NAGY, NOÉMI:[1]

IDENTIFYING MINORITY COMMUNITIES AND PERSONS BELONGING TO NATIONAL MINORITIES IN LIGHT OF THE CASE-LAW OF THE CONSTITUTIONAL COURT OF HUNGARY[2]

1. Introduction

In the course of the various monitoring procedures by international and national expert bodies and non-governmental organizations, it has become a common finding that many rights exist only on paper. Especially regarding human rights and minority rights can we experience the sometimes painful difference between the legal provisions and their actual implementation. In Hungary and in most democratic countries, the supreme protection of the rights of minorities is the responsibility of the Constitutional Court. To put it differently, the successful implementation of the "law in books" largely depends on this highly respected judicial body. In addition, it is the author's firm belief – although not examined in this paper – that the Court's opinion, conveyed by judgements on minority issues, may have a

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[2] *The research has been carried out as part of the programs of the Ministry of Justice enhancing the level of legal education.*

strong influence on how minority rights are perceived and valued by the legal scholarship as well as practitioners, or even by the public.

This paper presents the initial results of a two-year international research project, during which I intend to critically evaluate the role of the Constitutional Court of Hungary in the protection of national minorities, by meticulously analysing all court cases relevant to minority rights. Ultimately, I seek to answer the following questions: Are minority rights guaranteed by the Constitution effectively protected by the Constitutional Court? If not, what are the reasons for the lack of effective legal protection? How does the Constitutional Court define minority rights and its own role in their protection? What are the main challenges and future prospects for the protection of minority rights in the practice of the Constitutional Court?

During the three decades of its operation, the Constitutional Court of Hungary decided approximately 10 000 cases in sum. Only about 30, that is less than 1% of these are related to minority rights.[3] In these cases, the Court has essentially dealt with three issues: 1. What is a minority? More specifically, what does the constitutional term "constituent part of the State" mean, and can certain

[3] The full texts of the decisions 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 from the decisions and orders of the Constitutional Court have been prepared by the author.

ethnic groups seeking recognition be considered minorities? 2. Who belongs to a minority? That is, who is to be recognised as a holder of minority rights, and what are the rules for minority self-identification? 3. What are minority rights? This means the exploration of the content of specific rights for persons belonging to minorities set out in the Constitution, the Minorities/Nationalities Act and other legislation, including the right to representation of minorities (parliamentary and municipal), the legal status of minority self-governments, and certain language rights. In this paper, only those cases will be addressed which concern the first two questions, i.e. the definition and recognition of minority groups, and the identification of those persons who are entitled to minority rights. Answering the third question, i.e. the exploration of the content of specific minority rights, and the overall evaluation of the Constitutional Court of Hungary will be the subject-matter of another paper, forthcoming in the second edited book of our research group.

2. The legal framework of minority protection in Hungary

People belonging to national minorities in Hungary currently make up approx. 8-10 % of the population according to scientific estimates, and 6,5 % according to

official census data.[4] The distribution of minority population is as follows: Roma – 315 583, Germans – 185 696, Romanians – 35 641, Slovaks – 35 208, Croats – 26 774, Serbs – 10 038, Ukrainians – 7 396, Poles – 7 001, Bulgarians – 6 272, Greeks – 4 642, Ruthenians – 3 882, Armenians – 3 571, Slovenes – 2 820; in total: 644 524 people.[5]

The presence of minority communities in the territory of the country is not a recent phenomenon, on the contrary. Hungary has been a multinational and multilingual state since its very establishment (AD 1000), and although the various peoples of the country had lived in peaceful coexistence for centuries, managing the diverse needs of nationalities became increasingly difficult by the end of the 19th century.[6] Some have even argued that the very dissolution of the Habsburg Monarchy – and the Kingdom of Hungary as part of it – was due to the

[4] KÖZPONTI STATISZTIKAI HIVATAL [Central Statistical Office of Hungary]: 2011. évi népszámlálás, 9. Nemzetiségi adatok [2011 Census, 9. Data on nationalities]. Budapest, 2013. 15. Available online: http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_09_2011.pdf (Last accessed: 1 November 2019)

[5] Ibid.

[6] BINDORFFER, Györgyi: Nemzetiségi politika Magyarországon Szent István korától a rendszerváltozásig. In: Gyulavári Tamás – Kállai Ernő (eds.): A jövevényektől az államalkotó tényezőkig. A nemzetiségi közösségek múltja és jelene Magyarországon. Országgyűlési Biztos Hivatala, Budapest, 2010. 10–48.; Nagy Noémi: A hatalom nyelve – a nyelv hatalma: Nyelvi jog és nyelvpolitika Európa történetében. Budapest, Dialóg Campus Kiadó–Nordex Kft, 2019, 251 p.

State's failure to accommodate its linguistic and ethnic diversity.[7] After a relatively calm period following World War II,[8] the fall of Communism presented new challenges to Eastern and Central European countries regarding their minority policies: renewed tensions between ethnic groups were a serious threat to the stability of the entire region. Hungary managed to survive the political transition with a largely acclaimed new legal framework on the protection of national minorities.

The four main levels of Hungary's minority-related law are the following: the Fundamental Law of Hungary (before 2012: Constitution), the Nationalities Act of 2011 (before that, the Minorities Act of 1993), sectoral laws (e.g. on elections, civil and criminal proceedings, public administration), and international treaties ratified by the State (most importantly, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages).

Hungary's former Constitution (Act No. XX of 1949) recognized minorities living in the country as constituent

[7] See, e.g. JÁSZIM Oszkár: A Monarchia jövője. A dualizmus bukása és a dunai egyesült államok. Budapest, Maecenas, 1988 [1918]. SETON-WATSON, Robert: Racial Problems in Hungary. London, Archibald Constable and Co. Ltd., 1908.

[8] On the minority policy and legislation of the socialist period, see NAGY, Noémi: Nyelvi jog és nyelvpolitika Magyarországon az első világháború végétől napjainkig. Közelítések, 2015/3–4, 112–124.

components of the State and granted them the right to collective participation in public affairs, the fostering of their culture, the use of and education in their language, representation, and the right to self-government:

> Art. 68 (1) The national and ethnic minorities living in the Republic of Hungary share the power of the people: they are constituent parts of the State.
> (2) The Republic of Hungary shall provide for the protection of national and ethnic minorities.[9] It shall ensure their collective participation in public affairs, the fostering of their cultures, the use of their mother tongues, education in their mother tongues and the use of names in their own languages.
> (3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country.
> (4) National and ethnic minorities shall have the right to establish local and national self-governments.

[9] The distinction between national and ethnic minorities was primarily based on whether a given minority had a kin state (that is, a country from which the people of the minority derive their origin) or not. In this sense, the Roma and Ruthenians were considered as ethnic minorities. KÁLLAI, Ernő – VARJÚ, Gabriella: A kisebbségi törvény. In: Gyulavári – Kállai 2010: 187. Naturally, this distinction has never been relevant in terms of the constitutional rights of minorities.

