MINORITY AND IDENTITY IN CONSTITUTIONAL JUSTICE:

CASE STUDIES FROM CENTRAL AND EASTERN EUROPE

International and Regional Studies Institute
Szeged, 2021

The research for this book was carried out

by the Faculty of Law of the University of Szeged
and UNION University Dr Lazar Vrkatić Faculty of Law and Business Studies

with the support of the programs of the Hungarian Ministry of Justice enhancing the standards of legal education

as a result of research in "Nation, Community, Minority, Identity:
The Role and Activism of National Constitutional Courts in Protecting Constitutional Identity and Minority Rights as Constitutional Values".

FLV | FAKULTET ZA PRAVNE I POSLOVNE STUDIJE DR LAZAR VRKATIĆ

Authors:
© Beretka, Katinka 2021
© Korhecz, Tamás 2021
© Nagy, Noémi 2021
© Sulyok, Márton 2021
© Szakály, Zsuzsa 2021
© Szalai, Anikó 2021
© Teofilovic, Petar 2021
© Tribl, Norbert 2021

Editor:
Tribl, Norbert
Proof-reader:
Szalai, Anikó

ISBN 978-963-306-798-7

Published by the International and Regional Studies Institute of Faculty of Law and Political Science, University of Szeged.

Table of contents

Noémi Nagy:[1]

Pacing around hot porridge: Judicial restraint by the Constitutional Court of Hungary in the protection of national minorities[2]

1. Introduction

This paper presents the final results of a two-year research evaluating the role of the Constitutional Court of Hungary in the protection of national minorities. Since in most democratic states the ultimate guardian of minority rights (and human rights in general) is a constitutional court, it is essential to be aware of its jurisprudence to have a thorough understanding of the situation of national minorities.

In Hungary the relevant case law is relatively minor: during the three decades of its operation, the Constitutional Court of Hungary adjudicated approximately 10 000 cases in sum, whereas only about 30, that is less than 1% of these[3] are related to the rights of national minorities (or as they are referred to since 2011: nationalities[4]). The issues dealt with in these cases may be categorized along three main questions: 1. What is a minority? More specifically, what does the constitutional term "constituent part of the state" mean, and which groups seeking recognition can be considered minorities? 2. Who belongs to a minority? That is, who is to be recognized as a subject of minority rights, and what are the rules for minority self-identification? 3. What are minority rights? The first two issues I have discussed elsewhere,[5] therefore this paper will focus on the third one only. Namely, I will explore the exact content of specific rights for persons belonging to minorities set out in the Constitution/Fundamental Law, the Minorities/Nationalities Act[6] and other sectoral laws, in the light of the interpretation of the Constitutional Court. For a general overview of Hungary's legal framework on minority rights readers are referred to my previous article,[7] however, when analyzing the individual cases, the necessary explanation of the relevant legal provisions will be given.

---

1 Senior Lecturer, University of Public Service (Budapest), Faculty of Public Governance and International Studies, Department of International Law.

2 The research for this paper has been carried out within the program Nation, Community, Minority, Identity – The Role of National Constitutional Courts in the Protection of Constitutional Identity and Minority Rights as Constitutional Values as part of the programmes of the Ministry of Justice (of Hungary) enhancing the level of legal education. The manuscript was submitted on 31 October 2020.

3 The full texts of the decisions and orders discussed in this paper are available (in Hungarian) at the official website of the Constitutional Court of Hungary: https://www.alkotmanybirosag.hu/ugykereso/ . Translations of excerpts have been prepared by the author.

4 The terms "nationalities" and "(national) minorities" will be used interchangeably throughout this paper, similarly to how they are used in the constitutional case-law.

5 Noémi Nagy: *Identifying minority communities and persons belonging to national minorities in light of the case-law of the Constitutional Court of Hungary*. In: Petar Teofilović (ed.): Nation, Community, Minority, Identity – the Protective Role of Constitutional Courts. Szeged – Novi Sad, Szegedi Tudományegyetem Állam- és Jogtudományi Kar – Pravne i poslovne akademske studije dr Lazar Vrkatic, 2020, pp. 36–82.

6 Act no. LXXVII of 1993 on the Rights of National and Ethnic Minorities; replaced as of 1 January 2012 by Act no. CLXXIX of 2011 on the Rights of Nationalities.

7 Nagy 2020, pp. 38–47.

In the following section I will provide a theoretical background to how Hungarian legislation conceive the very notion of minority rights, then I will analyze those decisions of the Constitutional Court which are relevant for the rights of national minorities. Issues that have been raised include the right to representation of minorities (parliamentary and municipal), the legal status of minority self-governments, and certain language rights. Finally, I will discuss how effectively or ineffectively the Constitutional Court of Hungary have protected minority rights. The conclusions will be provided on the basis of all the relevant cases, analyzed in both my previous paper and this one.

2. What are minority rights?

According to Article XV (2) of the Fundamental Law of Hungary (entered into force on 1 January 2012),[8] the State shall guarantee the fundamental rights to everyone without any discrimination, in particular without discrimination on the grounds of language and national origin. This was also provided by the former Constitution.[9] At the same time, one of the underlying ideas of Hungary's legislation on minorities is that it is not enough to guarantee universal human rights without discrimination to persons belonging to minorities, because in their case equal treatment with other citizens would only lead to *formal* equality.[10] As Justice Bragyova put it in one of his concurring opinions: "The rights of national and ethnic minorities are, in fact, constitutional rights equal to the »majority« rights; their uniqueness stems only from the fact that they serve to compensate for the disadvantages – in any case, differences – arising from the different situation of national and ethnic minorities in the exercise of certain constitutional rights. The constitutional role of minority rights is to ensure the equality of national and ethnic minorities in the exercise of fundamental rights."[11] For Bragyova, minority rights have a dual basis: one of them is the constitutional provision which guarantees the fundamental rights of the members of national and ethnic minorities without discrimination. The other basis is "the provision for special conditions for the exercise of fundamental rights […], especially the provision for rights that can only be exercised in community (jointly) with the members of the minority which, due to the peculiarities of national and ethnic minorities, cannot be created by the mere absence of discrimination."[12]

Five years later, Decision no. 1162/D/2010 of the Constitutional Court expressed a similar view: "national and ethnic minorities as constituent parts of the State should be assisted in the exercise of certain constitutional rights, in order to eliminate disadvantages and inequalities arising from [their] different situation".[13] That is why it can be said that

8 The English translation is available at: https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf

9 Act no. XX of 1949, thoroughly modified after the transition to democracy, in 1989/90.

10 Bernadette Somody: *A nemzeti és etnikai kisebbségek jogai*. [The rights of national and ethnic minorities.]. In: István Kukorelli (ed.): Alkotmánytan I. Budapest, Osiris Kiadó, 2007, p. 155.

11 Decision 45/2005. (XII. 14.) AB, Justice Bragyova's concurring opinion, [1], par. 2.

12 *Ibid.* [1], par. 3.

13 Decision 1162/D/2010 AB, III. [3], par. 1.

Hungary's regulation is based on the provision of *special* or *additional minority rights*.[14] However, whether minority rights shall be considered as additional or special rights at all, is a subject of serious academic debate. Legal philosopher Andrássy, for example, strongly opposes this notion, and claims in relation to minority language rights that it is precisely the recognition of these rights that can counterbalance, to a modest extent, the additional rights and privileges enjoyed by persons belonging to the majority.[15] International lawyer Kardos's opinion might offer a middle ground here: "minority rights are not additional rights because they give an additional right in a material sense, because they do not, they only guarantee the implicit rights of the majority, but because their implementation requires additional effort – […] infrastructure – on the part of the State".[16]

Another important starting point for the protection of minorities in Hungary is that minority rights cannot be properly implemented if they are regulated only as individual human rights; it is also necessary to formulate them as *collective rights*.[17] In this spirit, the Fundamental Law provides for the following – partly individual and partly collective – rights of minorities: to freely express and preserve their identity, to use their mother tongue, to use names in their own languages, to nurture their own cultures, to receive education in their mother tongues, and to establish their self-government at both local and national level (Article XXIX). In addition to these, the previous Constitution specifically ensured the right to collective participation and *representation* in public life, whereas the current Fundamental Law (Article 2 (2)) mentions the *participation* of nationalities in the work of the National Assembly (but does not guarantee it as a subjective right). In the following, I will discuss the constitutional case law relevant to these rights.

