Constitutional Identity vs. Human Rights

The ECtHR's Bizarre Turn in Three Latvian Cases

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21.12.2023 doi: 10.59704/55184a96adabe0b0

Constitutional identity can now consist in denying crucial human rights guaranteed under the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) made this clear in two recent Latvian cases concerning the Russian-speaking minority decided respectively in September and November 2023, confirming the already decried *Savickis and Others v. Latvia* case (2022). Protection of constitutional identity has now been elevated to a legitimate aim for a differential treatment under the Convention.

In the three cases, protection of constitutional identity has deprived a large proportion of the Latvian population of the right not to be discriminated against with regard to pensions and the right to be educated in the mother tongue. Combined with a wide margin of appreciation and a very superficial assessment of proportionality, constitutional identity was found to trump Convention rights.

In this post, we explore how the protection of constitutional identity has been deployed to enable a collective punishment by association with a former occupier, and how the ECtHR's reasoning has effectively endorsed such a punishment, which is unbefitting of a liberal democratic system the ECHR aspires to represent. Until the three cases were decided, no liberal European democracy could argue without losing face that suppressing a large proportion of its population was its constitutional identity – one of the goals of its statehood. Today, this claim is seemingly kosher, marking a U-turn in the understanding of what the European human rights protection system is for minorities in Europe.

From Savickis to Džibuti

The Grand Chamber, for the first time in the history of the ECtHR, recognised 'protection of constitutional identity' as a legitimate aim for differential treatment in *Savickis and Others v. Latvia* (2022, analysed here, here and here). The case concerned 'permanently resident non-citizens of Latvia' or *nepilsoņi*, a special legal stateless status reserved in Latvian law for former Soviet citizens who were settled in Latvian territory during the occupation and were not granted Latvian citizenship after Latvia's restoration of independence in 1991. The applicants, who belonged to this category, had to live with a paltry pension because their period of employment outside of Latvian territory during Soviet times was not recognised by the Latvian State. For Latvian citizens, meanwhile, work elsewhere always counted.

In a 10-7 vote, the Grand Chamber found no violation of the right to non-discrimination read in conjunction with the right to property. It assented to Latvia's argument that the differential treatment in the calculation of pensions was intended to safeguard the constitutional identity of the Latvian State 'by implementing the doctrine of State continuity' (para 196). The Grand Chamber accepted that the difference in the calculation of pension was 'informed' by the historical background of the illegal Soviet annexation of Latvia's territory in 1940, specifically 'to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country' (para 198).

On this basis, the Grand Chamber accepted the proportionality of paying a lesser pension to the minority settled in Latvia and made stateless upon the disappearance of the Soviet Union to the aim of

protecting Latvia's constitutional identity. In this respect, the Court ruled that 'the assessment of whether the impugned difference in treatment is justified by "very weighty reasons" must be carried out against the background of the wide margin of appreciation to be applied in the circumstances of the present case' (para 213). Since wide margin of appreciation translates to lesser scrutiny by the Court, it was satisfied that protection of constitutional identity constituted a very weighty reason to treat *nepilsoņi* differently in the calculation of pensions.

In fact, the majority flushes the idea of non-discrimination and the 'very weighty reasons test' down the drain by implicitly overruling the settled case-law in *Andrejeva v. Latvia*. The Court implied that it is perfectly fine to punish stateless minorities settled in Latvia for not seeking to naturalise in the name of protecting constitutional identity. It also seemed to accept that for the sake of a primordialist view of constitutional identity, it is equally fine if socio-economic rights are exclusively tied to citizenship which 'belies the Court's long-standing case-law' in the words of the dissenters in *Savickis* (joint dissenting opinion of O'Leary, Grozev and Lemmens JJ., para 20).

Instead of a one-off departure from the basic principles informing the Convention, the Court reaffirmed the doctrine one year later in a case concerning the right of Russian-speaking minorities to obtain education in their mother tongue. For twenty years now, Latvia has been undertaking structural reforms of its public and private education by increasing teaching of and in Latvian in minority schools, while reducing teaching in minority languages, mainly Russian. The case of *Valiullina and Others v. Latvia* (September 2023) concerns such reforms in public schools, which partly deprived Latvian children belonging to minority groups from obtaining education in their mother tongue.

In this case, the Court unanimously approved of further restrictions on Russian-language education in public schools in Latvia, thereby depriving a large proportion of the Latvian population of education in their mother tongue. Particularly striking in *Valiullina* is the ECtHR's full acceptance of the Latvian Constitutional Court's constitutional identity argument. The ECtHR was satisfied that protecting and strengthening the official language goes 'to the heart of the constitutional identity of the State', as the Constitutional Court emphasised that the illegal Soviet occupation continued to negatively impact the use of Latvian in society and in educational institutions, while Latvian has never been used more in the Republic than it is today. On this basis, the ECtHR held that it is not its 'role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case' (para 208).

