

National Minorities – Constitutional Status, Rights and Protection

Tamás KORHECZ

ABSTRACT

National minorities and their status, rights and protection are among most sensible and disputed political issues all over Central and Eastern Europe (CEE). All eight analysed nation states constitutionally recognise national minorities and at least some group-specific minority rights. The list of constitutional group-specific minority rights varies, and it is longest in Serbia, Slovenia and Romania; however, national legislators in all states have wide discretion to regulate these constitutional rights and to determine their scope and content with laws. The constitutionally protected minorities are named only in Slovenia and Croatia, and constitutions only exceptionally make difference between minorities based on territoriality or numerical concentration. The jurisprudence of constitutional courts generally reveals no particular judicial activism in this area – with the exception of the Constitutional Court of Slovenia – and courts have usually failed to conceptualise minority rights and made no proper equilibrium between minority rights and constitutional provisions protecting and promoting the nation state and dominant position of the titular nation. Furthermore, in some states, the status of minorities is tacitly still more a state security issue and less a constitutional law question.

KEYWORDS

National minorities, titular-dominant nations, constitution, group-specific minority rights, nation state building, equality.

1. Introduction

This chapter has the ambition to describe, compare and analyse the current constitutional framework for the protection of national minorities in Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. Beyond the analyses of the relevant constitutional provisions, the chapter also includes some reflections regarding the protection and practice of constitutional, group-specific minority rights. Before delving into these issues, it might be useful to address the historical and political roots of the minority issue in these states, such as the ethnic composition of these areas.

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In the twentieth century, the eight analysed states underwent turbulent, dynamic processes of state formation, unification and state partition, losing and gaining sovereignty, territories and population, and expulsions and exchanges of residents with other states. What seems permanent in the region is the centrality of the minority issue as well as the variety of state policies and responses for managing the status of minorities in CEE countries. Many scholars identify the heart of the problem to be the idea of the nation state ‘one nation (people) one state’, where the borders of the state and nation overlap, meaning that the population of the state is composed of inhabitants belonging to one nation and sharing the same language, culture and traditions. Such a fiction or ideal of the nation state simply does not correspond to the physical reality, meaning that nation states are usually inhabited by diverse ethnic groups that use different languages and share different cultures and traditions.¹ From the late nineteenth century and onwards, CEE states have pushed forward various drastic and soft nation-state building policies – accompanied with a corresponding legislative framework – to achieve homogeneity of the population, to ensure that the titular majority nation gradually becomes the state-bearing nation with a dominant influence on state institutions. After World War II, CEE countries became part of the communist area; however, even under the rule of the international and supranational communist ideology, explicit or implicit nation state-building took place in these countries.² Furthermore, after the collapse of the Communist Bloc, in post-communist state building, during the period of EU integration, the accommodation of ethno-national diversity was mainly overshadowed by the importance of political processes revolving around the ethnicity of the majority, state-bearing community.³ In parallel with nation-state building policies insuring the domination of the state-bearing majorities, states were also developing legislative frameworks protecting ethnic diversity and guaranteeing group-specific rights to national minorities or persons belonging to these minorities to protect their distinct language and identity and ensure their effective participation and representation in state institutions. All analysed states, or their predecessors, were parts of the international system of minority protection under the auspices of the League of Nations⁴; consequently, they created their domestic legal frameworks for the protection of national minorities and ethnic diversity. Most recently, after the collapse of the Socialist Bloc, in the course of EU integration, these states ratified international minority treaties framed within the Council of Europe.⁵ The current legal framework for the protection of national minorities in these states, developed in the last hundred years, shows some common features but also noteworthy differences between states.

1 Kymlicka and Strehle, 1999, p. 73; Pan, Pfeil and Videsott, 2017, p. 3.

2 Agarín and Cordell, 2016, p. 35.

3 Agarín and Cordell, 2016, pp. 57 and 59.

4 Macartney, 1934, pp. 212–423.

5 The European Charter for Regional and Minority Languages (1992) and The Framework Convention for the Protection of National Minorities (1995).

The minority issue and its management in nation states have two, often competing dimensions: human rights (equality) and security. The human rights approach is based on the concept of full and effective equality of all inhabitants of states, irrespective of the native language, culture and traditions (ethnicity). Such an approach requires the protection of national minorities, guarantees of various group-specific minority rights, differentiation and sometimes even affirmative measures ensuring the equality of the majority and minorities. Numerically strong, concentrated minorities with developed national identities usually respond to nation-state building policies with ethnic homogenisation as well as claims for self-determination, territorial autonomy and ethnic-based power-sharing, and such claims are often considered a threat to the security of states.

Although the turbulent conflicts and coercive nation-state building policies in the analysed states altered the ethnic landscape substantially during the twentieth century,⁶ national minorities still inhabit the analysed states in significant numbers. According to 2011 censuses, in the analysed states, 3–20% of the total population belongs to various national minorities, demonstrating that national diversity is not merely a relic of history but a living reality in the region.⁷

State	Titular ethnic group and its proportion in the total population	Most numerous minorities with their overall number	Tendency concerning the number of the persons belonging to national minorities increasing/decreasing
Croatia	Croats – 90.4%	Serbs (186,633), Bosniaks (31,479), Italians (17,807), others and no indication (84,962)	Decreasing
Czech Republic	Czechs – 95%	Slovaks (147,152), Ukrainians/Ruthenians (53,992), Poles (39,096), others (209,404)	Decreasing
Hungary	Hungarians – 85.6	Roma (315,583) Germans (185,696) Romanians (35,641), no indication (664,401)	Increasing
Poland	Poles – 94.8%	Kashubians (232,547) Germans (147,814), Ukrainians (61,532). Others and no indication 591,334)	Increasing

6 The most drastic change to the ethnic map of CEE countries occurred with the Holocaust of Jews and the expulsion of millions of ethnic Germans from Czechoslovakia and Poland, where they had lived for centuries, after WWII. Moreover, hundreds of thousands of Germans were forced to leave Hungary, Romania, Serbia, Croatia and Slovenia (former Yugoslavia). The policy of 'ethnic cleansing' during the armed conflicts after the breakup of the former Yugoslavia also made drastic changes to the ethnic map of the involved states.