3. The right of minorities to representation

Ensuring the representation of minorities living in Hungary has been subject to heated public debate since the democratic transition in 1989/90, thus it is no surprise that the issue was brought to the Constitutional Court several times. However, the Court did not actively promote the case, instead it usually rejected to address the subject on the merits on the grounds that, although ensuring participation in the decision-making of public authorities is a constitutional obligation, the legislator has a wide discretion in choosing how to fulfill this obligation.[18]

14 Interestingly, while the need to reduce „the disadvantages which result from being a minority" was included in the preamble of the (previous) Minorities Act of 1993, in the new Nationalities Act of 2011 this perception – i.e. acknowledging that belonging to a nationality can be a disadvantage – is omitted. Péter Kállai: *Az alkotmányos patriotizmustól a nemzeti és etnikai kisebbségek parlamenti képviseletéig*. [From constitutional patriotism to parliamentary representation of national and ethnic minorities.]. In: Fundamentum, 2012/4, p. 46.

15 György Andrássy: *A nyelvszabadságról és a nyelvszabadság jelentőségéről*. [On the freedom of language and the importance of freedom of language]. In: Létünk, 2013/special edition, p. 17.

16 Gábor Kardos: *Nyelvi jogok, európai megoldások?* [Language rights, European solutions?]. In: Magyar Kisebbség – Nemzetpolitikai Szemle, 2016/2, p. 8.

17 Ernő Kállai– Gabriella Varjú: *A kisebbségi törvény*. [The Minorities Act.]. In: Tamás Gyulavári– Ernő Kállai (eds.): A jövevényektől az államalkotó tényezőkig. A nemzetiségi közösségek múltja és jelene Magyarországon. [From newcomers to state-forming factors. The past and present of ethnic communities in Hungary.]. Budapest, Országgyűlési Biztos Hivatala, 2010, p. 188.

18 Cf. e.g. Decision 34/2005. (IX. 29.) AB, III. [2]

One form of representation is the establishment of *minority self-governments*, which will be discussed in detail in the next section of this paper. Other forms of representation include the participation of political parties representing minorities in the elections, the establishment of a second parliamentary chamber on a corporate basis, and the deviation from the general rules for the allocation of mandates in favor of minorities in the elections.[19]

The latter mode of representation, namely the possibility of obtaining a preferential seat in the local government, was provided by the regulation in force until 2005, but the similar new provisions (modifying the former Minorities Act) did not pass the Constitutional Court's ex ante review, initiated by the President of the Republic.[20] The provision in question would have made it possible for an elected member of the local minority self-government to become a member of the board of representatives of the local government (municipality) by making a declaration, if he or she obtained a certain amount of votes. According to the Constitutional Court, this solution violates the principles of democratic legitimacy and equal suffrage, as it would give persons belonging to minorities the right to vote twice (that is, to vote in the elections of both the local governments and the minority self-governments). The Court found that a departure from the principle of equal suffrage constitutes a restriction on fundamental rights, which cannot be justified even with the protection of fundamental rights of minorities.[21]

As far as *parliamentary representation* is concerned, the relevant constitutional rules allow for various interpretations. The previous Constitution in 1990 clearly stated that "the representation of national and linguistic minorities living in the Republic of Hungary must be ensured in the National Assembly and the Councils".[22] However, the provision was amended in the same year by Act no. XL of 1990: "The laws of the Republic of Hungary ensure the representation of national and ethnic minorities living in the territory of the country". Clearly, the latter provision no longer refers explicitly to representation in the Parliament[23]. However, the issue remained on the political agenda, and despite the relevant – albeit contradictory – decisions of the Constitutional Court (see below), the legislator seemed to embrace the idea of an outstanding constitutional omission to represent minorities.[24]

A constitutional amendment in 2010 eventually limited the number of the members of Parliament at two hundred, and allowed for the election of maximum thirteen additional members to represent national and ethnic minorities. However, this provision never

19 Gábor Kurunczi: *Az általános és egyenlő választójog elvével összefüggő kihívások alkotmányjogi elemzése a magyar szabályozás tükrében.* [Constitutional analysis of the challenges related to the principle of universal and equal suffrage in the light of Hungarian regulations.]. PhD dissertation. Budapest, Pázmány Péter Katolikus Egyetem, Jog- és Államtudományi Doktori Iskola, 2019, p. 97. Available online: http://real-phd.mtak.hu/874/2/Kurunczi_G%C3%A1bor_dolgozatv.pdf

20 Decision 34/2005. (IX. 29.) AB

21 *Ibid.* III. [5]–[6]. This decision may be one of the reasons why the current regulation on the representation of minorities in the Parliament prescribes that persons belonging to minorities shall vote for *either* a party-list *or* a nationality-list but not both. See more on this below.

22 Article 68 (3), incorporated by Act no. XVI of 1990.

23 The terms „Parliament" and „National Assembly" are used interchangeably in this paper.

24 Kállai 2012, p. 49.

entered into effect, and the Fundamental Law, in force since 2012, does not deal with the right of nationalities to representation. Although Article 2 (2) stipulates that "[t]he participation of nationalities living in Hungary in the work of the National Assembly shall be regulated by a cardinal Act", as Kállai appropriately points out, the concept of participation is not the same as representation.[25] The cardinal law in question[26] finally came into force on 1 January 2012, but the regulation on the parliamentary representation of nationalities and its practical benefits continue to be disputed.[27] Based on the overview of legislative changes, Hargitai's statement made two decades ago seems valid even today: "the Hungarian political elite […] never had a definite idea of the parliamentary representation of minorities".[28]

The issue was first brought before the Constitutional Court in 1991. Although the petitioner alleged the unconstitutionality of a legislative omission expressly with regard to paragraph 3 of Article 68 of the Constitution, which regulates the representation of minorities, the Constitutional Court examined the entire article *ex officio*. After finding that „the *general* representation of minorities has not been statutorily ensured to the extent and in the manner prescribed by the Constitution" (emphasis added),[29] it called on the Parliament to pass a law on the rights of national and ethnic minorities. Importantly, the decision did not specify that there would be any constitutional requirement to ensure the *parliamentary* representation of minorities. The Parliament finally enacted the Minorities Act in 1993, in which it settled the issues of minority self-governance (as a form of representation), but delegated the regulation of parliamentary representation to a separate law.[30] That law, in turn, was never drafted, and it is also clear that the right to representation referred to by the Minorities Act was not a constitutional requirement, simply because it was not included in the Constitution but in a parliamentary act.[31]

In light of the above, one may have a hard time understanding Order no. 24/1994 of the Constitutional Court. Here, a petitioner alleged a legislative omission violating the Constitution, because the electoral law in force at the time did not provide for the election of minority members of the Parliament. The Constitutional Court noted with satisfaction

25 *Ibid.*

26 Act no. CCIII of 2011 on the Election of Members of the National Assembly, and Act no. XXXVI of 2013 on the Electoral Procedure. The latter gives nationalities the possibility to obtain preferential seats: the 5% threshold for candidates of nationalities is abolished, and it is sufficient for them to reach a quarter of the votes required to obtain a mandate from the party-list (cf. Articles 14 and 16). Following this regulation, in 2014 no nationality group was able to send a representative to the Parliament, and in 2018 only the Germans did. The other nationalities elected so called advocates to the Parliament. However, the legal status of nationality advocates is fundamentally different from that of the Members of Parliament, as an advocate does not have the right to vote at parliamentary meetings, and he can only speak if the agenda item affects the interests or rights of nationalities (cf. Act no. XXXVI of 2012 on the National Assembly, Article 29). For more information, see Péter Kállai: Képviselő-e a szószóló? Nemzetiségi képviselet az Országgyűlésben. [Is the advocate a Member of Parliament? Representation of nationalities in the National Assembly.]. MTA Law Working Papers, 2017/12. Available online: https://jog.tk.mta.hu/uploads/files/2017_12_Kallai.pdf

27 See András László Pap: *Sarkalatos átalakulások – a nemzetiségekre vonatkozó szabályozás.* [Cardinal transformations – regulation on nationalities.]. MTA Law Working Papers, 2014/52. pp. 11–12. Available online: http://jog.tk.mta.hu/mtalwp; Kurunczi 2019, pp. 104–118.

