MINORITY AND IDENTITY IN CONSTITUTIONAL JUSTICE:

CASE STUDIES FROM CENTRAL AND EASTERN EUROPE

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The Role and Activism of National Constitutional Courts in Protecting Constitutional Identity and Minority Rights as Constitutional Values".

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

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

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

(i) Minority identity and rights – Protecting nationalities as constitutional values

(ii) National and constitutional identity – Protecting achievements of the legal order

In the following, I shall stand on these two legs when introducing the results of the second phase of our effort and summarize our overall results, with references to previous findings. Last year, in the prologue for the previous book[3] publishing the results of the first milestone of our research project I referred to an "age of constitutional identity" brining identitarian inquiries in the foreground of legal academic discourse and political activism.

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

Since then, a major win for minorities in European politics has been the recent (17 December 2020) adoption by the European Parliament of a resolution[4] supporting the European Citizens Initiative famously called *Minority SafePack* with 524 votes cast in favor. The resolution marks an important milestone in the 7-years-long struggle for EU-level support to national and linguistic minorities. Normally, at this point it is on the European Commission to provide a proposal for EU legislation on the matters of establishing an agency dedicated to dealing with linguistic diversity, supporting media services behind linguistic minorities and cultural actors operating in regional or minority languages – among others. The answer came not long after the beginning of the new year, when in their response, the European Commission halted the initiative by stating that no legislative proposal will be put forward to the EU legislator because *"*[w]*hile no further legal acts are proposed, the full implementation of legislation and policies already in place provides a powerful arsenal to support the Initiative's goals."*[5]

Besides this "lopsided" win[6] for those in favor of "access to identity", the COVID-19 pandemic has also shown us in many ways that an inward-looking, identity-focused discourse might just sometimes provide the necessary boost in many contexts to strengthen our stamina in facing the consequences of the "new normal", of the way we are forced to live in the prison of our current circumstances. Just as the concept of "constitutional identity" is oftentimes found to be locked up in its own prison of circumstances due to an increasing reliance on the concept by national constitutional courts in the context of European integration and its undeserved association with populist or Euro-pessimist overtones, the realization of many minority rights and identities also have their own prisons of circumstance on their respective national levels.

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

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

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

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

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

- *What is the relative importance of minority rights in establishing the fair balance between these competing fundamental rights?*
- *Can constitutional courts be considered as activist in their approach of minority rights in any of the countries examined?*
- *If there is activism, is it affirmative in terms of minority rights or does it go against them?*
- *What does protecting constitutional values mean in upholding protections for fundamental minority rights?*
- *What can the different systems learn from each other – is there any 'cross-fertilization'?*[7]

Korhecz identifies a significant problem regarding the Serbian practice already in the title of his analysis wherein he refers to the fact that minority rights in Serbian constitutional case law seem to be reflected as 'constitutional rights without protected substance',[8] thereby referring to an apparent discrepancy between the letter of the law and the relevant practice and alluding to the necessity of the simultaneous inquiry into law in books as well as into law in action (famously attributed to Roscoe Pound[9]).

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

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

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

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

7 Sulyok 2020, pp. 33-34.
8 Tamás Korhecz: *Constitutional Rights without Protected Substance: Critical Analysis of the Jurisprudence of the Constitutional Courts of Serbia in Protecting Rights of National Minorities.* In Present Volume, pp. 21-46.
9 Roscoe Pound: *Law in Books and Law in Action*. In: American Law Review, 1910/44, pp. 12-36.
10 Korhecz 2021, p. 25.
11 Andrew R. Murphy: *Tolerance, Toleration, and the Liberal Tradition.* In: Polity. 1997/4, p. 593.
12 Cf. https://plato.stanford.edu/entries/toleration/

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

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

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

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

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

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

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

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

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

In his paper,[14] still in this context, Petar Teofilovic also focuses on issues of constitutional interpretation undertaken by constitutional courts in the domain of 'positive discrimination', otherwise more widely known as "affirmative (or positive[15]) action"[16] in Slovenia and Croatia (between 1990 and 2020, effectively until 2016, based on available data). The preferential treatment of minority groups, e.g. through the introduction of quota systems is a widely applied tool to foster equal opportunities, but are not necessarily subject to non-derogation in a goal-oriented approach, as argued by Teofilovic. Constitutional courts' responsibility in these terms lies, according to him, in their argumentation regarding any challenged affirmative action.

After a broad-ranging enumeration of the different minority rights provided for by Slovenia and Croatia[17] and their individual and collective nature, Teofilovic carries out the comparison of the two countries' constitutional jurisprudence in illustrative detail, focusing on three main areas:

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

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

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

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

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

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

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

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

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

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

Katinka Beretka joins this line of research with her detailed analysis[18] of linguistic rights of what she calls "new minority groups", through the presentation of the linguistic rights of the Serbian minority group in Croatia. Linguistic rights are traditionally attached to the use of one's native (in this case minority) language when participating in public affairs. In those countries where this might exacerbate the peaceful coexistence of majority and minority populations due to its role in people's "access to identity", courts will step in to

18 Katinka Beretka: Practice of the Constitutional Court of the Republic of Croatia in Field of National Minority Rights, with Special Regard to the Linguistic Rights of the Serbian Community in Croatia. In Present Volume, pp. 91-112.