7 In discussing national diversity and protection of minorities in this section, we focus exclusively on traditional national minorities, leaving aside the twentieth- and twenty-first-century immigrations.

State	Titular ethnic group and its proportion in the total population	Most numerous minorities with their overall number	Tendency concerning the number of the persons belonging to national minorities increasing/decreasing
Romania	Romanians - 83.3%	Hungarians (1,229,159), Roma (621,573), Ukrainians (50,920), others and no indication (1,257,351)	Decreasing
Serbia	Serbs - 83.3%	Hungarians (253,899), Bosniaks/Muslims (167,579), Roma (147,604), others (320,450)	Decreasing
Slovakia	Slovaks - 80.7%	Hungarians (458,467), Roma (105,738), Ruthenians (40,912) others and no indication (393,216)	Decreasing
Slovenia	Slovenians - 83.1%	Hungarians (8,328), Roma (6,009) Italians (3,388), others and no indication (82,746)	Increasing

Table 1. Ethnic national diversity according to the year 2011 data⁸

2. Constitutional status, rights and protection of national minorities

The status, protection and rights of national minorities in constitutions shall be analysed in this section with a comparative law lens. In the following sub-sections, relevant constitutional provisions will be elaborated on, compared and analysed on various grounds. In the first subsection, national constitutions will be analysed to determine whether constitutions explicitly recognise the existence of national minorities and whether national minorities – or some of them – are named concretely in the text of the constitution, what their status in the state and their position compared to the titular nation/people are and what terminology is used for them. In the second subsection, the provisions on group-specific minority rights will be compared and analysed applying the following criteria: the number of provisions on these rights, the list of concrete rights protected, the direct applicability of group-specific minority rights and the freedom of legislators to prescribe the content of these rights, and equal/universal group-specific rights for all national minorities or rights related to specific territory and numerical strength of the minority.

⁸ Pan, Pfeil and Videsott, 2017, pp. 97–194.

2.1. Constitutional status and identification of national minorities, terminology and their relation with the titular nation

All constitutions under scrutiny in this chapter explicitly recognise the existence of national minorities; however, the terminology used for these groups varies. In three constitutions (Croatian, Romanian and Serbian), the term ‘national minority’ is utilised, while in the constitutions of the Czech Republic and Poland, the term used is ‘national and ethnic minority’. The constitution of Slovakia uses the term ‘national minority and ethnic group’, while the Hungarian Fundamental Law uses the term ‘nationality’. Finally, the Slovenian constitution uses the term ‘autochthonous national community’. Only the constitutions of Croatia and Slovenia enumerate concrete protected national minorities. The preamble of the constitution of Croatia enumerates the following national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians.⁹ The Constitution of Slovenia specifies Hungarians, Italians and Roma – albeit with a different status.

Concerning the determination of the status of national minorities in relation to the state, constitutions differ considerably. The constitutions of Croatia and Hungary stipulate that the state incorporates – and also ‘belongs’ to – persons of national minorities¹⁰ or to national minorities as a group.¹¹

The constitutional status of national minorities is also indirectly determined with the constitutional status of the titular nation, such as with provisions serving nation state building. Although all analysed states can be categorised as nation states, the centrality and special position of the titular, state-bearing ethnic group/nation/people is not equally emphasised and stipulated in constitutional provisions. In this respect, the constitution of the Czech Republic is unique, lacking provisions openly declaring the status and dominance of the titular nation in the state or serving the nation-state building policies. The preamble the Czech constitution stipulates that the constitution is enacted by the citizens of the Czech Republic; however, a kind of exception is present in the Charter of Basic Rights and Freedoms,¹² of which the preamble

9 It is noteworthy that the current list of national minorities (22) was introduced with amendments in 2007; until that time, only the first 10 groups had been enlisted with the adjective ‘autochthonous’.

10 The preamble of the Croatian constitution stipulates that “...the Republic of Croatia is established as the national state of the Croat people and is also the state of members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians”.

11 The National Avowal/preamble of the Basic Law of Hungary stipulates that “we consider the nationalities and ethnic groups living in Hungary to be part of the political community and constituent parts of the State...”.

12 The Charter of Basic Rights and Freedoms is a separate act; although it is part of the constitution, according to Arts. 3 and 112, it is part of the constitutional order of the Czech Republic. The charter was enacted in 1991 during the period of existence of Czechoslovakia.

stipulates that the charter is enacted “based on the Czech and Slovak Peoples right for self-determination...” The constitution of the Czech Republic has no provision on the official language nor on the determination of the state to support Czechs outside its borders. In all seven remaining constitutions, the specific position of the titular nation and its relation with the state and constitution is declared and emphasised in various ways. In the constitutions of Croatia, Poland and Slovakia, this was done in the preambles¹³; in the constitution of Romania in the legal-normative parts¹⁴; and in the constitutions of Hungary, Serbia and Slovenia, it was done in both the preambles and in the legal-normative parts.¹⁵

Beyond the above listed provisions related to the specific position of the titular nation in the state and its role in the enactment of the constitution, nation-state building provisions are also those stipulating the obligation of the state to support the members of the titular nation living outside its borders, and those guaranteeing the dominance and official use of the language of the titular nation. Such provisions are present in all analysed constitutions except in the case of the Czech Republic. The duty of the state to take care of and support co-nationals outside the borders is stipulated in all seven constitutions with some variations¹⁶; however, the Fundamental Law

13 The preamble of the Constitution of Croatia stipulates that “the Republic of Croatia is established as the national state of the Croat people”; the preamble of the Constitution of Poland stipulates that the constitution is enacted by “... the Polish Nation – all citizens of the Republic”; finally, the preamble of the constitution of Slovakia stipulates that the constitution is enacted by “...the Slovak nation...”.