28 János Hargitai: *A kisebbségek jogai*. [The rights of minorities.]. In: Fundamentum, 2001/3, p. 61.

29 Decision 35/1992. (VI. 10.) AB, III. par. 3.

30 Act no. LXXVII of 1993 on the Rights of National and Ethnic Minorities, Article 20 (1).

31 Kállai 2012, p. 48.; cf. Hargitai 2001, p. 62.

that the representation of minorities in form of local self-governments had already been settled by law.[32] As regards parliamentary representation, the Court quoted at length from its previous decision (no. 35/1992), and concluded that it had „already established a violation of the Constitution with regard to the representation of national and ethnic minorities in the Parliament", which therefore qualifies as *res judicata* and entails the rejection of the submission without substantive examination.[33] András Sereg, then press chief of the Constitutional Court, thought that the 1994 order *subsequently* "projected" the constitutional requirement of compulsory parliamentary representation into the previous decision, where it had not been explicitly included – thus providing adequate basis for creating the "myth of omission".[34]

Since the Parliament remained reluctant to remedy its legislative omission (even after the Constitutional Court had "already established" that the situation was unconstitutional), the Minority Ombudsman launched an attack from another direction. In his submission for an ex-post review, he claimed that the provisions of the electoral law were discriminatory and thus unconstitutional, because they prescribed a general 5% electoral threshold. This threshold also applied to parties organized on a national or ethnic basis, when it was well-known that only 10% of Hungary's population belonged to minority groups, so they obviously had no realistic chance of getting the necessary amount of votes.[35] However, the Constitutional Court saw the matter differently and, relying on a restrictive interpretation of the prohibition of discrimination, rejected the submission: "The provisions sought to be annulled by the petitioner do not discriminate between voters or parties on the grounds of their national or ethnic minority affiliation. […] The conditions are equal for everyone, so the possibility of negative discrimination cannot even arise."[36] As for *positive* discrimination, no one has a constitutional right for that, since the application thereof falls within the competence of the legislator.[37] Consequently, the parliamentary representation of minorities can be provided by the Parliament "in other constitutional ways", the Constitution does not contain a mandatory provision for the solution outlined by the Minority Ombudsman.[38]

The Court did not provide further guidance on possible "other constitutional ways" either in its 2001 decision or afterwards. Although in Decision no. 45/2005 – dealing mainly with minority affiliation – the Court confirmed that the representation of minorities and their collective participation in public life is a fundamental constitutional right,[39] in con-

32 Order 24/1994. (V. 6.) AB, II. par. 8.

33 *Ibid.* II. par. 9. This was confirmed by Presidential Order 760/I/2003 AB, which also rejected a submission concerning the parliamentary representation of minorities, claiming that the legislative omission in that regard had already been established.

34 Kállai 2012, pp. 48–49. Interestingly, this myth of omission was embraced by former Minority Ombudsman (Parliamentary Commissioner for the Rights of National and Ethnic Minorities) Ernő Kállai as well as legal scholars, e. g. Zsuzsanna Csapó: *A kisebbségek parlamenti képviseletének kérdése az "Új Alkotmány" küszöbén*. [The issue of parliamentary representation of minorities on the verge of the "New Constitution".]. Kül-világ, 2011/1–2, pp. 82–101; Kurunczi 2019, p. 103.

35 Decision 1040/B/1999. AB, I. par. 2.

36 *Ibid.* III. 5.

37 *Ibid.* III. 6.

38 *Ibid.* III. 7.

39 Decision 45/2005. (XII. 14.) AB, III. 9.

nection with the concrete implementation thereof it only stated that the legislator has a wide decision-making power, which can only be limited by other fundamental rights.[40]

After reviewing the changes in the constitutional and statutory regulations, the Court came to the evasive conclusion that with regard to the method of minority representation, "no clear constitutional principle has emerged since 1990. The legislator experimented with different solutions and this search for a path was allowed by the text of the Constitution".[41] These findings, in the present case, applied mainly to *minority self-governance*, and it is at least thought-provoking that the issue of constitutional omission regarding parliamentary representation was not even mentioned by the Constitutional Court. What is more, this time the Court referred to its previous Decision no. 35/1992 (of a notoriously uncertain interpretation) as one whereby "in order to enforce the right of minorities to establish self-governments (*sic!*), the Constitutional Court […] found a legislative omission violating the Constitution, because the Parliament had not enacted the law on the rights of minorities".[42] As the Parliament has since adopted the law – argues the Court –, no omission can be found anymore. So, while the original decision (no. 35/1992) established a breach of the Constitution with regard to the *general* representation of minorities, which may include parliamentary representation as well (as assumed by Order no. 24/1994), Decision no. 45/2005 cautiously stayed away from the matter of parliamentary representation and limited itself to examining representation in the form of self-governance, which was the actual subject-matter of the submission.

Although we did not learn from the Constitutional Court in what form the parliamentary representation of minorities can be provided constitutionally, we at least know in what form it *cannot*. A 2006 decision – based on an objection to the National Election Commission's decision rejecting an initiative to hold a referendum – stated beyond doubt that "delegating elected leaders of national and ethnic minorities to the Parliament would be contrary to the principles of equality and directness".[43] Therefore, it is not possible for the national leaders of minorities – who are otherwise duly elected on the basis of a separate law – to automatically become members of the National Assembly due to their position, as this would result in unequal suffrage, similarly to the preferential mandate in the local government.[44]

Decision no. 53/2010[45] came as a shock for adherents of the "myth of omission". In 2007 a citizen had enough of the idleness of the National Assembly (still not enacting the necessary legislation on the parliamentary representation of minorities) and initiated a referendum on the issue. The National Election Commission duly authenticated the signature sheet, but its decision was objected to in front of the Constitutional Court. According to the objection, the initiative was unconstitutional because it concerned an organizational issue that falls within the competence of the Parliament. Pursuant to the Constitution, it was indeed impossible to hold a referendum on such an issue, so the Constitutional Court

40 *Ibid.* III. 6. par. 2.
41 *Ibid.* III. 7. last paragraph.
42 *Ibid.* IV. 2. par. 3.
43 Decision 14/2006. (V. 15.) AB [4] par. 2.
44 Cf. Decision 34/2005. (IX. 29.) AB
45 Decision 53/2010. (IV. 29.) AB

upheld the objection.[46] More importantly for the purposes of our discussion, the objection also considered the initiative inadmissible because "a possible negative result [of the referendum] would be contrary to the legislative obligation arising from the unconstitutional omission declared by Decision no. 35/1992 of the Constitutional Court".[47] The Court did not seek to resolve the contradictory situation arising from its previous decisions, instead it simply noted that "the said decision found a legislative omission *solely* because the National Assembly did not enact a law providing for the right of national and ethnic minorities to organized self-government and the »terms and conditions« thereof. The National Assembly fulfilled this task in 1993" (emphasis added).[48]

To sum it up, it is unclear from the relevant decisions of the Constitutional Court whether the Parliament made up for its unconstitutional omission or exercised its legislative freedom when in 2011, two decades after the ominous Decision no. 35/1992, it finally enacted a law on the parliamentary representation of nationalities. Whatever the truth may be, the Constitutional Court was certainly not vehement in defending the right of minorities to parliamentary representation. As for the final solution, the legislator seemingly accepted the advice of the Constitutional Court, since the status of nationality advocates does not match that of the Members of Parliament, thus it does not threaten the principle of equal suffrage.[49] Nevertheless, the Parliament "generously" abolished the 5% electoral threshold, although it had no constitutional obligation to do so.[50] Whether the current regulation will stand the test of time is yet to be seen.

