitutional frameworks and practices over time, testing the limits of their European “prison of circumstance”. Regarding further criteria for the selection of the countries subject to our research please refer to the introduction of the first book on our research findings.⁴⁵

Within this framework, over two years, our researchers spent time analyzing the different perceptions of these four key words within their respective fields and areas (international public law, constitutional law), and on their possible contexts appearing in national constitutional courts’ jurisprudence on minority rights and, where available, national and constitutional identity, with any possible links between the two spheres.

Our researchers have, over the course of two years, examined frames of reference (and their consistency) regarding the keywords developed in national constitutional court case laws and identified shortcomings as well as signs and directions for possible future development. Due attention was given to the fact that historical and regional prisons of circumstance might have bearing on the content and context of national, constitutional identity and its appearance in constitutional jurisprudence. Due to a comparative point of view, similarities and differences were identified on several accounts regarding certain principles and constitutional values.

In many chapters of this book and the previous one we can find numerous examples of minority rights’ conflicting with other constitutional rights and the relative importance of minority rights as part of a balancing exercise was always assessed by our authors, if not by the respective constitutional courts themselves. Law in books was indeed compared to law in action. Judicial restraint, deference, activism, neglect are all attitudes that appear in the different case studies for the countries subject to our research.

The mindset of constitutional convergence and learning theories mentioned already in the introduction of this research project in the first volume of our findings has already

45 Cf. SULYOK 2020, pp. 29-31.

imposed a limit on our inquiry. This limitation is our prison of circumstance. We are also prisoners not just of circumstance but also of geography. Prisons we cannot always escape – not even together.

Whether we are in the EU or under the auspices of the CoE, or specifically in the Western Balkans, the inherent diversity of the national contexts examined, the different social conditions and overall popular goals⁴⁶ mixed with the sometimes very much connected national past and present puts us in a situation where – even after carefully studying the protective roles and approaches of the different national constitutions and constitutional courts – we still have more questions than answers regarding the peaceful cohabitation of nations, communities, minorities and identities.

46 Cf. Sulyok 2020, pp. 5-13. For the reference on learning theories and convergence, see: Rosalind Dixon – Eric Posner: *The Limits of Constitutional Convergence*. In: Chicago Journal of International Law. 2011/11, pp. 399-423, at 413-414.