14 The Constitution of Romania, in various provisions, emphasises the position and status of the Romanian people and the nation-state character of the state. For example, “Romania is a national state...in spirit of democratic traditions of the Romanian people...” (Art. 1); “national sovereignty is vested to the Romanian People” (Art. 2); and “the bases of the Romanian state is the unity of the Romanian People” (Art. 4).

15 The preamble/National Avowal is declared by the “members of the Hungarian nation”, while Fundamentals, Art. D stipulates the “the unity of the undividable Hungarian nation”, and Art. IX prohibits expressions directed towards the violation of the “dignity of the Hungarian nation...”. The preamble of the Serbian constitution declares that the constitution is enacted “considering the state traditions of the Serbian People...”, while Art. 1 defines that the “Republic of Serbia is a state of the Serbian people...” The preamble of the Constitution of Slovenia stipulates that the constitution is enacted “from the eternal right of the Slovenian people for self-determination... and centuries long straggle for liberation of Slovenes...”, and Art. 3 stipulates that “...Slovenia is based on the eternal and non-alienable right for self-determination of the Slovenian people.”

16 The Constitution of Croatia stipulates in Art. 10 that Croatia “guarantees care and protection for persons of Croat nationality living in foreign countries”. The Constitution of Poland stipulates that Poland helps “the Poles living abroad in maintaining their links with the national cultural heritage”. The Constitution of Romania stipulates that “the state supports the maintaining of contacts of the country with Romanians outside the borders, and supports the preservation, development and declaration of their ethnical, cultural, linguistic and religious identity...” The Constitution of Slovakia in Art. 7A stipulates that “Slovakia supports the national and cultural identity of Slovaks outside its borders...” Art. 5 of the Constitution of Slovenia stipulates that “Slovenes without Slovene citizenship can enjoy special rights and privileges in Slovenia” and that “it (Slovenia) shall maintain concern for the autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland”.

of Hungary stipulates most extensively the duties of Hungary towards Hungarians outside of Hungary.¹⁷ Concerning the constitutional status of the titular national language, provisions differ. While in the constitutions of Hungary, Poland, Romania and Slovakia, the official language status of the dominant language is exclusive,¹⁸ in the constitutions of Croatia, Serbia and Slovenia, the official status of national minority languages is also guaranteed – or at least permitted – to some extent.¹⁹

2.2. Comparison and analyses of the provisions on group-specific minority rights

In this section, we deliberately use the term ‘group-specific minority right’, although one may find different terms for these rights in the literature, such as ‘additional rights of minorities’, ‘group rights’, ‘collective rights’, ‘special rights of minorities, or persons belonging to national minorities’. These rights are usually considered as cultural or language rights; however, they are deeply linked to power-sharing between the majority and minorities,²⁰ including access to economic resources, public services, public employment and political powers.²¹

All analysed constitutions contain provisions recognising and guaranteeing group-specific minority rights aimed to ensure full and effective equality between individuals belonging to the titular nation and those belonging to a national minority, but they also constitute a redistribution of power between state and national

17 The Fundamental Law of Hungary, in the preamble/National Avowal, stipulates that “we promise to preserve the intellectual and spiritual unity of our nation, torn apart by the storms of the past century”, while in the Fundamentals, Art. D, it stipulates that “bearing in mind that there is one single Hungarian nation which belongs together, Hungary shall assume responsibility for the fate of Hungarians living outside its borders and shall foster the survival and development of their communities; it shall support their endeavors to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and Hungary”.

18 Hungary’s Fundamental Law (Fundamentals, Art. H), Constitution of Poland (Art. 27), Constitution of Romania (Art. 13) and Constitution of Slovakia (Art. 6) all stipulate that the Hungarian, Polish, Romanian and Slovak language, respectively are the official language of the state, without referring directly to a possibility that any other language could have an official status on the territory of the state. However, the cited Art. 27 of the Constitution of the Republic of Poland states that “Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements”. This provision indirectly opens the door for the official status of a minority language.

19 Art. 12. of the Constitution of Croatia stipulates that the Croat language is the official language in Croatia, but on some territorial units, other languages can be official as well in accordance with the law. Art. 10 of the Constitution of Serbia stipulates that the Serb language is the official language of Serbia, and the use of other languages can be prescribed by law based on the constitution. Furthermore, Art. 79 of the constitution explicitly guarantees the possibility that administrative and court procedures can be conducted on the languages of national minorities. The Constitution of Slovenia in Art. 11 explicitly guarantees that the Hungarian and Italian languages are official languages (in addition to the Slovenian language) in communities where these minorities reside.