4. The right of minorities to self-governance

The establishment of minority self-governments is one of the possible ways in which minority groups can realize their right to representation (and participation in the public affairs). Minority self-governance in general has two main forms: territorial and personal autonomy. In Hungary, the system of minority self-governments is based on the personality principle, with the involvement of some territorial elements. In the model of personal autonomy, minority bodies are elected only by those belonging to the given minority, and the power of these bodies extend only to the minority. Since in this model minority bodies typically have competences on the fields of education, culture and media, this type of autonomy is often referred to as cultural autonomy.[51]

The Constitutional Court has repeatedly held that when creating rules on the establishment, competence and position in the administrative system of minority self-governments – since the Constitution itself does not regulate these issues –, the legislator has a wide margin of discretion, limited only by the provisions of the Constitution, in particular those

46 *Ibid.* III. 2.
47 *Ibid.* I. 1.
48 *Ibid.* III. 3.
49 Cf. Decision 14/2006. (V. 15.) AB
50 Decision 1040/B/1999. AB
51 For more information on autonomy for minorities, see Tamás Korhecz: *Autonómiák és regionális modellek Európában*. [Autonomies and regional models in Europe.]. In: Ildikó Réka Szakács (ed.): Nemzetpolitikai ismeretek. [About national politics.]. Szeged, SZTE ÁJK, International and Regional Studies Institute, 2017, pp. 145–189.

on fundamental rights.[52] In spite – or precisely because – of this, the regulation on minority self-governments has been widely criticized.[53] It is no coincidence that the majority of the submissions to the Constitutional Court on minority issues concern this topic. Since the *establishment* of minority self-governments is inseparable from the identification of right-holders (Who belongs to a minority?), many relevant questions and Constitutional Court's decisions have already been discussed in my previous article.[54] Also, the previous section of this paper dealt with the prohibition of obtaining preferential seats for representatives of local minority self-governments. Yet, the functioning of minority self-governments entails many other issues which will be discussed in the following.

In 1997 a petition alleged the unconstitutionality of a provision of the (1993) Minorities Act which, in the absence of special statutory provisions for local minority self-governments, provided for the *application of the general rules for local (municipal) governments*. According to the petitioner, local minority self-governments and municipal governments differ from one another in all relevant aspects, including their electoral communities and regulatory powers. The two legal institutions are in fact so unlike that no analogy can possibly exist between them.[55] The Constitutional Court found no constitutionally relevant connection between the impugned provision of the Minorities Act and the cited article of the Constitution (Article 43), as the latter concerns local governments, while the institution of minority self-government rests on Article 68 on the rights of national and ethnic minorities. Article 68 of the Constitution guarantees the fundamental right to minority self-governance, however, it does not regulate how these self-governments shall be established, their position in the state organization or their relations with state bodies. Consequently, the legislator has a free hand in these matters. Thus, the Constitutional Court had little to say about the legal status of minority self-governments: they have statutorily defined, independent tasks and powers integrated into the local government system, and they participate in the administration of local public affairs.[56] Apparently, the judges did not appreciate the fact that the functions of a municipality and those of a minority community are fundamentally different, and for the Court „the exercise of public affairs [was] a sufficient reason to treat unequals equally".[57]

The Constitutional Court also rejected a constitutional complaint and a submission regarding the *electoral procedure for minority self-governments* at the national (country-wide) level and in the capital city.[58] According to the petitioner, the relevant provisions unjustifiably impede the exercise of the right of minorities to self-governance, as the establishment of national self-governments and those in Budapest is subject to a three-quarters quorum – as opposed to the 50+1% ratio which is generally applied in Hungarian public law. In the meantime, the impugned legislation had been amended in

52 Cf. e.g. Decision 45/2005. (XII. 14.) AB

53 See e.g. Balázs Majtényi: *A magyarországi kisebbségi önkormányzati rendszer elvei és működése.* [Principles and operation of the minority self-government system in Hungary.]. In: Fundamentum, 2001/3, pp. 34–42.

54 Nagy 2020, pp. 60–77. Relevant court cases include Order 181/E/1998 AB, Decision 45/2005 (XII. 14.) AB, Decision 168/B/2006 AB, and Decision 41/2012 (XII. 6.) AB.

55 Decision 435/B/1997. AB, I. 2.

56 *Ibid.* III. 3.

57 Judit Tóth: *Kisebbségi jogok az Alkotmánybíróság előtt*. [Minority rights before the Constitutional Court.]. In: Gyulavári – Kállai 2010, p. 308.

58 Decision 300/B/1999. AB

accordance with the petitioner's intention, and the Constitutional Court obviously did not found the 50+1 % quorum rule to be unconstitutional. As regards the constitutional complaint, it was rejected by the Court on the ground that the petitioner had not exhausted the remedy available under the Electoral Procedure Act. The fact that pursuant to previous legislation the Roma, the Armenian and the Romanian minorities had not managed to establish their self-governments in the capital city, obviously „did not disturb the principled judgement"[59] of the Constitutional Court. After all, in 2002 new elections would take place, and until then, the national self-governments would represent the interests of the minorities concerned in Budapest. In the Court's view, the legislator's omission to organize new self-government elections in the capital (complying with the new quorum provision) did not reach the level of unconstitutionality, because „there is an organization that performs the tasks of the non-functioning self-government in the capital".[60]

The status of *minority advocates*[61] was also discussed in front of the Constitutional Court. A 2002 decision[62] found that a local government decree had created a constitutional omission by failing to set a fee for the minority advocate. The mayor justified this on the grounds that in the municipal elections held in 1998, the minority candidate received enough votes to become a full member of the board of representatives of the local government, so he received the same amount of honorarium as the other representatives, there was no need to set a separate honorarium for him. The Constitutional Court proclaimed that if the local government decides to set a fee for the board representatives – who normally perform their work in a social capacity –, then it shall set a fee for the minority advocate as well. This amount shall be an addition to the honorarium of representatives, since the advocate's activities in the interest of the minority community involve additional tasks and responsibilities. The decision did not include any substantive statement regarding minority self-governance.

It is somewhat surprising that while the remuneration of minority *advocates* was provided for in law, for a long time there was no clear rule as to whether an honorarium could be established for a minority *representative* of the local government. The opinion of the Court once again remained unknown, since following a submission for the establishment of unconstitutional legislative omission, Act no. CXIV of 2005 remedied the uncertain legal situation. Since thus the submission became devoid of purpose, the Constitutional Court terminated the proceedings.[63]

Another unconstitutional omission was alleged in 2000 because the legislator did not provide the right for the local minority self-government to *initiate a local referendum*. According to the act on local governments in force at the time, the following persons

59 Tóth 2010, p. 307.

60 Decision 300/B/1999. AB, III. 5.

61 Under the act on local governments in force at the time of the petition, the minority candidate who received the most votes in the elections of mayors and local government representatives became the local advocate for the given minority. A 2005 amendment to the law abolished the institution of minority advocate and gave its powers to the chair of the minority self-government. This latter solution is used by the current Nationalities Act as well (Article 105 (2)): "The chair of the local nationality self-government shall attend the board or general meetings and committee meetings of the local municipality with the right of consultation."