> (5) A two-thirds majority of the votes of the Members of Parliament present is required to adopt the law on the rights of national and ethnic minorities.[10]

Based on the Constitution, Act No. LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereinafter: Minorities Act) regulated individual and collective rights of minorities in great detail, including educational rights, the right to use their own language in various public and private spheres, and the right to self-government. Whereas the language regime of the Minorities Act had hardly been criticized, serious problems had been raised in connection with the regulation and operation of the minority self-government system, thus the law was thoroughly amended in 2005 and 2010.[11]

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[10] This text is the result of three modifications of the original constitutional text. Act No. XXXI of 1989 only contained the first two paragraphs of Article 68, using the term "national and linguistic minorities". Act No. XL of 1990 introduced the term "ethnic" instead of "linguistic" minorities, and included two new paragraphs to regulate the representation of minorities as well as to lay down the condition for adopting a law on minority rights. Finally, Act No. LXIII of 1990 gave the right to minorities to establish their own self-governing bodies at the local and national levels.

[11] Act No. CXIV of 2005 on the Election of Minority Self-Government Representatives and on the Amendment of Certain Laws on National and Ethnic Minorities; Act No. LXII of 2010 Amending the Laws Necessary to Reduce the Number of Minority Self-Government Representatives.

The Minorities Act defined national or ethnic minorities as *„any ethnic group with a history of at least one century of living in the Republic of Hungary, which represents a numerical minority among the citizens of the State, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history"*.[12] The Minorities Act also gave a taxative list of the 13 minorities living in the country: Armenians, Bulgarians, Croats, Germans, Greeks, Poles, the Roma, Romanians, Ruthenians, Serbs, Slovaks, Slovenes, and Ukrainians.[13]

In 2011 a new Constitution and a new law on minorities were adopted by the Hungarian Parliament. The Fundamental Law of Hungary, which entered into force on 1 January 2012, declares Hungarian as the official language of the State, and re-introduces the traditional term "nationalities" instead of "minorities" (although with the same meaning). Nationalities and their languages are first mentioned in the preamble. With a bit unlucky phrasing, nationalities are declared to be State-

[12] Minorities Act, Article 1 (2).

[13] However, the list of recognized minorities is not closed once and for all: the law enables the stakeholders themselves to initiate their recognition as a national or ethnic minority by means of a special popular initiative. See, section 4 of this paper.

forming factors: *„nationalities living with us form part of the Hungarian political community and are constituent parts of the State"*. Since the preamble has been written in the name of *„we the members of the Hungarian nation"*, a strictly grammatical interpretation might suggest that members of the „nationalities living with us" are not part of the Hungarian people.[14] However, Article XXIX repeats this provision in a way that leaves no doubt about nationalities being State-forming factors: "[n]*ationalities living in Hungary shall be constituent parts of the State*". Article XXIX further provides that "[e]*very Hungarian citizen belonging to any nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their native languages and to the individual and collective use of names in their own languages, to promote their own cultures, and to be educated in their native languages*". Nationalities also have the constitutional right to establish self-governments at the local and national levels, the detailed rules of which shall be defined by a cardinal act. Nationalities are mentioned in two other instances in the Fundamental Law: first, in relation to the Parliament's work, calling for their participation as

[14] This non-inclusive language was criticized by the Venice Commission, the advisory body of the Council of Europe on constitutional matters: Opinion no. 621/2011 on the new Constitution of Hungary, CDL-AD(2011)016. Strasbourg, 20 June 2011, par. 40. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e (last accessed: 14 December 2019)

defined by a cardinal act,[15] and second, in relation to the Commissioner of Fundamental Rights, one of whose deputies is entrusted with the protection of the rights of nationalities.[16]

In accordance with the Fundamental Law, the new law on minorities (Act No. CLXXIX of 2011 on the Rights of Nationalities, hereinafter: Nationalities Act),[17] which entered into force on 1 January 2012, clarified the rules on the legal status and operation of nationality self-governments, taking into account many legislative proposals of the former Minority Ombudsman.[18]

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[15] „Nationalities living in Hungary shall contribute to Parliament's work as defined by a cardinal Act." Fundamental Law of Hungary, Article 2.

[16] Fundamental Law of Hungary, Article 30 (3). The deputy of the Commissioner of Fundamental Rights has replaced the former independent position of the Minority Ombudsman. For an assessment of constitutional changes relevant to minorities, see PAP, András László: Kisebbségi jogok (védelmének változásai) az új alkotmányban, Kisebbségkutatás, 2011/2. 190–206.

[17] The English text of the law is cited from: VENICE COMMISSION: Opinion no. 671/2012 on the Act on the Rights of Nationalities of Hungary, CDL-AD(2012)011. Strasbourg, 19 June 2012. Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)011-e (last accessed: 14 December 2019)

[18] A Nemzeti és Etnikai Kisebbségek Országgyűlési Biztosának véleménye a készülő nemzetiségi törvény tervezetéről [Opinion of the Parliamentary Commissioner for National and Ethnic Minorities on the Draft Law on Nationalities], 15 November 2011. Available at: http://www.kisebbsegiombudsman.hu/hir-706-velemeny-keszulo-nemzetisegi-torveny.html (last accessed: 14 December 2019).

Innovations include, inter alia: elections of nationality self-governments are linked to census data; return of the transformed nationality self-government form at the local level; restoration of the legal institution of preferential nationality mandate; nationality self-governments are now legal persons autonomously managing their finances; conditions provided for legal and financial control; obligation of cooperation between the local nationality self-government and the local government is strengthened with legal remedies; introduction of the collection of recommendations for candidates. Passive voting has been made subject to stricter conditions in the elections of nationality self-governments: first, only Hungarian citizens belonging to the given nationality may stand as candidates in these elections, and second, candidates must formally declare that they did not stand as candidates for another nationality in the last two general elections of nationality self-governments. In addition, the Act on the Election of Members of Parliament (Act No. CCIII of 2011) further specified the institutions of preferential parliamentary mandate and parliamentary spokesperson. As regards linguistic provisions, these were taken from the earlier Minorities Act relatively unchanged. An important novelty is that the mandatory provision of certain language rights became bound to a certain ratio of the nationality population as established by census data. If that ratio is not reached, such rights may still be granted

by the local municipality at the request of organizations and persons belonging to the respective nationality.[19]

The Venice Commission, which had been asked to comment on the Nationalities Act, was generally satisfied with the new regulation. According to the Commission, the new act – despite being particularly complex and at times excessively detailed and lacking legal clarity – *„confirms Hungary's internationally recognised commitment to minority protection"*.[20]

3. The Constitutional Court of Hungary in a nutshell

In Hungary, the supreme guardian of rule of law, human rights, and most importantly for the purposes of this paper: minority rights, is the Constitutional Court. The institution is the product of the transition to democracy (just like in other post-soviet countries of the East-

[19] A 20% ratio is requested for the bilingual drafting of minutes and decisions of the board of representatives and for employing local officials familiar with the nationality language concerned; whereas 10% is needed for decrees, declarations, announcements, and forms of local municipalities as well as place names, street signs and public inscriptions to be published in the languages of nationalities (in addition to Hungarian), and for local media service providers to broadcast regular nationality public service programs (Articles 5 and 6).

[20] VENICE COMMISSION 2012, paras. 82–84.