20 Pan, Pfeil and Videsott, 2017.

21 Choudhry, 2012, p. 999.

minorities.²² The number of provisions guaranteeing group-specific rights – such as the lists of these rights – differ substantially from country to country. The number of constitutional provisions guaranteeing group-specific minority rights is the largest in the case of the constitution of Serbia, but the constitutions of Slovenia and Romania also guarantee group-specific right relatively extensively. In the case of Serbia, 37 articles stipulate something on minority rights, while 12 articles with dozens of provisions explicitly stipulate various group-specific minority rights.²³ The constitution of Slovenia²⁴ has seven, while the constitution of Romania has five such articles.²⁵ The remaining five constitutions have a lesser number of articles containing some group-specific minority rights.²⁶ Regardless of the number of provisions on group-specific minority rights, it is more important to compare and analyse the specific content of these constitutional provisions. To make this comparison, we group these rights into the following sub-groups: in the first, I sorted individual group-specific rights related to the preservation of specific identity; in the second, rights related to the minority self-governance; in the third, rights guaranteeing special representation in public bodies; while in the fourth category, I sorted all other group-specific minority rights.

Group-specific minority rights guaranteeing the preservation of specific identity are stipulated in all analysed constitutions, albeit with remarkable differences. The general individual rights to freely declare one's own national affiliation and to express and preserve the specific identity, culture and traditions are stipulated by all constitutions with different wording. Six out of eight constitutions stipulate the right to school education in the national minority language,²⁷ and six out of eight contains the right to establish minority associations or institutions.²⁸ The most extensive and detailed list of group-specific rights related to the preservation of identity is stipulated in the constitution of Serbia, which includes the right to maintain transborder relations with co-nationals, to use personal names in the native language, to use one's own national symbols in public, to display street names and topographic signs in minority language and to conduct court and administrative procedures in the minority language. Only a slightly shorter list of rights is stipulated in the constitution of Slovenia.²⁹

Concerning the group-specific minority right to elect-establish minority, self-governance (autonomy) bodies, only three constitutions contain the group-specific

22 Pan, Pfeil and Videsott, 2017, p. 7.

23 Korhecz, 2021, pp. 28–30.

24 Arts. 5, 11, 61, 62, 64, 65 and 80.

25 Arts. 6, 32, 62, 120 and 128. See Varga, 2019, p. 91.

26 Croatia (Arts. 3, 15 and 43), Czech Republic (Arts. 3, 24 and 25), Hungary (Art. XIX), Poland (Arts. 27 and 35) and Slovakia (Arts. 12, 33 and 34).

27 The constitution of Croatia and Poland contains no such provisions.

28 The constitutions of Hungary and Romania contain no such provisions.

29 The right to use personal names in a minority language is not specifically stipulated in the Constitution of Slovenia.

collective right to establish minority self-governments: the constitutions of Hungary, Serbia and Slovenia.³⁰

Most of the analysed constitutions contain some provisions on the right of national minority to special representation in state authorities. Five constitutions, in one way or another, stipulate that national minorities must be represented in national parliaments. The constitution of Slovenia guarantees seats in parliament for the Hungarian and Italian national minorities, together with veto rights related to the legislative acts regulating their group-specific rights.³¹ The constitution of Romania guarantees one seat in parliament for all national minorities if their organisations failed to acquire seats under general electoral conditions.³² The constitution of Croatia refers that national minorities may elect their representatives to parliament in a manner stipulated by the law.³³ The constitution of Serbia stipulates that the representation of national minorities in parliament is guaranteed,³⁴ while the constitution of Hungary stipulates that the participation of nationalities in the work of the parliament shall be regulated by cardinal law.³⁵ The rights for special representation in elected assemblies of local territorial units are stipulated only in the constitutions of Serbia and Slovenia.³⁶

Beyond the representation and participation of national minorities in elected state bodies, only the constitution of Serbia contains guarantees regarding the adequate employment of persons belonging to national minorities in state and local assemblies.³⁷

Some of the analysed constitutions contain provisions guaranteeing fewer common rights, which do not fall into any of the previously analysed categories. The constitution of Serbia stipulates affirmative measures (positive discrimination) and prohibits measures resulting in the change of the national composition of the population in areas inhabited by national minorities.³⁸

At the end of our analyses of group-specific minority rights in the eight analysed constitutions, we discuss some notes on the regulation of these rights by the legislator

30 The Constitution of Hungary stipulates that “nationalities living in Hungary shall have the right to establish local and national self-governments” (XXIX.2). The Constitution of Serbia stipulates that national minorities “may elect their national councils in order to exercise the right to self-governance in the field of culture, education, information and official use of their language and script” (75.3). The Constitution of Slovenia stipulates that national minorities “may establish their own self-governing communities in the geographic areas where they live” (64.2).

31 Constitution, Art. 64(3) and (5).

32 Constitution of Romania, Art. 62(2).

33 Constitution of Croatia, Art. 15(2).

34 Constitution, Art. 100(2).

35 Fundamental Law, Art. 2(2).

36 Constitution of Serbia, Art. 180 (4); Constitution of Slovenia, Art. 64(3).

37 Constitution, Art. 77(2) stipulates that “when taking up employment in state bodies, public services, bodies of autonomous province and local self-government units, the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration”.

38 Constitution of Serbia, Arts. 21(1), 76(3) and 78(3).

regarding the issues of territoriality, such as on the provisions restricting group-specific minority rights.