62 Decision 46/2002. (X. 11.) AB

63 Order 926/E/2003. AB

and bodies could initiate a referendum: at least a quarter of the local government representatives, committees of the board of representatives, governing bodies of local social organizations, and a certain number of voters to be specified in a local government decree – the minority self-government did not. The Constitutional Court did not discuss minority rights in its reasoning, it only analyzed the right to local self-governance (i.e., the right to establish municipal governments). The Court stated that the Constitution only determines the indirect and direct exercise of this right, but neither the conditions, nor the personal scope thereof. Thus, no unconstitutionality can be established, as the personal scope of the right to initiate a local referendum is not regulated by the Constitution but by the act on local governments.[64]

The Constitutional Court has several times addressed the *right to consent of minority self-governments concerning legislation on issues relevant for minorities*. One of the submissions requested the annulment of a provision of the Public Education Act, which granted the minority self-government the right to consent when adopting or amending the budgets of minority institutions maintained by the local government (municipality). In the petitioner's view, the right to consent restricts the fundamental right of local governments to make independent decisions. The Constitutional Court dismissed the charge of unconstitutionality with reference to its previous case law: when restricting fundamental rights of local governments the legislator is prohibited from introducing a restriction that leads to the emptying and actual withdrawal of the content of the given right,[65] and here this was not the case. The exercise of the right to consent involves two contradictory interests: one is to prevent decisions that infringe minority interests, and the other is the interest of the local government not to delay the adoption of its financial regulation for an unpredictable period of time. And though the right to consent is undoubtedly a strong constraint in the decision-making process – as it may require multiple consultations –, the law provides guarantees (e.g. setting up a conciliation forum) to ensure that a mutually satisfactory decision is reached in a foreseeable period of time. Consequently, the impugned right to consent "does not restrict the fundamental right of local governments to independent decision-making to such an extent that it would ultimately lead to its emptying and thus to the inoperability of local governments".[66] Analyzing the content of the right to consent, the Court further explained that this right only allows minority self-governments to be *involved* in the process of making decisions concerning the education of minorities, but does not provide either the decision-maker or the subject of the right to consent with the capacity to make decisions individually.[67]

In another decision adopted on the same day,[68] the Constitutional Court ruled on a submission requesting the establishment of unconstitutionality in connection with the 1993 Minorities Act. The provision in question required the *consent* of the local minority self-government for the adoption of local government decisions covering the *education* of persons belonging to a minority. According to the petitioner, the provision is contrary to the constitutional requirement of rule of law, because it is not possible to determine

64 Decision 18/B/2000. AB, III. 1.
65 792/B/1998. AB, III. 1.
66 *Ibid.* III. 2.
67 *Ibid.* III. 1.
68 Decision 713/B/2002. AB

exactly what is meant by "extending also to the education of persons belonging to a minority". Due to the uncertainty of the norm, it is not applied in practice, which makes it impossible to exercise the right of minorities to consent. The legislator is further responsible for an unconstitutional omission, because it did not create the legal conditions for the exercise of the right to consent.[69] After recalling its case law on legal certainty and the rule of law, the Constitutional Court examined all elements of the impugned part of the provision to see whether they are indeed so indeterminate that taken together they may lead to arbitrary decisions or even indecision. The Court easily ascertained the meaning of the words "education" and "also" with grammatical interpretation, and it did not contemplate much about the concept of "belonging to a minority", either, as that was clearly defined in the Minorities Act. For the Court, the fact that there was no official register certifying who is considered to belong to a minority did not make the very concept of "belonging to a minority" incomprehensible or obscure.[70] The picture of course becomes obscurer when it comes to the exercise of minority rights, especially the right to vote, but that is another matter…

Decision no. 657/B/2004. also concerned the right to consent of minority self-governments. The submission raised several aspects as being unconstitutional, but it did not contain "substantive, constitutionally relevant justification", worthy of the Constitutional Court's attention, except in connection with the *local government's decree on the budget of minority institutions maintained by the local government*.[71] This issue had already been discussed by the Constitutional Court, but the petition contained a new argument compared to Decision 792/B/1998 and therefore proved to be suitable for a substantive examination. The Court sought answers to the questions of *whether the right to consent constitutes participation in legislation* by minority self-governments, and if so, whether they have constitutional empowerment for this – since law-making is a public authority which can only be authorized by the Constitution.[72] After a lengthy explanation on legal technicalities (including on the difference between the budget and the law promulgating the budget), the Constitutional Court concluded that the examined rule of the Public Education Act required consent not for the adoption of a local government decree as a normative decision (meaning: law), but for the determination of the budget of minority public education institutions as an *individual decision*.[73] Therefore, minority self-governments have no legislative powers. So then, what does the right to consent mean? According to the Court, the right to consent of minority self-governments is rooted in a fundamental right, and does not affect the autonomy of local governments vis-à-vis the central government. The law only provides for a division of labor between the maintainer local government and the minority self-government, based on the fundamental right of minorities to participate in public life.[74]

Following the line of cases related to the *right to consent* of minority self-governments, a petitioner claimed that the (former) *Minorities Act* had been *amended unconstitutionally*,

69 *Ibid.* I.
70 *Ibid.* III.
71 Decision 657/B/2004. AB, III. 7.
72 *Ibid.* III. 2.
73 *Ibid.* III. 3–4.
74 *Ibid.* III. 6.

because the amendment was adopted *without the consent of minorities*, in violation of the constitutional provision stating that national and ethnic minorities shall share the sovereign power of the people.[75] The Constitutional Court once more remained reluctant to explore the meaning of the term "constituent part of the State"[76], it merely stated that this concept does not entail that laws concerning minorities can be created or amended only with the consent of minorities. As an explanation, the Court cited the provision of the Minorities Act itself, the very subject of the constitutional review, using a circular argumentation: "The Constitution […] does not regulate the rights of minorities with regard to draft legislation affecting minorities, the obligation to provide for the right to consent cannot even be inferred from the Constitution, and [the Minorities Act] gives national minority self-governments not the right to consent but the right to *consult*" (emphasis added).[77] In the same case, the Minorities Act was also challenged because it did not ensure the *effective public autonomy* of minority self-governments, it only provided for cultural autonomy. The Constitutional Court again avoided addressing the legal status of minority self-governments, instead it cited the disputed provision of the Minorities Act on the definition of minority public affairs,[78] and then concluded without any explanation: "therefore, the Act does not limit the concept of public minority affairs to cultural autonomy".[79]

Based on the above decisions, I must agree with Tóth's conclusion that, in the eyes of the Constitutional Court, *minority self-governance is not much different from civil representation in terms of the status of minority self-governments under public law*. According to the Court, the public autonomy of minority self-governments must be established within the conceptual framework of minority public affairs as regulated by the Minorities Act, which is in fact exhausted in cultural autonomy (even if the body claims otherwise).[80]

5. The language rights of minorities[81]

Both the previous Constitution (Article 68) and the current Fundamental Law (Article XXIX) granted three language rights to national minorities: to use their mother tongues (without specifying in which private and public spaces), to use names in their own languages, and to receive education in their mother tongues. A total of six cases have been submitted to the Constitutional Court in connection with these rights – none of them concern education.

75 Decision 168/B/2006 AB

76 See the relevant cases in Nagy 2020, pp. 50–60.

77 Decision 168/B/2006. AB, III. 2.

78 A minority public affair is "any affair related to the provision of certain public services to persons belonging to minorities, the independent conduct thereof and the creation of the necessary organizational, personal and financial conditions, in order to enforce individual and collective minority rights enshrined in this Act, to express the interests of persons belonging to minorities, in particular to nurture, preserve and enhance the mother tongue, and to implement and preserve the cultural autonomy of minorities via minority self-governments". Act no. LXXVII of 1991, Article 6/A, (1) 1. a), as modified by Act No. CXIV of 2005. (Translation by the author.)

79 Decision 168/B/2006. AB, III. 8.

80 Cf. Tóth 2010, p. 138.

81 This section is a shortened and revised version of the following article: Noémi Nagy: *„Nyelvében él a nemzet(iség)", avagy a magyarországi nemzetiségek nyelvi jogainak alkotmánybírósági védelme.* ["A nation(ality) lives in its language", or the protection of the linguistic rights of Hungary's nationalities by the Constitutional Court.]. In: Fundamentum, 2019/3–4, pp. 86–98.