Central European region):[21] it was established in October 1989 (by a new Article 32/A inserted into the Constitution and Act No. XXXII of 1989 on the Constitutional Court).[22] On 23 November 1989 the Parliament elected the first five judges of the Court, which commenced its operation on 1 January 1990. Five additional members were selected by the new, freely elected Parliament in mid-1990. Since September 2011 the Court has fifteen members. Competences of the Court include ex post and ex ante constitutional review of legal provisions, examination of legislative omissions, interpretation of the Constitution, constitutional complaints, and performing remedy in referendum cases.[23]

The new constitution of Hungary and the new law on the Constitutional Court (Act No. CLI of 2011) introduced significant changes. For instance, whereas until 31 December 2011 anyone could submit a petition

[21] For a comparative overview and a thorough analysis of Constitutional Courts in the region, see SADURSKI, Wojciech: Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. Dordrecht – Heidelberg – New York – London, Springer, 2014.

[22] For the establishment and early operation of the Constitutional Court of Hungary, see SÓLYOM, László: The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary. International Sociology, 2003/1, 133–161. SCHEPPELE, Kim Lane: Guardians of the constitution: Constitutional court presidents and the struggle for the rule of law in post-Soviet Europe. University of Pennsylvania Law Review, 2006/154, 1757–1851.

[23] Brief history of the Constitutional Court of Hungary. Available at: https://hunconcourt.hu/history/ (last accessed: 14 December 2019)

requesting the posterior constitutional review of a legal norm, according to the new rules such a proceeding can be initiated only by the Government, one-quarter of the Members of Parliament, the Commissioner for Fundamental Rights, the president of the Curia (the Supreme Court's new name since 2012) and the General Prosecutor. Furthermore, there are now three types of constitutional complaints: the original one, submitted by a person or organisation affected by a concrete case if their fundamental rights were violated by the application of an unconstitutional law and there is no other legal remedy available; when rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation; and against a judicial decision that was contrary to the Fundamental Law if the decision violated fundamental rights.

Critical voices regarding the operation of the Constitutional Court have intensified following the changes in legislation after 2011, concerning *inter alia*the increase in the numbers of the judges, the introduction of restrictions on the body's powers, and the incorporation of mandatory constitutional interpretation criteria into the Fundamental Law.[24] Some authors speak

[24] For more information on this, see TILK, Péter – NASZLADI, Georgina: Az Alkotmánybíróságra vonatkozó szabályozás átalakulása 2010 után. In: Gárdos-Orosz Fruzsina – Szente Zoltán (eds.): Jog és politika határán: Alkotmánybíráskodás Magyarországon 2010 után. Budapest, HVG-Orac Lap- és Könyvkiadó Kft., 2015. 41–74. HUNGARIAN HELSINKI COMMITTEE: Attacking the Last Line of Defence. Judicial Independence in Hungary in Jeopardy. 15 June 2018. Available online:

of party-line constitutional justice,[25] the twilight of constitutionality,[26] or the loss of the constitutional role of the Constitutional Court.[27] In fact, on the basis of the review of the relevant case law, the Constitutional Court's approach towards minority rights appear to has been unaffected by the above developments (unless we consider a further decline in the numbers of minority-related cases as such): there has been little emphasis on the protection of minority rights in the Court's practice, both before and after 2011.

4. What is a minority?

Although the answers to the questions: What is a Minority? and Who is a minority? are obviously interrelated, there is a good reason to treat the two topics separately. Indeed, as Majtényi and Pap pointed out, *„while the State needs to identify persons belonging to minorities in order to ensure the special rights of minorities for them, it does not necessarily have to*

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https://www.helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf (last accessed: 14 December 2019)

[25] HALMAI, Gábor: In memoriam magyar alkotmánybíráskodás – a pártos Alkotmánybíróság első éve. Fundamentum, 2014/1–2. 36–64.

[26] HANÁK, András: Sötétség délben: az alkotmányosság alkonya Magyarországon. Fundamentum, 2013/1. 63–75.

[27] MAJTÉNYI, Balázs: Alkotmányos értékek játszmája. Fundamentum, 2017/1–2, 41.

endeavour to define the concept of minority."[28] In fact, neither did the Constitution, nor does the Fundamental Law contain a definition of the term "minorities" or "nationalities", it is merely stipulated that they are "constituent parts of the State". As several authors argue, the term has not yet been given a clear meaning, despite a number of interpretative rulings by the Constitutional Court.[29]

The first case in which the Constitutional Court touched upon the concept of minorities dates back to 1992. The Constitutional Court's Decision no. 35/1992. (VI. 10.) of 2 June 1992 addressed a petition concerning the representation of minorities, and stated the following: *„The assertion of the Constitution that recognizes national and ethnic minorities as constituent parts of the State makes the statutory regulation of the rights of minorities extremely important. Among and in addition to these rights, the Constitution specifically mentions the representation of national and ethnic minorities. Representation is a necessary prerequisite for national and ethnic minorities to fulfil their role as constituent parts of the State".*[30] And since, up to then, *„the general representation of minorities has not been statutorily*

[28] MAJTÉNYI, Balázs – PAP, András László: Végtelen történet: a kisebbségi hovatartozásról, Fundamentum, 2006/2. 100.

[29] Cf. e.g. PAP, András László: Sarkalatos átalakulások – a nemzetiségekre vonatkozó szabályozás, MTA Law Working Papers, 2014/52. 4–5. Available at: https://jog.tk.mta.hu/uploads/files/mtalwp/2014_52_Pap.pdf (last accessed: 14 December 2019)

[30] Decision no. 35/1992. (VI. 10.) of 2 June 1992, III. par. 1.

ensured to the extent and in the manner prescribed by the Constitution",[31] the Court found a legislative omission violating the Constitution. In short, we learnt from this decision that the role of minorities as constituent elements of the State makes minority rights so important that they need to be regulated in the second highest form of law in the Hungarian legal system (with the Constitution on top of the domestic legal hierarchy), that is an act adopted by the Parliament. Furthermore, we also learnt that representation is a *sine qua non* for minorities to fulfil their role as State-forming factors. All of this was repeated verbatim in Order no. 24/1994 (V. 6.) (2 May 1994) of the Constitutional Court (II. par. 6.).

According to the (former) Parliamentary Commissioner for National and Ethnic Minorities, the fact that the exact content of the legal status of "constituent part of the State" is not legally defined is problematic because thus it is not possible to determine what specific rights can be deduced from the constitutional provision and what legislative tasks are required to ensure this special status for minorities. The Constitutional Court, in its Order no. 1041/G/1999 of 5 September 2000, rejected the Commissioner's petition without considering it on the merits, referring to the lack of its own competence. The Court justified its decision by the fact that the petition basically established general requirements for legislation, it did not present a specific constitutional problem, and therefore did not meet the requirements of

[31] Ibid., III., par. 3.

an abstract interpretation of the Constitution with *erga omnes* effect, which requirements – in light of the Constitutional Court's standing practice – must be interpreted strictly.