All analysed constitutions empower the legislator to regulate the specific content and the implementation of enumerated and guaranteed group-specific minority rights. This means that these constitutional rights are, as a rule, not directly applicable; their content should be regulated by legislative acts. In other words, legislators are usually only obliged to regulate these rights but not in a specific manner; thus, they enjoy wide freedom. However, some of the constitutions protect the basic content of human and minority rights, which cannot be subject to limitations.³⁹ Another commonality among most of the analysed constitutions is that they offer the same scope of rights to members of all national minorities, making no differentiation between minorities based on their size, territorial concentration and distribution etc. However, it is not excluded that the legislator, when regulating the implementation of these rights, can still differentiate between groups. Exceptions are provided in the constitutions of Slovenia and, to a lesser extent, in the constitution of Serbia. The Slovenian constitution reserves most group-specific minority rights to the Hungarian and Italian autochthonous national communities, with references to the territory where they reside. The constitution of Serbia makes no differentiation between national minorities, nor does it list them, but some of the group-specific rights are guaranteed only on territories populated in large numbers by the particular minority (official language use, bilingual public inscriptions); furthermore, autonomous provinces are entitled to prescribe additional rights to the members of national minorities.⁴⁰ Finally, it is noteworthy that two constitutions contain provisions specifically restricting the application of minority rights. The constitution of Slovakia stipulates that “the exercise of rights by citizens of a national minority guaranteed by this Constitution may not threaten the sovereignty and territorial integrity of the Slovak Republic or discriminate against other citizens”,⁴¹ while the constitution of Romania stipulates that “the protective measures taken by the state to preserve, develop, and express the identity of the members of the national minorities shall be in accordance with the principles of equality and nondiscrimination in relation to the other Romanian citizens”.⁴²

3. Implementation and practice

The ‘law in books’ does not always coincide with the ‘law in practice’; therefore, the analyses of constitutional provisions should be complemented with some basic knowledge on the protection, implementation and practical application of constitutionally protected, group-specific minority rights. Constitutional guarantees of basic rights remain

39 Constitution of Serbia, Art. 20(3).

40 Constitution of Serbia, Art. 79(2).

41 Constitution of Slovakia, Art. 34(3).

42 Constitution of Romania, Art. 6(2).

nothing but empty declarations if they are not protected and enforced by constitutional and regular courts and if these rights are not implemented in legislative acts and applied and financed by the administration. In this section, first, we make several assessments on the judicial interpretation and protection of group-specific minority rights by constitutional courts; then, we present some information on legal practice, primarily with reference to the monitoring mechanisms of the Council of Europe conventions.

3.1. Judicial interpretation and protection of group-specific minority rights

Constitutional courts have a primary role in the interpretation and protection of constitutional rights, including group-specific minority rights. Evaluating the accomplishments of CEE constitutional courts related to the protection of minority rights, the well-known Polish scholar Wojciech Sadurski concluded that constitutional courts in CEE states have been neither intellectually equipped nor morally and politically prepared to interpret minority rights in an expansive, generous manner and have not played a significant role in shaping the ‘toleration regimes’.⁴³ The relevant literature related to the case law of constitutional courts in the analysed eight states concerning group-specific rights of national minorities is rather nuanced compared to Sadurski’s conclusions. The Slovenian Constitutional Court often expansively interpreted provisions of the constitution to uphold and validate challenged legislative and other provisions implementing and concretising constitutional minority rights, protecting the rights of Hungarian and Italian autochthonous national communities. In one of those cases, the Constitutional Court of Slovenia upheld the constitutionality of the challenged provision of the law allowing the usage of national minority symbols, which might be identical to the symbols of a foreign state.⁴⁴ In another remarkable constitutional dispute, the Constitutional Court upheld the constitutionality of legislative provisions, making it possible for voters belonging to the Hungarian and to the Italian autochthonous national communities to cast two votes/ballots on parliamentary elections – one as all other citizens (general voting right) and the other as members of the autochthonous national community, to elect minority representatives to parliament (special voting right).⁴⁵ Furthermore, the Constitutional Court of Slovenia, with

43 Sadurski, 2014, pp. 289 and 328.

44 The court stated that the constitutional phrase ‘national symbols’ means symbols of the Italian and Hungarian nation “to which Italian and Hungarian communities belong” and adds that national symbols of the Italian and Hungarian nation are “well known and cannot be matter of choice”. In the absence of a clearly worded constitutional restriction, these communities can use their symbols irrespective of whether they are identical to the symbols of the Italian and Hungarian states (Decision 691 of the Constitutional Court, Official Gazette of RS, No. 14/1999, p. 1322).

45 The Constitutional Court admitted that such regulations make exceptions from the principle of equal voting right, but these exceptions are demanded by the constitution itself, which guarantees direct special representation and does not limit the general voting rights of minorities as citizens. If the legislator forced the members of ethnic community to choose between the “realization of their general or special voting right (between the vote on the minority deputy or other deputies), one of the two constitutionally guaranteed right would be taken from” (Decision 844 of the Constitutional Court, Official Gazette of RS 20/1998, p. 1312).

similar reasoning, rejected the initiative challenging Art. 53 of the Statute of Koper municipality that guaranteed a seat of deputy mayor to the members of the Italian minority if the elected major was non-Italian.⁴⁶ The constitutional court also rejected initiative challenging provisions of the Act on the Protection of Consumers obliging business entities to ensure communication with consumers also in the Hungarian and Italian languages.⁴⁷ Moreover, the Constitutional Court was ready to declare unconstitutional legislative provisions favouring the Slovenian language over the official language of national communities by the relevant provisions of the Societies Act.⁴⁸ We can agree with Teofilović, who, after scrutinising the analyses of the case law, concluded that the Slovenian Constitutional Court has consistently interpreted positive measures expansively, defining no strict limits for their appropriateness, and in some found that special rights were justified even where they contradicted the general constitutional principle of equality of all citizens or where they collided with some other constitutionally guaranteed rights.⁴⁹