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

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

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

Continuing along the lines of mapping out constitutional courts' relevant practices, the research carried out by Noémi Nagy[20] analyzes the causes and the effects of judicial self-restraint in the practice of the Hungarian Constitutional Court (HCC) regarding these rights. The first "prison of circumstance" she identifies is the factual minority of relevant cases in the overall caseload of the HCC (1%)[21], however, this also facilitates a clearer delineation of the topical focus of jurisprudence around questions regarding the concept of "constituent part of the state"[22] (and who qualifies for such a classification).

Based on this, another issue Nagy examines is "access to identity", i.e. legal channels for minority self-identification, leading directly to the question of the scope and extent of minority rights, elaborated in this book. Starting out from various legal aspects of the majority-minority counterbalance dilemma, the parliamentary representation of nationalities[23] (minorities) is addressed (specifically provided for by the Fundamental Law), the extent

19 Beretka 2021, p. 94.

20 Nagy 2021, pp. 48-67.

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

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

23 For a brief review of different models of kin-state policies of Hungary's neighboring countries and the relevant theories regarding the loyalty of nationalities and their parliamentary representation in Hungary, see: Ágnes M. Balázs: *Kötődés és identitás. – A nemzetiségek országgyűlési képviselete, az identitás fogalma az anyaországhoz való viszony tükrében.* [Belonging and identity – The parliamentary representation of minorities and the notion of identity in light of their relationship to the kin-state.]. In: Kisebbségkutatás, Minority Studies, 2018/1, pp. 7-27. Available online: http://epa.oszk.hu/00400/00462/00078/pdf/EPA00462_kisebbsegkutatas_2018_01.pdf

of which varies from symbolic recognition (like the long-lasting debate[24] regarding Australia's indigenous minorities) to providing actual veto rights in legislative matters directly concerning national minorities (e.g. under Article 64 of the Slovenian constitution[25]).

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

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

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

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

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

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

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

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

We should bear in mind that the possibility to provide for constitutional requirements is a tactical weapon in the hands of the HCC (courtesy of the new Act on the Constitutional Court[27]), but applying it does not absolve the HCC from under the constitutional responsibility to reinforce the protection of minorities in their jurisprudence. This decision can certainly be considered as a step toward more effective protections for minorities in judicial proceedings, but I am sure that future case-law along this path will provide fertile ground for continued research in this field as well. What we learn from Noémi Nagy's elaborate analysis of the HCC's minority rights jurisprudence is that there is always room to improve. Her detailed historical review of constitutional case-law from the 1990 transition sheds light on many omissions, myths, ideas, misnomers and misconceptions regarding the missed opportunities in law-making and constitutional interpretation.

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

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

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

26 and without additional costs (as per point [135] of the justification of the HCC Decision quoted)
27 Cf. Article 46, para. (3), Act CLI of 2011. Available in English: https://hunconcourt.hu/act-on-the-cc
28 Szalai 2021, p. 70.

remained unresolved during the 16 years that have passed between the first and the last AC opinion.
in Croatia[29], the AC's most recent opinion (2015) points to lacking inter-ethnic tolerance and dialogue in general. It needs to be added that – among other international monitoring mechanisms – the 2020 cycle of UPR on Croatia refers to a National Roma Inclusion Strategy in education (2013-2020)[30] intended to bridge these gaps, but no results are yet at our disposal to evaluate its success. Efforts towards the reduction of discrimination of the Roma have also been made, but problems of ethnic profiling and segregation in education still persist after four cycles of AC assessment.
in Slovenia, the emphasis is on the differences between the realization of minority rights for the Italian and Hungarian communities versus the Roma communities. Despite all this, based on the AC assessments' conclusions, Slovenia seems to be the outlier of the group, where inter-ethnic tolerance has been successfully reinforced through education and media.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 Szakály 2021, p. 138.

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

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

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

In the second phase of our research, this aspectwas further examined by Norbert Tribl based on his initial findings[38] about the HCC's identity decision, linking autonomies and national minorities to the concept of constitutional identity as part of a broader survey sent to European constitutional courts in 2018-2019.

In our "age of identities" previously recalled, new political and legal impetus has been given to the "identity debate" by the May 5 2020 decision[39] of the German Federal Constitutional Court (GFCC) dubbed PSPP (after the public sector purchase program it concerned). Albeit this decision squarely falls outside of the predetermined geographical focus of our research, it cannot be circumvented in this field for two reasons:

(i) Although it did not spend much time with fine-tuning the German-type 'identity review' of the challenged ultra vires EU legal act in the case at hand, it was heavily criticized[40] for its identitarian tone 'against' the idea of integration, which it chose in light of its self-proclaimed constitutional responsibility for the European integration, the so-called *'Integrationsverantwortung'*.[41] In this light, we can agree that responsible thinking about the future of EU integration in constitutional terms requires a careful consideration of all aspects of constitutional identity on both the EU and the national levels and this also extends to the examination of scientific approaches and trends to this concept in countries that expect to soon join the integration.