5.1. Language of place names in official documents

The use of languages in place names – a minority right not especially guaranteed by the Constitution itself, but by the Minorities/Nationalities Act – was raised only once, in a quite peculiar case in 1999, which aimed at the ex-post constitutional review of the law on birth registers, marriage procedures and naming.[82] Pursuant to the challenged provision, in foreign-born Hungarian citizens' birth certificates (and in documents issued on the basis thereof) the foreign name of the place of birth as well as the Hungarian designation thereof – if known – must be indicated, along with the country of birth. In the petitioner's opinion, the foreign language designation of the country and the place of birth should be omitted if Hungary's jurisdiction had ever extended to the given locality and the Hungarian name is known, otherwise the person can be discriminated against in many situations. Quite clearly, the facts of the case have nothing to do with the protection of Hungary's national minorities. Rather, the change in the name of a locality having formerly belonged to Hungary affects ethnic Hungarians who became minorities abroad due to the territorial changes after World War I. Many such individuals – ethnic Hungarians who are citizens of neighboring countries of Hungary – decide to immigrate to Hungary where they can easily acquire Hungarian citizenship. These people often face discrimination in practice (in job interviews, in official proceedings, etc.) when on the basis of their official documents their former citizenship is revealed and they are identified as foreigners by their "original" kin-Hungarians. Of course, since these immigrants are ethnic Hungarians, they do not constitute a minority under Hungarian constitutional law. However, interestingly enough, the decision of the Constitutional Court contains principled statements concerning minority rights.

The Constitutional Court found the petition unfounded because the impugned provisions could not be materially related to any of the constitutional rights allegedly violated (right to human dignity, participation in public affairs, right to hold public offices, right to work, free choice of work and occupation). As for the matter of discrimination, the Court stated that whether a Hungarian citizen was born abroad or in Hungary is an objective fact. Since "different regulations are based on different facts", the regulation was found to be non-discriminatory and non-arbitrary, on the contrary: "necessary for the realization of the goals of civil registration".[83]

Turning to the language issue, the Court ruled that *the choice of the language of official proceedings and the determination of administrative place names are part of state sovereignty*. Exercising its sovereign authority, the State may or may not grant additional rights to minorities living in its territory.[84] Such an additional right is contained, for example, in Article 53, c) of the (former) Minorities Act, which obliges local municipalities to display the signs of place names and street names in the given minority language if the local minority self-government so requested.[85] However, this right of minorities – opined

82 Decision 36/1999. (XI. 26.) AB
83 *Ibid.* IV. 3.
84 *Ibid.* III. 1.
85 This right is also guaranteed by the Nationalities Act (Article 6 (1) d) currently in force, albeit not only conditional upon the request of the local nationality self-government, but also requiring a ten percent ratio of the given nationality, as registered in the census.

the Court –, does not extend to the use of non-Hungarian forms of place names in the proceedings of civil registration.[86] This finding is peculiar for two reasons. Firstly, the petition did not intend to indicate the name of a *locality in Hungary* in a *minority language* (which possibility was indeed provided for in the Minorities Act), on the contrary: the petitioner objected that a *foreign* place name could not be indicated only in the *Hungarian language* (whenever a given locality was previously under Hungary's jurisdiction, thus its name in Hungarian was known). The reference to minority rights in the Court's decision is, in fact, completely unexpected and logically inappropriate.

Another oddity of the finding is that it confuses two completely different spheres of language use: the language of personal documents and the language of topographical indications. In my opinion, the present issue was not about whether the "additional right" of minorities in relation to topographical indications extends to the language of official documents or not, but that these are two different areas and therefore subject to separate regulation.[87] This is easy to realize, since a personal document must be accepted by the authorities as valid throughout the country, while place name signs must be displayed only in a given geographical area. It is therefore not entirely clear how the Constitutional Court arrived at the issue of topographical indications based on the facts concerning the language of official documents – precisely, the language of a single entry –, in any event, Decision no. 36/1999 is very important for minority language rights. This was the first decision of the Constitutional Court to discuss the language rights of minorities, in addition, it reveals the restrictive theoretical approach of the Court: the choice of the language of official proceedings and the establishment of place names are matters of state sovereignty, and in this context, any rights granted to minorities should be interpreted as "additional".

5.2. The right of minorities to use their names

Decision no. 58/2001,[88] adopted in the matter of petitions seeking a posterior review of unconstitutionality, is once again based on a factual background which had nothing to do with national minorities. The decision is nevertheless well-known among Hungarian constitutional lawyers, as it is of paramount importance for the constitutional interpretation of the right to a name in general.[89] For the purposes of this paper, I will only examine the aspects relevant for the language rights of minorities.

The only minority-relevant aspect of the case is that one of the petitioners, an ethnic Hungarian, referred to the constitutional provision protecting the right of national and ethnic minorities to use their names in their own language, arguing *a contrario* that citizens of

86 Decision 36/1999. (XI. 26.) AB, III. 3.

87 Cf. the logic of regulation in the European Charter for Regional or Minority Languages (Article 10) and the Framework Convention for the Protection of National Minorities (Article 11).

88 Decision 58/2001. (XII. 7.) AB

89 For more information on the right to a name, see: László Kiss: *A névjog mint alkotmányos alapjog*. [The right to a name as a constitutional fundamental right.]. In: Jura, 2002/2, pp. 45–58.; Zoltán Megyeri-Pálffi: *Név és jog. A névviselés jogi szabályozásának fejlődéstörténete Magyarországon.* [Name and law. The evolution of the legal regulation of naming in Hungary.]. PhD dissertation. Debrecen, 2011. pp. 53–56, 79, 85–90, 93–95, 113–116, 141, 146–149, 168; Péter Tilk: *Az emberi méltósághoz való jog „új" összetevője: a névjog*. [The "new" component of the right to human dignity: the right to a name.]. In: Magyar Közigazgatás, 2002/11, pp. 651–662.

Hungarian ethnic origin shall also have this right.[90] Indeed, the right to have a name is not recognized by the Constitution as an independent fundamental right; it is *expressis verbis* provided for as a right of minorities. Nevertheless, according to the case law of the Constitutional Court, the right to a name is protected as a fundamental right deriving from human dignity, one of the manifestations of the right to identity. In the standard interpretation of the Court, every human being has an inalienable right to have and bear his or her own name expressing his or her identity. This right cannot be restricted by the State, but other elements thereof – in particular choosing, changing and amending one's name – can, within the limits of the constitutional test of necessity–proportionality.[91] Referring to an earlier decision (No. 995/B/1990), the Constitutional Court stated in principle that a name may also be a carrier of national affiliation,[92] and that the classification of the right to change one's name as a fundamental right can be justified by the right to a person's national(ity) identity.[93]

The Court could have summarily rejected the petition referring to the above, instead it thoroughly examined the legal regulation on the right of nationalities to choose their names – expressing judicial activism which is an unusual approach for the Court in minority issues. Pursuant to the relevant provision of Legislative Decree no. 17 of 1982 on birth registers, marriage procedures and naming, only forenames contained in the Hungarian Book of Forenames with a supplement on the forenames of nationalities may be registered, furthermore, members of nationalities living in Hungary or persons whose mother tongue is a minority language – without having to prove that they belong to a nationality – may bear a forename appropriate to their nationality. In turn, according to the Minorities Act, a person belonging to a minority has the right to "freely" choose his own forename and the forename of his child, to have his forename and family name registered in accordance with the rules of his mother tongue, and to have them indicated in official documents. In short, the Minorities Act provided for the "free" choice of names for national and ethnic minorities, whereas the legislative decree on naming used the term "appropriate to nationality". In the Constitutional Court's opinion, the two terms do not have the same meaning, as choosing a name "freely" offers a wider scope of options than what is designated by "appropriate to their nationality". Thus, there is indeed a collision between the two statutory provisions, which, however, does not necessarily cause unconstitutionality: only if one of the provisions of the Constitution is violated.[94]

90 Decision 58/2001. (XII. 7.) AB, I. [1], par. 3.

91 The Constitutional Court applies two measures in its practice on discrimination and the restriction of (fundamental) constitutional rights: the stricter „necessity–proportionality test" in case of fundamental rights, and the simpler "reasonableness test" in case of rights which are not considered as fundamental. Based on the latter, the Court has to ascertain only whether the classification of persons can be justified by objective reasons or not. According to the necessity–proportionality test, a restriction of a fundamental right is constitutional when it is indispensable, that is, if the protection or enforcement of another fundamental right or liberty or the protection of other constitutional values cannot be achieved in any other way. In addition, the importance of the objective pursued and the severity of the violation of the fundamental right caused by it must be in proportion. When restricting a right, the legislator shall choose the least severe means to achieve the given objective. See: Gábor Halmai – Attila Tóth (eds.): *Emberi jogok*. [Human rights.]. Budapest, Osiris, 2003. pp. 390–391. Cf. Decision 30/1992. (V. 26.) AB and Decision 1006/B/2001. AB, III. 4.1.