If not the Constitution, the Minorities Act did contain a definition of minorities which the subsequent Nationalities Act retained almost in identical form (except the requirement of citizenship).[32] According to the current regulation, *„all ethnic groups resident in Hungary for at least one century are nationalities which are in numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions, and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities".*[33] The annex to the law contains a list of the 13 ethnic groups that are currently recognised as nationalities, but this list is not closed because those concerned are allowed to initiate their recognition as a minority. Under the former Minorities Act, in order to prove that an ethnic group met the conditions set out in the legal definition of a minority, a special popular initiative had to be launched by at least 1 000 persons (as opposed to the general rule of popular initiatives requiring at least 50 000 valid signatures).

[32] Under the 1993 Minorities Act only citizens of Hungary were entitled to minority rights. For further details, see Section 5 of this paper.
[33] Nationalities Act, Article 1.

Procedural issues were governed by the provisions of Act No. III of 1998 on National Referendums and Popular Initiatives, with the – later incorporated – additional prescription that during its proceedings the National Election Commission (NEC) shall request the statement of the President of the Hungarian Academy of Sciences on whether the legal conditions had been met.[34] The possibility of recognizing an additional minority group is also provided for in the new Nationalities Act,[35] although Act No. CCXXXVIII of 2013 abolished the institution of popular initiative.

Four cases related to such popular initiatives have been brought before the Constitutional Court: those of the Jews and the Russians in 2006, that of the Bunjevacs in 2010, and that of the Huns in 2012.[36] In the first three cases, individuals filed objections to the decision of the NEC approving the requested popular initiative. The objection that served as a basis for the Constitutional Court's Decision no. 2/2006 (I. 30.) of 30 January 2006

[34] Minorities Act, Article 61 (2).

[35] Nationalities Act, Article 148, paras. (3)–(6). The previous institution of special popular initiative is now called „initiative for the recognition of a nationality group as being traditionally resident in Hungary".

[36] (Popular) initiatives have been also launched in order to recognize the Aegean Macedonians and the Szeklers, but these were rejected by the NEC and therefore never reached the Constitutional Court. See, Decisions no. 1/2001. (V.7.) and no. 996/2019. of the National Election Commission. Available online (in Hungarian language): https://www.valasztas.hu/hatarozat-megjelenito/ (last accessed: 14 December 2019)

was filed against the NEC's decision authenticating the signature sheet for the recognition of the Jewish minority. The petitioners regarded the authentication unlawful because they considered that the legal conditions for recognising Jews as a minority were not met, and thus the initiative itself was contrary to the definition of national and ethnic minority as stipulated in the Minorities Act. The Constitutional Court stated that, like all popular initiatives, this one also had as its purpose to put the issue on the agenda of the Parliament – the organ which had the actual competence to decide about the approval or rejection of popular initiatives. According to the Court, the institution of popular initiative as regulated by the Minorities Act aims at a specific purpose: to amend the provision of the Minorities Act enlisting recognised minority groups, thereby to recognise an ethnic group as a national or ethnic minority; however, the initiative itself does not bind the Parliament. Therefore, the assessment of whether the "testimony" made by the signatories meets the requirements of the Minorities Act belongs to the competence of Parliament. Consequently, the Constitutional Court upheld the decision of the NEC and did not undertake to pronounce itself on the content of the statutory conditions for being a minority, and even less on the fulfilment of these conditions in the present case.[37]

[37] In turn, Justice Péter Kovács, in his extensive dissenting opinion, devoted particular attention to the concept of minority, including international legal aspects thereof. For an analysis of this decision of

By the time of the Constitutional Court's Decision no. 27/2006 (VI. 21) of 19 June 2006 on the recognition of the Russians in Hungary, the amendment to the Minorities Act had already been in force, pursuant to which the National Election Commission was obliged to seek the opinion of the President of the Hungarian Academy of Sciences on compliance with the statutory minority criteria. According to the petitioner, the body acted unlawfully in approving the popular initiative because it did not comply with this new condition. However, the Constitutional Court pointed out that although the amended law requires the NEC to obtain the opinion of the President of the Academy, it does not specify when to do so during its proceedings: it may do so before or after authenticating the signature sheets, since – as Decision no. 2/2006. (I. 30.) previously underlined – the determination of whether a given minority group meets the legal requirements falls within the competence of the Parliament (regardless of the opinion obtained). Thus, the NEC's obligation is merely to submit the initiative to the Parliament together with the opinion of the President of the Academy.

Decision no. 148/2010 (VII. 14.) (13 July 2010) of the Constitutional Court practically repeated the same line of reasoning about the NEC's purely technical role when upheld the decision on the popular initiative for the recognition of the Bunjevacs. In turn, the Constitutional

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the Constitutional Court and of the question of recognition as a minority in general, see MAJTÉNYI – PAP 2006: 100–103.

Court in its Decision no. 3265/2012. (X. 4.) of 24 September 2012 rejected, for formal reasons, a constitutional complaint seeking the annulment of the parliamentary resolution refusing to recognize the Huns and the provision of the Nationality Act, which, according to the petitioners, did not guarantee the recognition of the Huns as a nationality, thereby violating their right to identity. Since the complaint was rejected without examining it on the merits, we remained in the dark in terms of how the Constitutional Court opines about the constitutional criteria for the definition of "minorities".

In the case resulting in Decision no. 1162/D/2010 of 13 December 2011, the petitioner brought a constitutional complaint to the Constitutional Court. In the impugned order, the Central District Court of Pest rejected the petitioner's objection claiming that the local electoral office had refused to include him as belonging to the "Hungarian minority" in the register of minority voters. The petitioner requested the annulment of the provision of the Minorities Act defining the term "national and ethnic minority", because the definition, in his opinion, discriminated against persons who are not in numerical minority and did not specify what (how many) is to be understood under "numerical minority". The petition, in its absurdity, offered the Constitutional Court a great opportunity to elaborate on the concept of minority, but the judges remained reluctant to do so. The Court stated only that the Minorities Act defined the concept of minority as opposed to the ethnic group with Hungarian citizenship and nationality, constituting the majority

state-forming factor. It rejected the claim of discrimination on the basis of its previous case-law, according to which the Constitution prohibits unjustified discrimination only between right-holders within the same regulatory scope, however, in the present case the affected persons did not belong to the same group in terms of the regulation (majority vs. minority).[38] The second allegation about the precise numerical nature of a minority was summarily rejected by the Constitutional Court for the following reason: a constitutional complaint can only be filed in the event of a violation of a fundamental constitutional right, however, the provision referred to by the petitioner, i.e. *„the requirement of legal certainty as part of the rule of law*

[38] The Constitutional Court applies two measures 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 test, the Court has to ascertain only whether the classification of persons can be justified by objective reasons. (This test was applied in the case of the „Hungarian minority".) 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 freedom 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. HALMAI, Gábor – TÓTH, Gábor Attila (eds.): Emberi jogok [Human Rights]. Budapest, Osiris, 2003. 390–391. See also Decision no. 30/1992. (V. 26.) of 18 May 1992; Decision no. 1006/B/2001. of 4 December 2007, III. 4.1.

does not in itself qualify as a citizens' right guaranteed by the Constitution".[39]

The issue of definition of minorities has since been raised only marginally. Decision no. 6/2013. (III. 1.) of 26 February 2013 dealt with church rights, where the Court pointed out *"the fundamentally different status"* of churches as opposed to nationalities, the latter being *"constituent parts of the State, elements of the Hungarian political community"*, and thus they *"may have a special treatment as regards their participation in the work of the Parliament"*, as well.[40] Accordingly, the status of constituent parts of the State requires "special treatment", but the exact nature of this and the outlines of the resulting rights were not revealed by the Constitutional Court.