(ii) As part of such approaches, the paper of Norbert Tribl focuses on the similarities and the differences between the PSPP decision and the 2016 "identity-decision" of the Hungarian Constitutional Court, defining some of the elements of

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

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

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

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

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

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

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

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

42 Tribl 2021, pp. 158-174.

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

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

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

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

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

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

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

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

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

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

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

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

Whether we are in the EU or under the auspices of the CoE, or specifically in the Western Balkans, the inherent diversity of the national contexts examined, the different social conditions and overall popular goals[46] mixed with the sometimes very much connected national past and present puts us in a situation where – even after carefully studying the protective roles and approaches of the different national constitutions and constitutional courts – we still have more questions than answers regarding the peaceful cohabitation of nations, communities, minorities and identities.

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

Tamás Korhecz:[1]

Constitutional Rights without Protected Substance: Critical Analysis of the Jurisprudence of the Constitutional Courts of Serbia in Protecting Rights of National Minorities[2]

The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, alterable when the legislature shall please to alter it. It is emphatically the province and duty of the judicial department to say what the law is. This is the very essence of judicial duty."
/John Marshall/

"Courts are supposed to be places of reason. But this, of course, is a fantasy. I mean, there is reason being used as a technique. But courts, in fact, are baths of emotions."
/Helen Garner/

1. Introduction

The Republic of Serbia is a nation state with an ethnically rather mixed population[3] and with a comparatively developed legal and institutional system for the protection of national minorities, including the protection of national minorities and their specific rights in many provisions of the Constitution itself. However, the worth of its constitutional provisions – including human and minority rights – can only be truly equivalent to the degree to which they are implemented and protected in practice; by the legislator, the administration and, in final instances, by the courts. The Constitutional Court of the Republic of Serbia (hereinafter CCS) has, as other similar constitutional courts, the extensive and supreme power to interpret and protect constitutional provisions, including human and minority rights, primarily through their traditional competence: the judicial review of laws, government decrees, etc. This article critically analyses the almost three decade

1 SJD Central European University, Judge of the Constitutional Court of Serbia, Professor of Constitutional and Administrative Law at the Faculty of Legal and Business Studies "Dr Lazar Vrkatić" in Novi Sad, University UNION.

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 earlier version of this paper was submitted and accepted for publication in the Review of Central and East European Law.

3 More than 15 per cent of the total population of Serbia (without Kosovo) belongs to various national minorities. The most numerous national minorities are the Hungarian (253,000 persons or 3.53 per cent of the total population), the Romas (147,000 persons or 2.05 per cent) and the Bosniaks (145,000 persons or 2.02 per cent). Other numerous national minorities are the Croats (57,000 persons), Slovaks (52,000 persons), the Albanians (61,000 persons) the Montenegrins (38,000 persons), the Vlachs (35,000 persons), the Romanians (29,000 persons), the Macedonians (22,000 persons), the Bulgarians (18,000 persons), the Bunjevcis (16,000 persons), and the Ruthenians (14,000 persons). The minority population is largely concentrated in the Autonomous Province of Vojvodina, in the Raška/Sandžak region and in municipalities bordering Kosovo; *Population, Ethnicity, Data by Municipalities and Cities – 2011 Census of Population, Households and Dwellings in the Republic of Serbia,* Statistical Office of the Republic of Serbia, Belgrade, 2012, pp. 14-15.

long history of case law of the Serbian Constitutional Court related to the constitutional rights and protection of national minorities beginning in 1990 – namely, from the time when basic elements of liberal democracy, including political pluralism and market economy were constitutionally guaranteed in the Republic of Serbia (hereinafter Serbia).

The strong judicial review of legislative acts is a disputed instrument among scholars; some influential scholars like R. Dworkin and J. Waldron have in their papers often in examined the pros and cons of judicial activism and the legitimacy of the judicial branch to annul the acts of the democratic legislator.[4] Judicial review and activism was seriously questioned by Griffin, who claimed that in US constitutional history Congress has enacted legislation enforcing civil rights, often as a reaction to the various right-restricting abridging court decisions.[5] On the other hand, one of the most frequently invoked theoretical arguments in favour of such judicial review is the protection of various minorities and their rights against the violations and abuses by the democratic political majority.[6] In this article, we examine whether the CCS has served as an anti-majoritarian institution protecting the constitutional rights of minorities (in this case national minorities) against potential limitations set by the political-ethnic majority governing the legislation and the executive branch, or, as Sadurski concluded, as measured against all East and Central European Constitutional Courts, which have been neither intellectually equipped nor morally and politically prepared to interpret minority rights in an expansive, generous manner – and thus these courts have not played a significant role in shaping the "toleration regimes."[7] To answer this basic question one must extensively analyse the case law – the jurisprudence of the CCS. We shall analyse the case law of the CCS in order to determine its pro minority function (or the lack of such function) through the following methods: by defining the subject matter and final outcome of cases before the CCS, by identifying the interpretational technics and methods applied by the CCS in interpreting constitutionally protected minority rights, namely, if and how the CCS has been or has not been creating a balance between constitutional minority rights and other constitutional rights and principles, including an examination of the consistency or inconsistency of the interpretation and argumentation of the CCS regarding minority rights. We also wish to identify the background and the powers influencing the outcomes of constitutional disputes that have come before the CCS.