The Constitutional Court of Croatia has also had considerable number of cases in which it interpreted group-specific rights; however, it demonstrated less consistency in their protection and expansive interpretation.⁵⁰ In some cases, the Constitutional Court expansively interpreted constitutional rights and principles to protect group-specific minority rights,⁵¹ or when faced with contradicting legal provisions, it gave a preference to provisions more favourable to minorities.⁵² In other cases, it gave advantage to the provision of the law less favourable to the rights of national minorities⁵³ or

46 Decision U-I-283/94, 12 February 1998, Pt. 6.

47 Decision U-I-218/04-31, 20 April 2006.

48 Decision U-I-380/06-11, 11 September 2008.

49 Teofilović, 2021, pp. 137–138.

50 Teofilović, 2021, p. 138; Beretka, 2021, p. 115.

51 The Constitutional Court declared unconstitutional referenda initiative demanding amendment of the relevant law in a way to restrict the official use of minority language to local units in which a national minority constitutes local majority. The court based its decision on general constitutional values such as pluralism, tolerance, freedom of thought, expression of ethnicity and emphasis on minority consciousness. Decision U-VIIR-4640/2014 of 12 August 2014, pt.10.2.

52 In electoral disputes related to the guaranteed seats for national minority representatives, the Constitutional Court applied the provisions of the law on local elections and not those of constitutional law on the rights of national minorities, which were more restrictive concerning the conditions for a guaranteed seat in the local assembly (Decision U-VIIA-3004/2013, 26 May 2013. and Decision U-VII-3122/2013, 4 June 2013).

53 The Constitutional Court rejected the constitutional complaint of the applicant whose request for the identity card in Serbian language (bilingual) was rejected on the ground that the Law on the Use of Language and Script of National Minorities restricts the issuance of public documents bilingually or multilingually to municipalities, cities or counties where the minority language is introduced into official use. On the other hand Art. 9, par. 2. of the Constitutional Law on Minority Rights guarantees the issuance of identity cards in the national minority language as well, without territorial restrictions, or direct reference to sectorial law on official language use. The Constitutional Court interpreted Art. 9, par. 2 together with Art. 12, par. 3. of the Constitutional Law (referring to the regulation of some issues of the official language use of national minorities by other laws), despite of the fact that Art. 12, par. 3 is not directly related to Art. 9, par. 2. neither it refers to the language and script of identity cards. This way

by means of a restrictive interpretation, and the court simply avoided the protection of the group-specific right in question.⁵⁴

Even though the 2006 constitution extensively guarantees group-specific minority rights (overregulation), the Constitutional Court of Serbia has only rarely demonstrated capacities and willingness to interpret and protect minority rights in an expansive manner.⁵⁵ Its traditional deference towards the acts of the actual political majority in the legislation⁵⁶ is generally detectable in its case law related to minority rights as well. The court acknowledged the wide discretion of the legislator in regulating the implementation and content of constitutional minority rights in many decisions⁵⁷; conversely, judicial activism was exceptionally present in other cases, where the court annulled legislation generously stipulating some minority rights.⁵⁸ Various authors have emphasised the restrictive interpretation of the constitutionally guaranteed collective right to self-governance by the Constitutional Court's Decision IUz-882.⁵⁹ In the almost 30 years covering the period from 1990 to 2019, the Serbian Constitutional Court invalidated no provision of any law on the ground that it restricted a minority right, nor did the court ever uphold an initiative launched by members of national minorities or their organisations seek protection of a minority right against a violation by a law or regulation.⁶⁰

The Constitutional Court of Romania has rich case law related to the rights of national minorities because the bulk of legislative acts regulating group-specific

the Constitutional Court interpreted minority rights in restrictive way, accepting its limitation of a right by provisions of the law on official language and script. (Decision U-III-4856/2004 of 12 March 2007). Another example of such a restrictive approach is related to the conflicting provisions of the constitutional law on the constitutional court and the constitutional law on the protection of national minorities. While the first one excludes minority councils from the subjects empowered to launch constitutional complaints on behalf of the persons whose minority rights were violated, the second empowers them. The Constitutional Court gave advantage to the more restrictive provision (Decision U- I - 1029/2007, 1030/2007, 7 April 2010).

54 The Constitutional Court upheld provisions of the statutory decision of the Vukovar municipality stipulating that the application of some rights of the Serb minority be postponed, even though there were no bases for that in the law (Decision U-II-1818/2016, 2 June 2019).

55 The 'pro minority' decisions were mainly enacted in the period of the 1990 constitution (Decision IU-110/2004 from 15 July 2004, Decision IU-334/2004 from 2 December 2004, Decision IU-171/2002 from 5 June 2003, Decision IU-446/2004 from 18 February 2010).

56 Beširević, 2014, pp. 972–973; Papić and Djerić, 2019, p. 59; Tripković, 2011, pp. 744–745.

57 Decision IU-328/1992 from 14. October 1993, Decision IU-7/1998 from 1. June 2000, Decision IU-42/2008 from 14 April 2011.

58 In its cornerstone Decision IUz-882/2010 from 16 January 2014, the Constitutional Court invalidated many provisions of the Law on the National Councils of National Minority, often not referring to a concrete constitutional provision violated. The CCS invalidated provisions basically on two ground: first because provisions were not in harmony with the so-called sectorial laws regulating the area of electronic media, administrative procedure, public broadcasting, educational system etc.; second, because the court simply concluded that the "legislator went outside actions for the implementation of additional rights of persons belonging to national minorities", without determining what the constitutional limits of these 'actions' were.