To conclude, the Constitutional Court – in its majority decisions –has failed to interpret the concept of minority.[41] Instead, the body would conveniently refer to

[39] Decision no. 1162/D/2010, III. 4., referring to a former decision of the Constitutional Court.

[40] Decision no. 6/2013, par. 206.

[41] In turn, Justice András Bragyova's concurring opinion attached to Decision no. 45/2005. (XII. 14.) (12 December 2005) contains valuable statements: „*Ethnic and national minorities are cultural and political communities within the Hungarian political community; this is expressed in Article 68 (1) of the Constitution when referring to national and ethnic minorities as „constituent elements of the State*". Minorities form a special social group that is differentiated from the majority by their national–ethnic identity and, based on this, their cultural identity. Recognition as

the definition of the Minorities Act, often slipping into circular reasoning. One may come across with such "slips of the tongue" in the decisions of the Constitutional Court as the following one: *„The concept of minority and that of persons belonging to a minority are defined in the Minorities Act. The fact that »there is no public record of who are considered as belonging to minorities« does not make the concept of persons belonging to a minority incomprehensible or obscure."* [42] This already takes us to our next subject.

5. Who belongs to a minority?

Who can exercise minority rights guaranteed under the Constitution and other legislation? The answer at first glance seems obvious: persons belonging to minorities, of course. However, who belongs to a minority cannot be ascertained just as easily. In fact, the most problematic part of Hungary's law on minorities is the indeterminacy of the subjects of minority rights.[43] Therefore, it is extremely important to review the

„constituent elements of the State" entails the recognition that minorities must be treated on an equal basis with the majority: the constituent factor cannot have less rights than individuals belonging to the majority nation." (Justice Bragyova's concurring opinion, 1. par. 1.)

[42] Decision no. 713/B/2006, III.

[43] MAJTÉNYI – PAP 2006: 103.

Constitutional Court's interpretative work of the relevant law.

Pursuant to the current provisions of the Nationalities Act, for the purposes of the rights and obligations of nationalities, a person forms part of a nationality who *„resides in Hungary, regards himself as part of a nationality and declares his affiliation with that nationality in the cases and manner determined in this Act"*.[44] Self-identifying with a minority and declaring this fact is the exclusive and inalienable right of the individual; thus, as a general rule, no person may be required to declare his or her affiliation with a minority.[45] This principle is underlined by Article 3(1) of the Framework Convention for the Protection of National Minorities (a Council of Europe treaty to which Hungary is a party since its entry into force, that is 1998): „Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result

[44] Nationalities Act of 2011, Article 1 (2). Under the previous legislation (cf. Art. 1(1) of the 1993 Minorities Act), only Hungarian citizens could be right-holders. Since 2014, the scope of the Nationalities Act has been extended to foreign nationals residing in Hungary, and a case of this sort was in fact brought before the Constitutional Court in 2016, related to the right to use one's own language in court proceedings (see Order no. 3192/2016. [X. 4.] of 27 September 2016). The provision in question entered into force on the day of general elections called for nationality self-goverments, i.e. on July 29, 2014. Cf., Decision no. 1128/2014. (VIII. 5.) of the National Election Commission.

[45] Minorities Act, Article 7; Nationalities Act, Article 11.

from this choice or from the exercise of the rights which are connected to that choice".[46] In fact, the Advisory Committee on the Framework Convention in its fourth thematic commentary has considered the right to free self-identification a *"cornerstone of minority rights"*.[47] As Hungary's legislation also relies on the free choice of identity in relation to the exercise of minority rights, the Constitutional Court's practice is similarly based on this principle. The Court has interpreted minority affiliation as closely related to the right to self-determination and self-identification, and ultimately to the right to human dignity.[48]

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[46] COUNCIL OF EUROPE, ETS No. 157. Available at: https://www.coe.int/en/web/minorities/text-of-the-convention (last accessed: 14 December 2019)

[47] ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: The Framework Convention: a key tool to managing diversity through minority rights – The Scope of Application of the Framework Convention for the Protection of National Minorities. Thematic Commentary No. 4. Strasbourg, 27 May 2016. p. 7. For more information on this, see CRAIG, Elizabeth: Who Are The Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework. Journal on Ethnopolitics and Minority Issues in Europe, 2016/2., 6–30.

[48] For monographic discussion of this issue (in Hungarian language), see PAP, András László: Identitás és reprezentáció – Az etnikai hovatartozás meghatározásától a politikai képviseletig. Budapest, MTA Kisebbségkutató Intézet – Gondolat Kiadó, 2007. See also the more recent book edited by Halász Iván – Majtényi Balázs (eds.): Regisztrálható-e az identitás? Az identitásválasztás szabadsága és a nemzeti hovatartozás nyilvántartása. Budapest, Gondolat Kiadó – MTA Jogtudományi Intézet, 2013.

Hungary's pre-2005 regulation on minorities was severely criticized for the fact that in the absence of formal identification or registration anyone could participate in the elections of minority self-governments: that is, not only persons belonging to the given minority who considered themselves as such, but practically anyone could vote and be elected.[49] Of course, identifying those people who belong to minorities is important not only for the purposes of the right to vote but for the exercise of other minority rights, too. The Constitutional Court itself has acknowledged as much in its Decision No. 58/2001. (XII. 7.) (3 December 2001) related to the right to use one's name in their own language: *„it may give rise to abuses […] that minorities do not have to verify their nationality affiliation"*.[50]

In fact, most of the known malpractice have occurred in the context of elections. During the 2002–2003 elections there have been so many abuses in relation to all minority groups that the Constitutional Court was eventually requested to interpret the relevant provisions of the Constitution and declare that only citizens who consider themselves as members of a minority have the right to participate in the minority self-government

[49] For more information on the "cuckoo phenomenon" (ethnobusiness), see LATORCAI, Csaba: A nemzetiséghez tartozók önkormányzáshoz fűződő jogai az Alaptörvény és a nemzetiségi törvény tükrében. Rövid történeti áttekintés 1993-tól. A „kakukktojás" jelenség, Kisebbségkutatás, 2014/1., 30–51.

[50] Decision no. 58/2001. (XII. 7.) of 3 December 2001, IV.2.6. par. 9.

elections. The Court rejected the petition because the petitioners were not legally entitled to request a constitutional interpretation (Order no. 181/E/1998 of 16 February 2004). However, the judges could not avoid examining the issue on the merits when the Minority Ombudsman asked the very same question (Decision no. 45/2005 (XII. 14.) of 12 December 2005).