This article is divided into six sections. After the Introductory section, the second section contains a short overview of the legal protection of ethnic-linguistic diversity in East-Central European (henceforth 'ECE') states with particular emphasis on Serbia. The third section describes the legal regulation and position of the CCS, with a brief review of its history and its social-political reputation. The fourth section contains an analysis of the CCS case law based upon certain formal criteria. In the fifth section, an in-depth

4 See more: Jeremy Waldron: *Moral Truth and Judicial Review*. In: Am Journal Juris 1998/43, pp. 75-98, Jeremy Waldron: *The Core of the Case against Judicial Review.* In: Yale Law Review, 2006/6, pp. 1346-1407, Ronald Dworkin: *Laws Empire*. Fontana Press, London 1986, Ronald Dworkin: *Taking Rights Seriously*. Harvard University Press, Harvard, 1977.

5 Stephen M. Griffin: *American Constitutionalism*. Princeton University Press, Princeton, 1996, p. 116.

6 John Hart Ely: *Democracy and Distrust: The Theory of Judicial Review*. Harvard University Press, Harvard, 1980.

7 Wojciech Sadurski: *Rights before courts — a study of constitutional courts in post-communist states of Central and Eastern Europe*, 2nd edn. Springer, Heidelberg, 2014, p. 289, 324.

analysis of the case law shall follow with the purpose of identifying driving forces behind the jurisdiction of the CCS including the methodologies and techniques employed in interpreting minority rights, and the constitutional values determining court decisions. In the sixth chapter, concluding remarks are offered.

2. The Protection of National Minorities in East- and Central Europe[8] and the Legal Framework on the Legal Framework of Minority Protection in Serbia

Since the early 19th century, the idea of liberal democracy and the nation state (hand in hand) have begun to prevail as a state organization principle. The main problem with the liberal nation state model was then, and still is, that the borders of the nation (nation in the cultural sense) and the nation state have not usually been compatible.[9] Usually the population of nation states in East Central Europe (ECE) has been composed of one titular national group having ascendency in the nation state, holding a privileged position in the nation state, and a number of numerically smaller ethnic groups, usually labelled national minorities.[10] In such a situation, the titular nation is pursuing a nation-building policy of a real or imaginary nation state where language, culture, territory and polity are congruent. A specificity of the ECE context is that newly formed or reborn ECE states have needed the nationalist component in order to strengthen their political identity, with national minorities regarded as a threat, one that could destabilize their new and week statehoods.[11] After the fall of the Berlin Wall, ECE states began to establish legal and institutional frameworks for the protection of democracy, human rights and the rule of law, mainly related to their projected integration into the European Union. In this process the centrality of the idea of the homogenous nation state and nation-building in ECE was complemented, and in a way confronted with the emerging European regime of guaranteed minority rights – the systematic protection of national minorities and their separate identity.

2.1. Protection of National Minorities in ECE States

After the collapse of communism ethno-national state building, on the one hand, was accompanied by the constitutional recognition of minority rights and, on the other hand, the emergence of a European regime of minority protection.[12]. The auspices of this European legal framework were created in many documents enacted within the Council of Europe, the Conference (later Organization) for Security and Cooperation in Europe

8 Under the notion of the "East-, Central Europe states" we consider former socialist countries (ruled by the communist parties) within geographic Europe including those established after the fall of a part of the Soviet Union, Yugoslavia and Czechoslovakia.

9 Will Kymlicka – Christine Straehle: *Cosmopolitism, Nation-States, and Minority Nationalism: Critical Review of Recent Literature.* In: European Journal of Philosophy 1999/1, pp. 65-88, at 73.

10 Timofey Agarin – Karl Cordell: *Minority Rights and Minority Protection in Europe,* Rowman & Littlefield, London, 2016, p. 175.

11 Jeryy Kranz: *Introduction*. In: Jerzy Kranz – Herbert Küpper (eds.): Law and Practice of Central European Countries in the Field of National Minority Protection After 1989. Center for International Relations, Warszawa, 1998, i.