92 Decision 58/2001, III. [2], par. 6.

93 *Ibid*. III. [4], par. 10.

94 *Ibid*. IV.2.6. par. 2–4.

The Constitutional Court then turned to analyze Article 68 (2) of the Constitution which set out the following: "The Republic of Hungary shall provide for the protection of national and ethnic minorities. It shall ensure their collective participation in public affairs, the fostering of their own cultures, the use of their mother tongues, education in their mother tongues and the use of names in their own languages". This provision makes it clear that Hungarian citizens who identify themselves as belonging to a minority participate in public life, foster their own cultures and use their mother tongues *with regard to their nationality*, and their right to use of names in their own language is also linked to their nationality. Therefore, the "free" choice of names provided by the Minorities Act *does not mean as being without any restrictions*: this freedom of persons belonging to a nationality is connected to their nationality status, it must be interpreted as "appropriate to nationality". So, the relevant provision is not in conflict with the Constitution, on the contrary: it can be deduced directly from it.[95]

I do not agree with Judit Tóth in that the Constitutional Court, when interpreting the content of the provision of the Minorities Act on the free choice of names, did actually turn a statutory provision into a constitutional standard.[96] Although we have several times witnessed this attitude by the Court, the standard applied here was Article 68 (2) of the Constitution itself, the interpretation of which shows that the exercise of minority rights is in all cases linked to the minority status of the right-holders.

Consequently, in the Court's opinion, there are certain restrictions on the choice of names for citizens of both Hungarian and other ethnicity, which cannot be deemed unconstitutional. The essence of this constraint is the same for both groups: the traditions and customs of the given nationality, which are summarized in the Hungarian Book of Forenames. The choice of names of nationalities is also limited to this, they cannot bear any forename they want to. Thus, there is no discrimination between citizens of Hungarian ethnic origin and citizens belonging to a minority.[97]

Interestingly – and quite unusually in minority cases – the Constitutional Court drew attention to something which was not included in the petitions and which leads us to the controversial issue of minority self-identification. This circumstance is that minorities do not have to prove their nationality, which can lead to abuses. The majority decision warned that, although the legislator obviously did not intend to allow persons who are not members of a minority to exercise the right to use a nationality name, the current manner of regulation does not exclude such a possibility. The development of such an undesirable practice should be prevented by the State by further clarifying the relevant provisions.[98]

In a previous case concerning a name change, the Constitutional Court was far less thorough and, by a presidential order, in only four sentences rejected the petitioner's request for permission to change the maiden name of his deceased mother. According to the petitioner, the name in question reveals his Roma origin and puts him at a significant disadvantage in terms of employment. Alas, the Constitutional Court found that the challenged

95 *Ibid*., IV.2.6. par. 5–6.
96 Tóth 2010, p. 317.
97 Decision 58/2001, IV.2.6. par. 7–8.
98 *Ibid*. IV.2.6. par. 9.

provision "cannot be linked to the right to work and the prohibition of discrimination in any constitutionally relevant aspect", so the petition is clearly unfounded.[99] For a Hungarian scholar, this means that the limitability of the right to a name is so strong that even the enforcement of the constitutional standards of name change could be neglected.[100] I, however, consider that since by the time of this case (1996–97) the Constitutional Court had not yet laid down the constitutional framework for the interpretation of the right to a name, what is more, it did not even link the facts of the case to the right to a name or to minority rights, there was no constitutional standard to be enforced. Here, the Court can only be blamed for rejecting the petition without substantive examination. Undoubtedly, the elaboration of the framework for the interpretation of the right to a name as a fundamental right caused quite a headache for the justices, which might be the reason why Decision no. 58/2001 (discussed above) was issued more than ten years[101] after the submission of the first relevant petition.

5.3. The language of the minutes of the minority self-government

The Constitutional Court has dealt with the language of the minutes of the board of representatives of the local minority self-government in two instances, but without making any substantive statement. The first petition requested the establishment of unconstitutionality and annulment of a provision of the 1993 Minorities Act (as amended in 2005). Article 30/F set out that in case the minutes were taken both in the minority language and in Hungarian, the version in the minority language shall be considered as authentic. The Court called on the petitioner to supplement his constitutional complaint, who, however, did so after the deadline, so the complaint was rejected.[102]

The same issue was raised by the Commissioner for Fundamental Rights in 2012,[103] who asked for the annulment of certain provisions of the new (2011) Nationalities Act. The highly detailed submission raised concerns about, *inter alia*, the provisions on the language of the minutes of nationality self-governments. Pursuant to the former Minorities Act, the minutes of the board meetings had to be prepared bilingually (in the minority language and Hungarian), *or* exclusively in Hungarian – in the former case the minority language version was considered authentic (this rule was objected to in the previous petition, rejected by the Court). In contrast, (the original) Article 95(1) of the Nationalities Act prescribed that the minutes of the self-government should be drawn up in Hungarian *and*, if the meeting was not held in Hungarian, in the language of the deliberations – both versions being authentic. According to the Commissioner for Fundamental Rights, the obligation to prepare bilingual minutes of board meetings held in a nationality language unnecessarily and disproportionately restricts the right of nationality self-governments to use their mother tongue. For the same reason, the regulation also violates the obligations set out in the European Charter for Regional or Minority Languages (hereinafter:

99 Presidential Order 924/I/1996. AB
100 Tóth 2010, p. 317.
101 Kiss 2002, p. 45.
102 Order 3208/2012. (VII. 26.) AB
103 Submission of the Commissioner for Fundamental Rights, dated 27 April 2012. Available online: http://public.mkab.hu/dev/dontesek.nsf/0/2ea8a1e5d6372fafc1257ada00524c26/$FILE/ATTQDTG3.pdf/2012_2883-0.pdf

Language Charter), because it discourages nationality self-governments from holding their meetings in their own language.[104]

The Commissioner's remark seems logical: if the minutes shall be prepared in the Hungarian language in any event, then it is easier to hold the meeting itself in Hungarian in order to avoid unnecessary work. Thus, the regulation indeed made the use of nationality language more difficult. Whether or not this violated a fundamental constitutional right is another matter. It would have been interesting to see the opinion of the Constitutional Court in this regard, to find out whether the regulation would have passed the test of necessity–proportionality. All the more so because the 2012 decision of the Court, in contrast to its previous minority-related case law, contained an extensive part of international law. The decision not only reviewed the rules of international law on minority (language) rights that bind Hungary (in particular the provisions of the Language Charter and the Framework Convention for the Protection of National Minorities), but it also referred to the monitoring materials adopted in the context of implementation of these treaties.[105] Before the publication of the decision, however, the Parliament had amended the challenged provision, therefore the Constitutional Court terminated the proceedings on this issue. Pursuant to the amended Article 95 (1) of the Nationalities Act, the minutes of the board meetings of nationality self-governments shall be drafted in the language used at the meeting *or* – based on the decision of the board – in Hungarian.[106] This solution is undoubtedly the most favorable one for the use of minority languages.