59 Beretka, 2019, p. 281; Tóth, 2017, pp. 235–236; Korhecz, 2019, p. 124.

60 Korhecz, 2021, p. 48.

minority rights end up before this court.⁶¹ The court has usually rejected initiatives related to the legislative provisions enlarging the rights of minorities in the area of minority language education, claiming that those provisions violate neither the rights of the Romanian people nor the status of the Romanian language.⁶² Conversely, in the area of language rights, the court tends to apply a much more restrictive interpretation, promoting the exclusive use of the Romanian language in written communication before courts and administrative authorities.⁶³ Although, the Constitutional Court had not decided on this topic, some authors claim that the National Assembly of Romania violated the constitution by omission because it failed to enact the organic law on national minorities in accordance with Art. 73 para. 3 of the constitution.⁶⁴

The Constitutional Court of Slovakia made only few decisions related to group-specific minority rights. The main political-legal disputes emerged around the State Language Act stipulating the dominant use of the Slovak language and allegedly violating language use of minorities. From the challenged provisions the Constitutional Court, Decision PL. ÚS 8/96 (from August 26, 1997) invalidated only one provision (Art. 3, par. 5), expressly excluding the possibility to address authorities in minority language in written form. The constitutionality of other contested provisions was confirmed based on formal argument that the State Language Act does not regulate the use of minority languages. In another case PL. ÚS 4/97 (24 February 1998), the Constitutional Court rejected the initiative of the president of the republic, challenging the House rules stipulating the exclusive use of the Slovak language in the work of the National Assembly based on the grounds standing that no rule obliges a state to prescribe the equal use of all languages.

In the last 30 years, the Constitutional Court of Hungary has had a moderate number of decisions related to group-specific minority rights.⁶⁵ Most of these cases were related to the right for special representation, including the status and remits of minority self-governments and representation in the parliament and in local assemblies. In several cases, the Constitutional Court determined how this special representation is not constitutionally permitted⁶⁶ or which affirmative measures are not

61 Varga, 2019, p. 102.

62 Decision No. 72 from 1995, Official Gazette no. 167/1995, Decision No. 114 from 1999, Official Gazette no. 370/1999, Decision No. 2 from 2011, Official Gazette no. 136/2011.

63 Despite explicit constitutional provisions allowing the use of minority language before local authorities and courts, the court upheld legislative provisions requiring that written submissions of parties shall always be submitted in the Romanian language (or also in the Romanian language), making the use of minority language practically useless (Decision No. 40 from 1996, Official Gazette 362/1999, Decision No. 636 from 2016, Official Gazette no.41/2017, Decision No. 633 from 2018, Official Gazette no. 1020/2018).

64 Veress, 2020, p. 8.

65 Only about 30 out of approximately 10.000 (Nagy, 2020, p. 37).

66 The delegation of elected leaders of national minorities to parliaments violates the constitutional principle of equality and directness (Decision no. 34/2005 and Decision no. 14/2006).

inevitable in electoral legislation.⁶⁷ Nevertheless, it failed to determine what the constitution requires from the legislator in order to implement this right, leaving indeed a wide margin of discretion to them.⁶⁸ It is noteworthy that the Constitutional Court has regularly confirmed the constitutionality of legislative provisions on consent powers of minority self-governments in the area of education.⁶⁹ Nagy concluded, in general, that the jurisprudence of the court towards minorities is characterised by a complete lack of judicial activism as it has avoided addressing petitions whenever possible, usually on the grounds that they did not contain a specific constitutional problem, that the regulation of the matter in question belongs to the legislator's competence or that it is not up to the Court to deal with practical issues.⁷⁰

3.2. Minority rights in practice, international obligations and monitoring

The full enjoyment of constitutionally guaranteed, group-specific minority rights usually needs further regulation, positive actions and measures by state authorities. Without budgetary planning, proper organisational measures and the establishment of a functioning institutional framework, minority rights might remain a 'law in books' declarative right without substance. The enjoyment of these rights depends to some extent on interpretations and protection provided by the judiciary as well as on government policies and administration. Perhaps the most objective and impartial insight into the practice of minority rights is possible through documents prepared within the monitoring mechanism of the Council of Europe Framework Convention for the Protection of National Minorities. All states analysed in this chapter have signed and ratified this international convention, whose implementation is provided through periodical state reports and corresponding opinions of the Advisory Committee (AC), evaluating the implementation of state obligations from the state parties.⁷¹

Concerning the practice in Croatia, the AC calls on the authorities to implement laws stipulating the use of minority languages and scripts in official contacts with local authorities more consistently. The AC also points to the high threshold for the official use of minority language established by the law.⁷² While the legal framework is well constructed and favourable, the practical application is hindered by the absence of a systematic government strategy to promote interethnic dialogue and reconciliation.⁷³ In the Czech Republic, the AC most often criticises discriminatory practices

67 The court rejected the initiative of the minority Ombudsman challenging the constitutionality of the 5% electoral threshold applicable for minority candidates, stating that it is not discriminatory (Decision 1040/B/1999).

68 Nagy, 2021, p. 55.

69 Decision no. 792/B/1998, Decision 713/B/2002, Decision no. 657/B/2004.

70 Nagy, 2021, p. 69.

71 Advisory Committee usually organises onsite visits to the respective state to consult with all relevant actors, to establish facts and to properly reflect on the states' statements.

72 Fourth Opinion on Croatia, adopted on 18 November 2015, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 29 November 2016, ACFC/OP/IV(2015)005rev.