12 Agarin – Cordell 2016, p. 39, 41-42.

and the European Economic Community (later the European Union).[13] The acceptance of these standards by ECE states gradually became one of the political conditions (Copenhagen criteria) for their membership in the EU and became a relatively prestigious implementation mechanism for these relatively vague standards of minority protection.[14] The system created under the Framework Convention for the Protection of National Minorities deserves special attention. The complexity and general wording of its provisions, the acceptance of the Convention by almost all ECE states and the specific system of monitoring, which proved to be much more effective in practice than initially expected,[15] all contributed to the situation that the fulfilment of (minimal) state obligations towards minority protection standards are now usually measured in the process of EU integration by the congruency of domestic standards with the Framework Convention standards. Although the integration of ECE states to the EU, contrary to expectations, has resulted in the reincarnation of the politicization of ethnicity,[16] it has also contributed to the incorporation of European minority right standards into the domestic constitutional and legislative framework, and ensured peace and stability within nation states and between nation states.[17] The constitutional identity of ECE states includes principles guaranteeing, on the one hand, the unitary state, the indivisibility of state territory, national unity, the protection of the titular nation and its language on one hand, while, on other hand, the protection of the separate identity of the members of national minorities, including the protection of their language, education, and sometimes rights for specific political representation.[18] A common denominator of ECE domestic standards of minority rights is that they, contrary to many Western European states, unanimously refuse to accept rights of ethnic territorial autonomy, and treat minority rights as primarily a security issue.[19] All these states except Bulgaria have decided to protect national minorities via group specific rights, often creating positive duties for state authorities rather than embracing the so called individualistic or liberal-neutralist approach of allotting universal individual rights to all persons including persons belonging to minorities.[20] In this way ECE states have continuously faced the challenge of how to accommodate constitutionally protected minority rights with the constitutionally protected ideal of an ethnic-based nation state, in which the titular nation is a bearer and owner of the state and in which the territory of the state and the titular nation tends to be congruent as much as possible. The protection and implementation of minority rights should ensure formal and also effective equality of persons belonging to minorities and those belonging to the titular nation, and beyond this

13 Will Kymlicka: *The internationalization of minority rights.* In: International Journal of Constitutional Law 2008/1, pp. 1-32 at 22-23, Balázs Vizi: *European integration and minority rights conditionality policy.* In: Balázs Vízi – Norbert Tóth – Edgár Dobos (eds.): Beyond International Conditionality: Local Variations of Minority Representation in Central and South-Eastern Europe. Nomos, Baden-Baden, 2017, pp. 57-58.

14 Vizi 2017, p. 59.

15 Asbjorn Eide: *The Council of Europe Framework Convention for the Protection of National Minorities*. In: Kristin Henrard – Robert Dunbar (eds.): Synergies in Minority Protection – European and International Law Perspectives. Cambridge University Press, Cambridge, 2009, pp. 145-151.

16 Agarin – Cordell 2016, p. 45.

17 *Ibid*. p. 43, 181.

18 Iván Halász: *A Közép-európai alkotmányok születése és identitása (1989-2012)* [Birth and Identity of Central European Constitutions (1989-2012)]. NKE, Budapest, 2014, pp. 118-121.

19 Will Kymlicka: *Justice and security in the accommodation of minority nationalism.* In: Stephen May – Tariq Modood – Judith Squires (eds.): Ethnicity, Nationalism and Minority Rights. Cambridge University Press, Cambridge, 2001, p. 156.

20 Sadurski 2014, pp. 310-311.

the preservation of those specific, different ethnic identities of persons belonging to national minorities (language, traditions, culture, religion etc.), e.g. to sustain and preserve ethnic diversity in the nation state. The ultimate goals of nation-building and minority rights seems hardly adjustable; they resemble a "zero sum game" in which successful nation-building excludes the successful protection and implementation of minority rights and sustainable ethnic diversity. The alternative might be to perceive the ethnic diversity management (minority rights) and nation building policies (protection of the titular nation and nation state) as competing constitutional values, abridging each other, looking for accommodation and balancing within the constitutional framework. Constitutional courts and the judiciary may seem, then, to be tasked with the pivotal role of balancing them and adjusting and accommodating these competing constitutional principles reflecting contradicting policy alternatives.

2.2. Constitutional and Legislative Framework of Minority Protection in Serbia

Minority rights in Serbia are guaranteed extensively and generously by a large number of constitutional provisions, as well as through numerous ratified international and bilateral agreements and various domestic legislative acts.[21] The spectrum of minority rights includes both individual and collective rights, the right to minority self-governance, special representation in elected assemblies, affirmative action and many rights requiring positive state action, including additional budgetary funding. The formally high standards of minority rights originate mainly from two resources. First, they originate from the federalist legal tradition of the socialist federal Yugoslav state, which not only tried to create equality and balance between Yugoslav titular nations, but also guaranteed high standards of protection to so-called nationalities, primarily living in the multinational autonomous provinces of Kosovo and Metohia and Vojvodina.[22] Despite the rigid one-party communist environment, which lacked democracy, the policy towards minorities, primarily language rights, was not merely a well-decorated display and mimicry – it indeed, at least partially, demonstrated genuine political desire and living practice. [23] Secondly, present day high minority right standards are result of the fact that after the fall of Milosević, Serbia tried to demonstrate its separation from the bloody ethnic conflicts in the nineties of the 20th century by accepting high standards of minority rights, showing considerable readiness towards the international community to accept some political demands of minorities.[24]

Notwithstanding the formal high standards of minority protection in Serbia, critics have continued to point out the problems of overregulation and inconsistency of the normative

21 Advisory Committee on the Framework Convention for the Protection of National Minorities. *Third Opinion on Serbia adopted on 28 November 2013*, No. ACFC/OP/III(2013)006, p. 6.