5.4. Use of minority languages in administrative and judicial proceedings

The latest decision (order) of the Constitutional Court on the use of minority languages was adopted on 27 September 2016.[107] Interestingly, here the right to use one's mother tongue was interpreted as a human right, and only Justice Czine's concurring opinion emphasized the relevance of the case for minority protection.

In the case, Russian- and Ukrainian–Ruthenian-speaking petitioners had requested the judicial review of an administrative decision and then applied to the Curia (the Supreme Court of Hungary). In their submission to the Constitutional Court, they alleged infringement of the right to use their mother tongue. They claimed that they had been deprived of this right already in the administrative proceedings because the official decisions had not been translated for them. Later, in the judicial phase, they had to take care of the translation, bear the costs of it, they were disadvantaged due to their lack of understanding of the Hungarian language, the court distorted the facts, and the procedure was deliberately delayed. On the basis of all this, their fundamental rights to human dignity, to the use of their mother tongue, to fair procedures and to the prohibition of discrimination were violated.

The Constitutional Court rejected the petition. In a rather succinct reasoning, it accepted the position of the Curia, with virtually no further comment, stating only that "there exists no unconstitutionality that would have substantially affected the judicial decision".

104 *Ibid*. 15.
105 Decision 41/2012 (XII. 6.) AB, [14] – [17]
106 Cf. Act no. LXXVI of 2012, Article 79 (3). In force as of 27 June 2012.
107 Order 3192/2016. (X. 4.) AB

Furthermore, the Court did not see "a matter of fundamental constitutional importance" in the connection between the legal interpretation of the contested court decisions concerning the use of the mother tongue and the provisions of the Constitution referred to by the petitioners: "From these constitutional provisions it does not follow that the petitioners should have the fundamental right to use their mother tongue in official and judicial proceedings free of charge in all cases." [108] Nevertheless, to show its generosity, the Court provided for the translation of its order into the petitioners' mother tongues.

Perhaps feeling the ackward succintness of the judgment, one of the justices considered it necessary to supplement the order of the Court. In her concurring opinion, Justice Czine set out that since the petitioners are Ukrainian citizens of Russian and Ukrainian-Ruthenian mother tongue, respectively, with a residence in Hungary, they belong to the nationalities of Hungary listed in the annex to the 2011 Nationalities Act.[109] As such, they are entitled to protection under Article XXIX of the Fundamental Law, including the right to use one's mother tongue. She pointed out that this minority right is guaranteed by several international treaties as well as domestic procedural laws. In the present case, the petitioners claimed a violation of their right to use their mother tongue in both the administrative and the judicial procedures, as the relevant documents were not translated for them. The Curia, on the other hand, asserted that the court hearing the case did appoint an interpreter for the petitioners, did order professional translations and did translate the judgment into the petitioners' mother tongues. Moreover, the petitioners' submissions were written largely in Hungarian, which proves that at least one of them is proficient in the Hungarian language. Justice Czine emphasized that the rights of nationalities, in particular the right to use their mother tongue in judicial procedures, enjoy special constitutional protection, and that the Constitutional Court refused a substantive examination only because the circumstances of the particular case did not warrant it.[110]

6. Final conclusions

Although Hungary's legislation on the protection of minorities is generally considered advanced and comprehensive, gaps remain to be filled and dysfunctional elements to be sorted out by the Constitutional Court. Based on the evaluation of the relevant case law, however, the contribution of Hungary's supreme judicial body in the protection of minorities seems much less significant than expected. The general attitude of the Constitutional Court towards minorities is characterized by a complete lack of judicial activism. In fact, the Court avoided to address head-on the petitions whenever possible, usually on the grounds that they did not contain a specific constitutional problem, 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. Although the Court many times had the opportunity

108 *Ibid*. [28]

109 Under the previous legislation (cf. Article 1(1) of the 1993 Minorities Act), only Hungarian citizens were possibly considered as minorities. In 2014, the scope of the Nationalities Act was extended to foreign nationals residing in Hungary. Cf. the original Article 170(1) of the Nationalities Act which was repealed by Article 238. d) of the same act as of 29 July 2014.

110 After this paper had been submitted, the Constitutional Court adopted a new decision on the language use of nationalities in judicial and administrative proceedings: Decision 2/2012 (I. 7.) AB, 15 December 2020. For a summary of this case, see Márton Sulyok's chapter in this volume.

to exercise its legal power to conduct ex officio examination or to extend the scope of the submission because of the factual context, it very rarely did so (a welcome exception is Decision no. 58/2001).

As I have already proven in the first study of my research,[111] the Court failed to provide a constitutional interpretation on the concept of minorities and precise guidelines on identifying persons belonging to national minorities, that is, the very subjects of minority rights, which are in fact unavoidable first steps in the process of exercising minority rights. As for individual minority rights, the same judicial restraint can be seen. In most cases, the Court used a circular reasoning, conveniently relying on definitions provided by the Minorities/Nationalities Act or other sectoral laws, instead of providing its own interpretation based on the Constitution/Fundamental Law. The Court many times practically gave a free hand to the legislator, such as concerning the legal status of minority self-governments or the parliamentary representation of minorities. As regards the latter, the Court not only did not move the issue forward, but with its contradictory decisions it might have even contributed to the prolonged settlement thereof.

Another shortcoming of the Court's minority-related jurisprudence is that it is not built upon the valuable experience of international minority protection mechanisms (except in a handful of cases after 2012). This is worrisome because Hungary is party to all relevant multi- and bilateral treaties on minority rights, therefore there are legally binding international obligations that the State has to consider when adopting and implementing laws on minorities. Disregarding the applicable international standards is "theoretically undesirable and in practice creates serious problems".[112]

Besides referring to the legislator's wide discretion in choosing how to fulfill its constitutional obligation, the Court's other favorite tactics is procrastination. Many times the Court delayed the adoption of its decision until eventually the legislator remedied its unconstitutional omission or amended the challenged provision in the desired direction, therefore the Court could completely avoid addressing the issue on the merits. This unwilling attitude is further testified by the fact that in almost 100% of the cases the Court rejected the petition, whether it was submitted in favor of or against minority interests. So the Court is not hostile towards minorities, rather it is *neutral*: it preferably stays away from the politically sensitive issues of minority protection like a cat from hot porridge.

Of course, it is a defensible position that judicial activism by constitutional courts is not at all desirable. In my opinion, however, this is not the case with minority protection. First of all, due to their small numbers, Hungarian nationalities do not have sufficient capacity to assert their interests; politics can easily neglect their wishes. Secondly, international legal standards for minority protection are much more flexible than human rights in general, thus the discretion of the legislator in regulating minority rights is much wider than in the case of other human rights. Thirdly, the possibilities for enforcement are much more modest, as for most minority rights the final forum is the Constitutional Court, while for the protection of other human rights, victims can easily turn to the European Court of

111 Nagy 2020.
112 Justice Kovács's dissenting opinion to Decision 45/2005. (XII. 14.) AB, III/2/1.

Human Rights (ECtHR) or other international fora. In turn, a complaint can be filed with the Strasbourg court only for violation of a right enshrined in the European Convention on Human Rights or any of its Additional Protocols, therefore the ECtHR's minority-related case law is essentially based on the prohibition of discrimination, it is rather limited and, in case of minority language rights, practically non-existent.[113]

Considering the above, it is quite disturbing that the Constitutional Court has so far failed to define the constitutional minimum standards for the protection of minorities. The deficiency is becoming more and more acute, since Hungary undertook extensive international commitments to protect national minorities and minority languages more than twenty years ago. Finally, the Constitutional Court's prominent role in public life puts it into the best place to convey the message to both the minority and majority members of the society: minority rights are indeed worth protecting and promoting.

113 Noémi NAGY: *Language rights as a sine qua non of democracy – a comparative overview of the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union.* In: Central and Eastern European Legal Studies, 2018/2, pp. 247–269.