Two months after, the ECtHR applied the same outright flawed reasoning for private schools in *Džibuti and Others v. Latvia* (November 2023). Following the government thesis that private schools form part of the State educational system, the Court found its conclusions concerning public schools in *Valiullina* to be relevant to private schools. While the ECtHR did not explicitly address constitutional identity in *Džibuti*, its full embrace of the reasoning in *Valiullina* on the protection and strengthening of the Latvian language implies that the Court would have accepted arguments based on constitutional identity had Latvia decided to invoke it. Quite cynically, in *Džibuti*, the Court glorified linguistic diversity for European Union citizens who are educated in their mother tongue in Latvia (para 156), while implying that such diversity amounts to segregation when it comes to Russian-speaking schools.

Constitutional Identity to Disengage Proportionality

The ECtHR accepted the use of 'constitutional identity' to justify a discriminatory treatment of an unpopular minority, many of whom were also made stateless by Latvia upon the restoration of independence (as a comparison, Malaysia granted full citizenship to a large number of ethnic Chinese and Indians who moved there during British colonial era). Combined with a wide margin of appreciation accorded to Latvia, constitutional identity has effectively become a trump card in restricting Convention rights: the Court will summarily accept the necessity and proportionality of

a discriminatory treatment as long as it is allegedly intended to uphold the core of the identity of the State concerned, even when a suspect ground is at stake.

That constitutional identity constitutes, in the words of Michel Rosenfeld, 'an essentially contested concept as there is no agreement over what it means or refers to' is nothing new. The novelty is that it is entirely unclear both whether constitutional identity is an autonomous concept endowed with any specific meaning under ECHR law and what triggers it under the Convention as a means for setting aside the rights the Convention is designed to safeguard. Equally perplexing is that the invocation of constitutional identity seems to be immediately accompanied by a wide margin of appreciation, suddenly rendering legal what would otherwise be violations of the Convention.

The consequence is that constitutional identity has transformed into a magic spell first tried in *Savickis* and able to turn upside-down the 'very weighty reasons' test, while disengaging proportionality in *Valiullina* (and indirectly in *Džibuti*). By giving constitutional identity such a magic twist, the Court turns the respondent State into a judge in its own case: invoking a spell to transubstantiate violations of the ECHR. Quite astonishingly, the Court appears oblivious to the fact that the ECHR is designed precisely to hold States accountable for such dark arts when carried out under their usual noble pretexts, opening an avenue for 'political arbitrariness' as warned by Federico Fabbrini and András Sajó.

In fact, the ECtHR repeated the mistake of the European Court of Justice (ECJ), when it used the 'national identity' of Article 4(2) of the Treaty on European Union as an easy fix to justify depriving minorities of rights. This turned European Union law into an additional tool for undermining minority protection, as we have seen in *Runevič-Vardyn*, for instance (as analysed here). More recently, in the *Cilevičs* case, the concept began as mere 'boilerplate (…) to reassure the Member States that their specificities have been duly taken into account' in the words of Giacomo Di Federico and Giuseppe Martinico.

Only the issue is trickier, of course: the ECJ and the ECtHR are now weighing in not on the specificities, but on the struggle *against* specificities. Neither the ECJ nor the ECtHR provide any explanations as to why protecting and strengthening the official language against minority languages are part of 'national' or 'constitutional' identities – two concepts which also need to be distinguished from each other – which appears counterintuitive in light of Benedict Anderson's insight that nations can be successfully imagined without linguistic commonality.

Conclusion

The outcome of the constitutional identity trend is messy and incomprehensible: a broad catch-all pretext to suspend a broad spectrum of rights guaranteed by law. The only safeguard emerging from the case law is that this suspension should not be arbitrary. But since constitutional identity appears to encompass most of the elements of the proportionality test – i.e. the aim sought and the means to reach it – there are not many other elements left to evaluate the arbitrariness of a measure. Furthermore, the use of constitutional identity in the context of Latvia is reek of a collective punishment by association – if you belong to a minority associated with the oppressor, you deserve to be treated differently. This type of reasoning is not worthy of a Convention founded on the values of legality and liberalism, as observed by George Letsas. Bad arguments are often heard, but the ECtHR could do better.

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SUGGESTED CITATION

Ganty, Sarah; Kochenov, Dimitry Vladimirovich; Nugraha, Ignatius Yordan: Constitutional Identity vs. Human Rights: The ECtHR's Bizarre Turn in Three Latvian Cases, Verfassungsblog, 21.12.2023, doi: 10.59704/55184a96adabe0b0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20231222-111202-0.