22 Tamás Korhecz: *National Minority Councils in Serbia*. In: Tove H. Malloy – Aelxander Osipov – Balázs Vizi (eds.): Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies and Risks. Oxford University Press, Oxford, 2015, p. 73.

23 Tamás Korhecz: *Official Language and Rule of Law: Official Language Legislation and Policy in Vojvodina Province, Serbia.* In: International Journal on Minority and Group Rights, 2008/4, pp. 457-488, at 481, Tibor Várady: *Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav Case*. In: Human Rights Quarterly, 1997/1, pp. 9-54, at 18.

24 Tamás Korhecz: *Evolving legal framework and history of national minority councils in Serbia*. In: International Journal of Public Law and Policy, 2019/2, pp. 116-137, at 119.

framework, such as problems with the implementation and effective protection of minority rights, and other human rights requiring positive state action.[25]

All the constitutions of Serbia from 1947 and onwards have contained some positive minority rights, including even the 1990 Constitution, which was criticized for its restriction of minority rights.[26] This continuity and consistency might serve as legitimate grounds for the bold claim that the recognition and guarantees for minority rights has become a part of the constitutional identity of Serbia.[27] The rights of national minorities and persons belonging to national minorities in Serbia were extensively incorporated into the 2006 Constitution of Serbia, welcomed by international bodies.[28] This constitution of the newly independent Serbia incorporated almost entirely the provisions on minority rights from the Charter of Human and Minority Rights of Serbia and Montenegro (2003), but also added some further provisions, in doing so adding many new, constitutionally protected minority rights compared to 1990 Serbian constitution.[29]

Provisions explicitly mentioning minority rights, protecting ethnicity, persons belonging to national minorities and guaranteeing special minority rights are present in the Preamble of the Constitution, and in not less than 37 articles of the total 206 articles of the Constitution[30] Even the Preamble of the Constitution makes a reference to minorities, stipulating: "*Considering the state tradition of the Serbian people and equality of all citizens and ethnic communities in Serbia… the citizens of Serbia adopt…"*

In the normative part of the Constitution, protection of national minorities is guaranteed first in Section One, titled Constitutional Principles, in Article 14, titled *Protection of national minorities*, which stipulates that "*The Republic of Serbia shall protect the rights of national minorities"* and that it guarantees special protection "*for the purpose of exercising full equality and preserving their identity."*[31]

25 Advisory Committee on the Framework Convention for the Protection of National Minorities. Third Opinion on Serbia adopted on 28 November 2013, No. ACFC/OP/III (2013)006, p. 6, 54 and 55. European Commission for Democracy Through Law (Venice Commission) Opinion on the Constitution of Serbia, no. 405/2006 adopted on the 70th. Plenary Session of the Commission, Venice, 17-18 March 2007, p. 5, 10. [Hereinafter: Venice Commission Opinion]

26 Várady 1997, pp. 21-26. Aelksandar Fira: *Ustavno pravo Republike Srbije i Republike Crne Gore.* [Constitutional Law of the Republic of Serbia and Republic of Montenegro]. Agencija MIR, Novi Sad, 1995, pp. 184-185.

27 Tamas Korhecz: *Ustavna revizija i manjinska prava – u kojoj meri je reviziona vlast slobodna da menja posebna prava manjina u Ustavu Republike Srbije?* [Constitutional Amendments and Minority Rights – to Which Extent is the Amendment Power Free to Change Certain Minority Rights in the Constituion of the Republic of Serbia?]. In: Edin Šarčević – Darko Simović (eds.): Reviziona vlast u Srbiji – Proceduralni aspekti ustavnih promena. [Amendment Power in Serbia – Procedural Aspects of the Constitional Amendments]. Fondacija Centar za javno pravo, Sarajevo, 2017, p. 141.

28 Venice Commission Opinion, p. 10.

29 *Ibid*. p. 7.

30 Constitution of the Republic of Serbia Preamble and Articles 1, 3, 5, 14, 18, 19, 21, 22, 43, 44, 47, 48, 49, 50, 55, 75, 76, 77, 78, 79, 80, 81, 100, 105, 108, 114, 166, 170, 180, 183, 190, 192, 199, 200, 201, 202, 203.

31 This constitutional provision greatly resembles the objects of minority protection defined by the Permanent Court of International Justice in its famous advisory opinion: "The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on the footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics." Minority Schools in Albania, Advisory Opinion, Series A. IB, Fascicule No.64. p. 17.