Shortly after the submission of the Ombudsman's petition, the Parliament adopted Act No. CXIV of 2005 on the Election of Minority Self-Government Representatives and the Amendment of Certain Acts concerning National and Ethnic Minorities, which introduced the institution of minority registration. However, even against this background, the Ombudsman considered the situation unconstitutional and filed another petition with the Constitutional Court. In his view, the new law failed to guarantee the truthfulness of declarations on national or ethnic minority affiliation, nor did it provide for sanctions in case of false declarations. Therefore, he maintained his request for a constitutional interpretation to clarify whether, in order to enforce the right of minorities to self-government, making voters declare their minority affiliation during electoral proceedings can be regarded as constituting a lawful restriction on their right to the protection of personal data, and whether the State could verify, within limits set by the law, the genuineness of these declarations. He further requested that the new legal rules be annulled and that the Parliament be called upon to adopt appropriate provisions.

According to thereasoning of the Constitutional Court, the decision on minority self-identification and the communication thereofto others fall within the scope of the right to identity and self-determination derived from human dignity (just like the right to one's own name[51]). The right to self-determination also includes the possibility of not revealing someone's affiliation with a minority group. This is where the right to privacy and the protection of personal data are linked to self-determination.[52] Use and disclosure of personal data related to minority affiliation is, in fact, subject to the consent of the individual, on the basis of the right to informational self-determination.[53] However, within the limits set by the Constitution, this right may be restricted: by law, in accordance with the requirements of the necessity–proportionality test.[54] Thus, the Constitutional Court considered it constitutionally permissible that individuals be obliged to declare their affiliation with a minority group, if this restriction is justified by compelling reasons in the protection of other constitutional rights and values, and if the least possible

[51] Cf. Decision no. 58/2001. (XII. 7.) of 3 December 2001.
[52] Decision no. 45/2005. (XII. 14.) of 12 December 2005, III. 5., paras. 2–3.
[53] For more information on the right of informational self-determination in the practice of the Consitutional Court of Hungary, see POLGÁR, Miklós: The development of data protection and privacy policy in the light of practice of the Curia and of the Constitutional Court of Hungary. Pro Publico Bono – Public Administration, 2017/Special Edition 3, 110–121.
[54] See supra note 38.

amount of restriction is used, along with the most appropriate means.[55]

The decision of the Court established that the Constitution regulates the right of national and ethnic minorities to participate in public life and to representation as a fundamental right, a form of which is the right to establish local and national self-governments.[56] The right to establish minority self-governments can be the basis for some sort of restriction of the right to self-determination in connection with the declaration of minority affiliation. Making false declarations about minority affiliation on a mass scale may indeed interfere with the establishment of minority self-governments, and in order to prevent the development of such practices (i.e. ethnobusiness) appropriate legislation may be required. However, the Constitutional Court also stated that no single solution follows from the Constitution. Through constitutional interpretation it is not possible to determine what restriction of the right to informational self-determination can be accepted as constitutional in order to confirm the authenticity of declarations about national and ethnic minority affiliation; it is not possible to decide on what basis, by whom and in what procedure may the verification take place. It is for the legislator to regulate this, and the legislator's task cannot be taken over by the Constitutional Court when interpreting the

[55] Decision no. 45/2005. (XII. 14.) of 12 December 2005, III. 5. paras. 4–6.
[56] Ibid., III. 9.

Constitution, since *„only through the examination of a specific rule adopted by the legislator can be determined whether a given restriction is constitutional”*.[57]

Nor did the Constitutional Court establish a legislative omission in breach of the Constitution, although the Minority Ombudsman complained about the lack of legal provisions for verifying the declarations of minority affiliation and for sanctioning false declarations. While the Constitutional Court acknowledged that the lack of rules outlined in the petition may indeed be a source of abuses in practice, it also emphasized that filling the regulatory void would, in turn, entail a restriction of the right to human dignity (identity, self-determination) and of the right to informational self-determination. As it is, the Constitutional Court cannot oblige the legislator to adopt specific legislation entailing restriction of fundamental rights.[58]

I must agree with Majtényi and Pap in that the majority decision, *„while making some important statements, has refrained, by laconic formalism, from engaging in theoretical discussions beyond what was minimally necessary”*.[59] Instead of examining in depth the relationship between the right to establish minority self-governments vs. the freedom of self-identification, the Court was satisfied with asserting that the Constitution

[57] Ibid., III. 5. par. 7.
[58] Ibid., IV. 2. par. 7.
[59] MAJTÉNYI – PAP 2006: 95.

does not specify the precise content of these rights or the rules governing the exercise thereof.[60]

At about the same time when the above case took place, in the midst of the revision of the legal framework on minorities, individuals filed a constitutional complaint, to which the Commissioner for Minorities eventually joined, requesting the Constitutional Court to declare that the law underlying an unlawful decision was unconstitutional. In view of the petitioners, during the interim elections held in the settlement of Csabaszabadi, the Slovakian representatives of the municipal government obtained their mandates unconstitutionally, because the electoral laws in force at that time did not require the minority candidate to actually belong to the community they were to represent. In this case, according to the Commissioner for Minorities, the minority representatives lacked the legitimacy from the members of the minority community represented. It logically follows from this that the subsequent transformation of the municipal government into a Slovak minority self-government was also unconstitutional. By Order no. 261/D/2005 of 21 February 2006, the Constitutional Court rejected the petitions on formal grounds, without considering them

[60] However, Justice András Bragyova's and Justice Péter Kovács's thoughts expressed in their concurring opinions are very valuable concerning the definition of the subjects (and the content) of minority rights. For a summary of these, see ENYEDI, Krisztián: Az Alkotmánybíróság legutóbbi döntéseiből, Fundamentum, 2006/1. 145., and MAJTÉNYI – PAP 2006: 96–98.

on the merits. Pursuant to the majority decision, the result of the local interim election and the decision on the establishment of the local minority self-government cannot be considered as decisions made in a concrete case, whereas a constitutional complaint may only be submitted when rights are violated due to the application of a law in a concrete case.[61] The reasoning of the majority decision did not meet Justice Elemér Balogh's endorsement: in his concurring opinion, he considered the decision determining the outcome of the interim municipal elections very much as a decision made in a concrete case, one that was also subject to appeal under the then applicable legal provisions. Justice Péter Kovács, in his dissenting opinion, expressed his disapproval because of the lack of substantive examination of the petitioners' concerns related to the enforceability of minority rights at the local level. He referred to the Constitutional Court's established principle pursuant to which it is not the title of a legal act but the legal nature of its provisions that is relevant when determining the Court's competence.