73 Szalai, 2021, p. 77.

towards the Roma minority, e.g. provisions prescribing high thresholds for displaying bilingual public inscriptions such as street names or names of settlements. The European Court of Human Rights found discriminatory practices in public education (segregation) towards Roma minority in Czech Republic but also in other States in the CEE.⁷⁴ In Hungary, the AC positively evaluates the newly established legislative framework but reiterates its call on the authorities to encourage persons belonging to national minorities to use minority languages when dealing with administrative authorities. Authorities should create an environment that is not obstructive to such a possibility in practice. Furthermore, the AC notes that the ‘magyarisation’ of the names (e.g. using Hungarian letters in writing) in practice blocks the full enjoyment of the right to use one’s own name in one’s own language.⁷⁵ In Romania, the AC frequently raises concern over the police brutality and discrimination faced by the Roma national minority; however, improvements were recently made. Although the funding of minority cultural life is generally acceptable, the state refuses to use the name ‘Szeklerland’, its symbols and the authorities have failed to present the documentation required for recognition by UNESCO as non-material heritage of humanity of an annual Whitsunday pilgrimage to Şumuleu Ciuc in the Harghita County practiced by a very large number of persons belonging to the Hungarian national minority. The Advisory Committee finds this regrettable.⁷⁶ In Serbia, the AC states that the legal framework of minority rights is solid, but discrepancies between laws still exist. There are disparities between law and practice and between certain regions, and the implementation is not monitored using evidence-based approaches.⁷⁷ In Slovakia, some shortcomings identified in the first opinion of the AC are still actual and mainly related to anti-Roma practices: hate speech, lack of adequate strategies for combating hates speech and promoting social dialogue, and the enrolment of Roma children into schools for children with disabilities.⁷⁸ The AC points to the proportionally low participation of national minorities in public administration, particularly Roma.⁷⁹ In Slovenia, the major concern of the AC from the first report and onward is the distinction between ‘autochthonous’ and ‘non-autochthonous’ minorities⁸⁰; however,

74 See *D. H. and Others v. Czech Republic*, Application no. 57325/00, judgement 13 November 2007, *Oršuš and Others v. Croatia*, Application no. 15766/03, judgement 16 March 2010 *Horváth and Kiss v. Hungary* Application no. 11146/11, judgement 29. January 2013.

75 Fifth Opinion on Hungary, adopted on 26 May 2020 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 12 October 2020, ACFC/OP/V(2020)002Final, p. 18.

76 Fourth Opinion on Romania – adopted on 22 June 2017 Published on 16 February 2018. ACFC/OP/IV(2017)005, p. 17.

77 Fourth opinion on Serbia, adopted on 26 June 2019, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 18 December 2019, ACFC/OP/IV(2019)001, pp. 1–2.

78 Szalai, 2021, p. 86.

79 Fourth Opinion on the Slovak Republic adopted on 3 December 2014 ACFC/OP/IV(2014)004, p. 27.

80 Despite criticism from the AC, Slovenia preserved the distinction between the autochthonous and non-autochthonous minorities, not without convincing arguments. On the issue, see more in Ribičič, 2004, pp. 29–43.

significant improvement has been noted concerning the measures protecting Roma (enactment of the Roma Community Act) and former Yugoslav minorities (Parliamentary declaration enacted in 2011).⁸¹ Concerning the rights of autochthonous national communities, the AC objects to the shortcomings in the implementation of this legal framework; for instance, the use of language in public spaces at the local level and the quality of education offered in minority languages are not fully respected.⁸²

4. Conclusions

Analysing the CEE constitutions, Iván Halász concluded that in constitutional provisions one can often trace a turn towards the ethnic notion of the people or nation – or at least a dual notion of the people-nation.⁸³ This complicates the determination of the constitutional position and status of persons belonging to national minorities. The eight analysed CEE states are, beyond any doubt, all nation states, but their constitutions recognise the existence of national minorities and, to some extent, constitutionally guaranteed, group-specific minority rights. Except in the case of the Czech Republic, the constitutional protection of minorities goes hand in hand with constitutional provisions ensuring the special, privileged position of the titular nation and its protection.

The most developed constitutional catalogue of rights is guaranteed in Serbia, Slovenia and Romania; however, the practical protection and implementation of these rights does not always correspond to the number or subject/matter of constitutional provisions. For example, in Serbia, the Constitutional Court has not shown readiness to strike any law or regulation for unconstitutionally limiting those widely guaranteed constitutional rights. Maybe the most considerable exception is Slovenia, where constitutional provisions are conceptualised, interpreted and protected by the constitutional court in a rather generous way, making their relationship with other constitutional values and provisions rather clear. However, the Slovenian record on group-specific minority rights is also not flawless, limiting the application of these rights explicitly to the Hungarian and Italian minorities and excluding the larger Serb, Croat and Bosniak minorities out *expressis verbis* by the constitution.

What seems a long-standing internal problem of CEE constitutions is to establish an equilibrium between nation state with state-bearing dominant nation and constitutional rights of national minorities. Constitutional texts themselves are not clear, and constitutional courts have also not clearly conceptualised this relationship. It seems that provisions on group-specific minority rights are more reflective of international pressures than a genuine constitutional development, while provisions on

81 Szalai, 2021, p. 80.

82 Fourth opinion on Slovenia, adopted on 21 June 2017 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, 25 January 2018, ACFC/OP/IV(2017)003Fourth Opinion, 25. January 2018.

83 Halász, 2014, p. 206.

nation-state building demonstrates the determination and sentiments of the ruling ethnic majority to create a national state. The minority question is not primarily a human rights question in many states: for example, the use of national symbols in Kovasna and Hargita counties in Romania, which are dominated by Hungarians, is considered a threat to security issue, rather than one of identity, by the Romanian authorities. Similarly, in Croatia, issues related to the use of the Serbian language and Cyrillic script are considered within the scope of military uprising of local Serbs during the nineties of the twentieth century. The minority question is still trapped, to a large extent, in historical legacy.

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