Section Two of the Constitution, titled *Human and Minority Rights and Freedoms,* in its second chapter, titled *Human Rights and Freedoms*, contains two articles specially linked to minority rights. Article 47 guarantees freedom of national affiliation, including the freedom that "*No person shall be obliged to declare his national affiliation,"* while Article 48 stipulates that "*the state shall promote understanding, recognition and respect of diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information."*

The main and most specific provisions guaranteeing minority rights are concentrated in Section Two of the Constitution in the separate Chapter 3, titled *Rights of Persons Belonging to National Minorities*, in Articles 75-81. Article 75, titled *Basic Provision*, guarantees in its first paragraph "*special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution*." Paragraph two guarantees that as a collective right *"Persons belonging to national minorities shall take part in decision-making or decide independently on certain issues related to their culture, education, information and official use of languages and script,"* while paragraph three concretizes this right and stipulates that these persons "*may elect their national councils in order to exercise the right to self-governance in the field of culture, education, information and official use of their language and script in accordance with the law."*

Article 76 prohibits the discrimination of persons belonging to national minorities and guarantees equality before the law, with the possibility of specific provisional measures in various areas "*aimed at eliminating extremely unfavourable living conditions which particularly affect them."* Article 77 stipulates "*the right to participate in administering public affairs and assume public positions, under the same conditions as other citizens,"* adding also a positive affirmative obligation for various public authorities and public services that in the course of employment "*the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration."* Article 78 strictly "*prohibits the forced assimilation of members of national minorities"* and also "*undertaking measures, which would cause artificial changes in the ethnic structure of population in areas where members of national minorities live traditionally and in large numbers".*

Article 79 deserves special attention because it contains a catalogue of individual rights related to the preservation of the specific identity of the members of national minorities.[32] This article stipulates in paragraph 1 "*that members of national minorities shall have a right to: expression preservation, fostering, developing and public expression of national, ethnic, cultural, religious specificity; use of their symbols in public places; use of their language and script; have proceedings also conducted in their languages before"* various public authorities "*in areas where they make a significant majority of population; education in their languages in public institutions*, *founding private educational institutions; use of their name and family name in their language; traditional local names, names of streets, settlements and topographic names also written in their languages, in areas*

32 These rights are usually called individual minority special rights, they are a step above a non-discrimination guarantee and they usually require positive state action. See: Georg Brunner – Herbert Küpper: *European Options of Autonomy: A Typology of Autonomy Models of Minority Self-Governance.* In: Kinga Gál (ed.): Minority Governance in Europe. Open Society Institute, Budapest, 2002, pp. 17-18.

where they make a significant majority of population;" complete, timely and objective information in their language, "*including the right to expression, receiving, sending and exchange of information and ideas; establishing their own mass media, in accordance with the Law*." The second paragraph stipulates that if empowered by Law *"in accordance with the Constitution, additional rights of members of national minorities may be determined by provincial regulations*."

Article 80 stipulates the rights to "*found educational and cultural associations"*, to which the state shall "*acknowledge a specific role"* in their exercise of rights, and also "*the right to undisturbed relations and cooperation with their compatriots outside the territory of the Republic of Serbia."*

Article 81 reformulates the obligation of the state already stipulated in Article 48: *"In the field of education, culture and information, Serbia shall give impetus to the spirit of tolerance and intercultural dialogue* to achieve *mutual respect, understanding and cooperation among all people living on its territory."*

The Constitution contains several provisions guaranteeing special representation of national minorities in elected parliamentary bodies in all levels of governance, though these provisions are formulated as state obligations and guarantees, not as specific rights.[33] Article 100, paragraph 2, stipulates that "*in the National Assembly, equality and representation of different genders and members of national minorities shall be provided, in accordance with the Law."* A similar guarantee is provided in Article 180, paragraph 4, for the provincial and local assemblies: "*In those autonomous provinces and local self-government units with the population of mixed nationalities, a proportional representation of national minorities in assemblies shall be provided for, in accordance with the Law."*

Beyond the above described provisions on minority rights in the referenced 12 Articles, the Constitution provides other kinds of recognition and protection of national minorities in 25 additional articles.[34]

2.3. Evaluation of the Serbian Legal Framework of Minority Rights

There is a wide range of consensus among scholars that the wording of the 2006 Serbian Constitution lacks necessary clarity and precision, making the interpretation of its provisions complex and demanding.[35] The Venice Commission expressed its opinion in the

33 These minority rights are defined in The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999) of the OSCE High Commissioner for National Minorities as participation in decision making, pp. 8- 9.

34 Minorities, their protection and their right are mentioned in several articles, together with human rights in (Article 1, Article 3, Articles 18-20 and 22), as a protected value (Articles 5, 43, 44, 49, 50, 55,), as a competences of various local and central authorities (Articles 105, 108 and 114, 166, 170, 183, 190, 192) or in conjunction with state of emergency or war (Articles 200-203).