Decision no. 168/B/2006. of 18 December 2007, dealing with minority self-governments, re-visited the institution of minority registration. The petitioners, unlike previous submissions and the Minority Ombudsman, considered unconstitutional the provision of the amended Minorities Act pursuant to which only those people can vote at the election of minority self-governments who identify

[61] Order no. 261/D/2005. of 21 February 2006, III. 2.

themselves with a minority group and declare their minority affiliation by registering themselves on the minority electoral roll. The petitioners held this provision discriminatory and unconstitutional for violating the right to freedom of expression and the right to secrecy of correspondence, and for restricting the essential content of fundamental rights.[62] In the opinion of the Constitutional Court, non-compliance with the freedom of expression cannot be established because it is the individual's own free and autonomous choice to self-identify with a minority group, and if they wish to participate in the election of minority representatives, they have to proclaim this choice in order to exercise their electoral rights. Furthermore, the institution of the minority electoral roll is regulated by law, and registering on it is at the discretion of the persons concerned, which does not result in the restriction of the essential content of a fundamental right. On the contrary, the minority electoral roll is a constitutional procedural guarantee for the exercise of another important (political) fundamental right: the right to vote.[63] As for the violation of the secrecy of correspondence, the petitioner is mistaken because the list of minority voters is not public: it can be accessed only by those concerned and by certain persons determined by law, and it must be destroyed immediately after the results of the election become final.[64]

[62] Decision no. 168/B/2006. of 18 December 2007, III. 3. paras. 1–2.
[63] Ibid., III. 3. par. 4.
[64] Ibid., III. 3. par. 5.

Furthermore, the submission considered as a case of unconstitutional discrimination that while Hungarian citizens do not have to declare their citizenship in order to be included in the (general) electoral roll, those who want to be registered on the list of minority voters have to explicitly state that they are members of a given minority community. However, the Constitutional Court pointed out that the right-holders in question do not belong to the same group in terms of the regulation, and thus there can be no discrimination between them.[65] The Court explained that the reason why one does not have to declare his or her Hungarian citizenship in order to be registered on the electoral roll at the elections of representatives of local self-governments and members of parliament is that there exists an authentic register of Hungarian citizens having the right to vote. Members of national and ethnic minorities can by all means participate in the general elections, and when doing so they are not obliged to declare their Hungarian citizenship, either. However, the election of minority self-governments is a right for only those persons who belong to national and ethnic minorities – in turn, there is no official register about them. The purpose of minority registration is precisely to protect the exercise of electoral rights of minorities.[66] The stricter regulation of the nomination process – only non-governmental organizations that have been in existence for at least three years may now nominate a minority candidate – also serves the representation of minorities. In this

[65] See supra note 38 on the application of the reasonableness test.
[66] Decision no. 168/B/2006., III. 3. par. 6.

respect, the distinction between political parties and civil organizations is not arbitrary or unreasonable, as the group of right-holders at minority elections is likewise different.[67]

Thus, the Constitutional Court reaffirmed its position expressed two years earlier that the institution of minority electoral roll is not unconstitutional in itself, on the contrary, it is a guarantee of the fundamental right of minorities to self-government: „*The [institution of] minority electoral roll is based on the right of minorities to self-determination; registration on it is based on the voluntary, free choice of individuals belonging to a given minority; the list is not public, and it is a condition for holding minority self-government elections. The electoral roll is one option to realize the right of minorities to establish their self-governments as provided for by Article 68 (4) of the Constitution; the minority electoral roll is a guarantee thereof."*[68]

The issue of the constitutionality of minority registration was raised in a new context after the adoption of the Nationalities Act of 2011. Pursuant to the new provisions, certain minority rights – related to language use and elections – may be exercised only if a specific number or proportion of persons belonging to a given nationality group is reached, according to the data of the latest census.[69] For instance, elections of local minority

[67] Ibid., III. 6.
[68] Ibid., III. 7.
[69] Nationalities Act, Articles 5(5), 6 and 56.

self-governments can be held only in settlements where there are at least 30 (before the 2024 elections: 25) people belonging to a given nationality.[70] The regulation has raised many problems, which the Minority Ombudsman had already pointed out at the time of the drafting of the new law,[71] and subsequently presented to the Constitutional Court in his petition for posterior constitutional review. The Ombudsman complained about, inter alia, that census data *„cannot be regarded as an accurate representation of the nationality population of a settlement, as they are based on voluntary declarations of sensitive data"*. In addition, it is of serious concern that at the time of the data collection of the latest census it was not known what consequences would the declaration of minority affiliation have for the exercise of minority rights.[72]

For its Decision no. 41/2012. (XII. 6.) of 4 December 2012, the Constitutional Court thoroughly studied Hungary's relevant international obligations, since the Ombudsman also alleged that several provisions of the Nationalities Act are incompatible with international treaties ratified by the State. The Court noted that the Hungarian authorities, when implementing the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National

[70] Nationalities Act, Articles 56 and 242 (2).
[71] Supra note 17.
[72] The latest census was held on 1 October 2011, while the draft law on nationalities was sent to the Minority Ombudsman for consultation on 13 November 2011.

Minorities, have been repeatedly confronted with a basic problem due to *„the lack of a credible dataset on ethnic/linguistic minorities, reservations about the feasibility of preparing [such a dataset], internal contradictions within the data collected at consecutive censuses, and the difficulty of reconciling the statistics of the Government with the estimates of the minorities, each using different techniques"*[73] This has also been noted by the monitoring bodies of the above treaties, who have repeatedly called on the Hungarian government *„to display a more open attitude towards [the idea of] creating a register respecting the protection of personal data, based on reliable data, and reflecting the composition of linguistic minorities in individual settlements"*.[74] The monitoring documents of the Language Charter and the Framework Convention have also consistently emphasized that *„the freedom of self-identification does not exclude the production and use of statistical datasets on nationalities in order to fulfil the commitments made"*.[75] What is more, the official commentary on the Framework Convention also clearly states that the right to free self-identification (Article 3, par. 1) *„does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity"*.[76]

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[73] Decision no. 41/2012. (XII. 6.) of 4 December 2012, par. 24.
[74] Ibid., paras 25–26.
[75] Ibid., par. 30.
[76] Ibid., par. 29., referring to par. 35. of the Commentary on the Provisions of the Framework Convention. Available

Finally, what Justice Péter Kovács stated seven years earlier in one of his concurring opinions,[77] now became part of a majority decision of the Constitutional Court (verbatim): *„It is therefore obvious that [free self-identification] is about the acceptance or rejection of one's own inherited identity, i.e. one cannot be placed in a certain group by an outside pressure, against his or her own wishes."*[78] The majority decision further recalled the recommendations of the European Commission on Racism and Intolerance as well as the recommendation of the Committee of Ministers of the Council of Europe concerning the protection of personal data collected and processed for statistical purposes, and concluded that the registration of nationalities is not in itself problematic, on the contrary, it is actually necessary to fulfil Hungary's international obligations. Considering previous experience on the implementation of the Minorities Act, the judges arrived at the same conclusion: *„declaring one's identity, safeguarded by proper data protection and other guarantees, is what can suppress the so called ethnobusiness and other dysfunctional phenomena"*.[79]

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at:https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf (last accessed: 14 December 2019)

[77] Decision no. 45/2005. (XII. 14.) of 12 December 2005, Justice Péter Kovács's concurring opinion, III/2/2.

[78] Decision no. 41/2012. (XII. 6.) of 4 December 2012, par. 29.

[79] Ibid., par. 43.

As for connecting the exercise of certain minority rights to census data, the Constitutional Court rejected the Minority Ombudsman's argumentation with *"unprecedented cynicism"*[80]: *„In the submission, in the comments of the national self-governments of certain nationalities, and in the mentioned document of the Venice Commission, it has been emphasized that when the enumerated persons gave their answers [to the question on minority affiliation], they were not aware that the result could have an impact on the establishment of minority self-governments.* […] *However, the Constitutional Court notes that even before carrying out the census, in 2010, the Government hadindicated that it would attach a much greater role to the census data, in fact, it would take it as a starting point for its actions."*[81] In sum, the majority of the judges opined that connecting the establishment of minority self-governments to census data does not violate the individual right of self-determination. On the contrary, this may encourage citizens belonging to a given nationality in a particular settlement to exercise their right to minority self-identification.[82] From among the 15 judges, Justice István Stumpf alone considered that linking the elections of nationality self-governments to the census data was a disproportionate restriction on fundamental rights, not least because this made the exercise of fundamental rights subject to an unforeseeable condition.[83] It seems

[80] Pap 2014: 15.
[81] Decision no. 41/2012. (XII. 6.) of 4 December 2012, par. 36.
[82] Ibid., par. 45.
[83] Ibid., paras. 69–71.

that this anomaly was also felt by the majority because they included in the decision – as a sort of suggestion – that the legislator could in fact amend the law if there was a marked need for elections on behalf of nationalities in between two consecutive censuses.[84]

Despite re-appearing constitutional concerns, the institution of minority registration seems to be accepted not only by the Constitutional Court but also by most scholars, as a necessary instrument of legal regulation, *„the need for which is inherent in the nature of law itself"*.[85]

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[84] Ibid., par. 54. The institution of nationality electoral roll was incidentally dealt with in Decision no. 1/2013. (I. 7.) of 4 January 2013, which, based on a submission for ex ante constitutional review by Hungary's President János Áder, examined the new (draft) law on the electoral procedure. Here, the Constitutional Court indirectly confirmed the role of minority registration in the exercise of fundamental rights: „*through the application for registration on the electoral roll it can be ensured that nationalities living in Hungary can exercise their right provided for in Article XXIX (2) of the Fundamental Law, and that they could be represented in the Parliament in the manner defined* [in the electoral law]". (par. 77.)

[85] MAJTÉNYI – PAP 2006: 93. Majtényi and Pap also think that abandoning special minority rights and positive discrimination would entail returning to the theoretical premises from where the universal system of human rights protection started off after World War II, initially refusing to include minority rights. However, whether minority rights shall be considered as additional or special rights at all, is a subject of serious academic debate. Andrássy, for example, strongly opposes this notion of minority rights. See, Andrássy György: A nyelvszabadságról és a nyelvszabadság jelentőségéről. Létünk, 2013/különszám. 17.

6. Conclusions

Hungary's legislation on the protection of minorities are generally considered progressive and, we might add, quite comprehensive: the Constitution and sectoral laws provide for the rights of minorities, including the right to collective participation in public affairs, the fostering of their own culture, and the widespread use of their own language in various spheres of private and public language use. Nevertheless, there have been gaps in the regulation, which remain to be filled through the interpretative work of the Constitutional Court. The role of Hungary's supreme judicial body is perhaps even more important when it comes tothe examination of the constitutionality of the relevant legal norms (through ex ante and ex post review). This is supposed to sort out dysfunctional elements in the regulation, and to guarantee that fundamental rights of minorities are indeed safeguarded, and that the concrete legislativesolutions are based on constitutional principles, thus building up a complex but coherent minority protection system.

The identification of minority groups and of persons belonging to these groups is aninavoidable, logical first step in the process of exercising minority rights. If the law is not clear about the personal scope of legal protection, then the rights themselves become useless. This is where one would expect the Constitutional Court to take a firm stance, guiding the legislator in the course of the development of the detailed legal framework. However, based on the cases examined in this paper,

onemight conclude that the general attitude of the Constitutional Court towards minorities is characterized by a complete lack of judicial activism. In fact, the Court avoided substantive examination whenever possible, usually on the grounds that the petition or complaint 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 to exercise its legal power to conduct ex officio examination or to extend the scope of the submission because of the factual context, it has practically never done so.[86]

Another deficiency is that in its decisions the Court has rarely built upon the valuable experience of international minority protection mechanisms (not until 2012, anyways). This would be all the more important 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. By disregarding the applicable international monitoring materials in its jurisprudence, the Court has practically given a free hand to the Hungarian legislature. This was also pointed out by Justice Péter Kovács in connection with free self-identification and

[86] Judit Tóth is of the same opinion after reviewing the same and other Constitutional Court cases, as well. See, TÓTH, Judit: Kisebbségi jogok az Alkotmánybíróság előtt. In: Gyulavári – Kállai 2010. 302–320, especially at 319–320.

minority registration in the form as the Constitutional Court of Hungary used these concepts: *„From a constitutional point of view, and considering the requirement of compliance under Article 7 (1) of the Constitution, the avant-garde interpretation and unfounded »innovations« regarding the terms contained in international treaties are theoretically undesirable and in practice create serious problems. Since law-makers and implementers cannot give an interpretation to an international treaty that is inconsistent with international law, they must pay particular attention to international documents in which the bodies authorized by the contracting parties provide interpretations. This obligation of consideration is independent of whether the international legal instrument containing it, in terms of its legal nature, directly imposes an obligation on Hungary or not"*.[87]

Turning to the two questions raised in this paper, the Constitutional Court has little to offer. Regarding the definition of minorities, the notorious term in the Constitution – *"constituent parts of the State"* – have not been elaborated by the Court, all we know is that this qualifies minorities for a special treatment (in relation to what?, how?), and that an essential requirement for minorities to fulfil such a role is representation. The exact content of the legal status of minorities as "constituent parts of the State" remains unclear. Furthermore, in the cases concerning the recognition of

[87] Justice Péter Kovács's dissenting opinion to the Constitutional Court's Decision no. 45/2005. (XII. 14.), III/2/1.

the Jews, the Russians, the Bunjevacs and the Huns as national minorities, the Constitutional Court refused to pronounce itself on the content of the statutory conditions for being a minority. Instead of giving a constitutional interpretation of its own, the Court would use a circular reasoning, conveniently relying on the definition of the Minorities Act.

As for the question of "who" (belongs to a minority), the Constitutional Court's practice is premised on the free choice of identity. In light of the Court's jurisprudence, minority affiliation is closely related to the right to self-determination, and ultimately, to the right to human dignity. The institution of minority registration, that is, disclosure of personal data related to minority affiliation, is subject to the consent of the individual. However, within the limits set by the Constitution, the right to informational self-determination may be restricted and individuals may be obliged to declare their affiliation with a minority group, if the restriction is justified by compelling reasons in the protection of other constitutional rights and values, subject to the principles of necessity and proportionality. The right to establish minority self-governments can be the basis for restriction, however, the Court did not see one single solution following from the Constitution, so once again it conveniently relied on the legislator to regulate the details of minority registration.

To conclude, by failing to provide a constitutional interpretation on the concept of minorities and precise guidelines on identifying persons belonging to national

minorities, that is, the very holders of minority rights, the Constitutional Court has in fact failed to define the constitutional minimum standards for the protection of minorities. This calls into question the role of this highly prestigious judicial body as the supreme guardian of minority rights in Hungary.