35 Profesor Ratko Marković labelled the 2006 Constitution the "*most illiterate of all constrictions of Serbia.*" See Ratko Marković: *Ustav Republike Srbije iz 2006.godine – kritički osvrt*. [The Constituion of the Republic of Serbia from Year 2006 – Critical View.]. In: Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade], 2006/2, pp. 5-46, at 5.

following words: "*the hasty drafting is evident in provisions that are unclear or contradictory… the new Constitution has all the hallmarks of an over-hasty draft…"*[36]

Such criticism is well-founded in regard to provisions protecting minorities as well. In observing the large number of provisions, one cannot avoid the impression that the drafter tried to incorporate as many as possible provisions related to the protection of national minorities. This tendency is present also in the case of human rights, particularly in the case of the provincial autonomy.[37] At the same time, this overregulation resulted in the repetition of similar provisions, with sometimes not-welcomed alternations creating confusion in interpretation. Clear examples of such negligence in drafting are evidenced in the regulation of the exceptions allowing affirmative action (in Article 21 and Article 76)[38] or in state measures promoting interethnic tolerance (Article 48 and Article 81). Overregulation and unclear wording is present in provisions regulating the conditions for the restriction of (human and) minority rights (Articles 18 and 20).[39]

It is also important to note that in the case of most important minority rights, such as the collective right for self-governance (Article 75), all rights protecting special identity (Article 79) and representation in Serbian, provincial and municipal assemblies (Articles 100 and 180) shall be exercised *in accordance with the Law.* These provisions empowering the legislator to regulate the exercise, enjoyment and scope of these constitutional minority rights opens the question to which extent the constitutional provisions limit the discretion of the legislator to determine the scope of these rights? This is especially evident in provisions found in Article 18, paragraph 2 (protection of the substance of the guaranteed minority right) and Article 20, paragraph 2 (protection of the attained level of minority rights). The responsibility to determine constitutional tests for such limitations lays exclusively on the CCS, but, as the Venice Commission noted, the problems inherent in the drafting of the constitutional provisions have led *"to many issues of interpretation and the Constitutional Court of Serbia will have to ensure a coherent interpretation"*[40].

The overloaded constitutional framework of minority protection is complemented with a comparatively large number of international and bilateral conventions, laws and other legislative acts regulating the exercise of constitutionally guaranteed minority rights.[41]

36 Venice Commission Opinion, p. 3.

37 Tamas Korhecz – Katinka Beretka: *Ustavnosudsko uobličavanje normativne nadležnosti Autonomne pokrajine Vojvodine – deset godina primene Ustava Republike Srbije.* [Constitutional Shaping of the Regulatory Powers of the Autonomous Province of Vojvodina –Ten Years of Application of the Constitution of the Republic of Serbia.]. In: Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade], 2018/1, pp. 90-116, at 93.

38 In Article 21 special measures for achieving full equality of individuals or groups in a substantially unequal position shall not be deemed discrimination, while in Article 76 only special measures *aimed at eliminating extremely unfavorable living conditions which particularly affect national minorities* shall not be considered discrimination.

39 Venice Commission Opinion, p. 8.

40 Venice Commission Opinion, p. 8.

41 Katinka Beretka – Tamás Korhecz: *The Agreement between Serbia and Hungary on the Protection of National Minority Rights – Revision Welcomed*. In: Hungarian Journal of Legal Studies, 2019/3, pp. 300-310.

3. The History, Legal Framework, Position and Reputation of the CCS

The constitutional adjudication, the judicial review of legislative acts, has a long tradition in Serbia (as in other successor states of the socialist Yugoslavia), at least compared to other ECE states.[42] Judicial review in Serbia has been exercised in continuity by a special Kelsenian-type constitutional court, outside the judicial branch, in the so-called concentrated system.[43] Despite important novelties introduced by the Serbian constitutions in 1974, 1990 and 2006, the constitutional review of statutes remained within the concentrated system by the constitutional court outside the judicial branch. Stipulations in the 2006 constitution intended to make the CCS more independent and powerful.

3.1. Status and Position of the CCS and its Judges

The constitutional provisions on the CCS are concentrated in Section Six of the Constitution (Articles 166-175). The CCS is defined as "*autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms"*. The CCS has 15 judges with nine year mandates, each judge having the possibility of one re-election. [44] Judges must fulfil the following requirements beyond those applicable for all public servants: be a minimum age of 40 years old and be a prominent lawyer with at least 15 years of practice in law. [45] In the appointment of judges, all branches of state power participate, ensuring a kind of balance between them; the National Assembly elects five judges from the list of 10 candidates proposed by the President of the Republic, the President of the Republic appoints five judges from the list of 10 candidates proposed by the National Assembly and the Supreme Court appoints five judges from the list of 10 candidates proposed jointly by the High Judicial Council and the State Council of Prosecutors.[46] The president of the CCS and its deputy are elected among the judges by themselves.[47] The CCS judges enjoy full immunity against any prosecution, as do the members of the National Assembly, and only the CCS itself can decide on the lifting of this immunity.[48] Judges cannot hold any other public function and cannot participate in any other professional activity except for teaching in law schools in Serbia.[49] A judge of the CCS may be dismissed only if he or she violates the incompatibility rules, loses his or her working capacity or is sentenced for a crime, making him or her "dishonoured" for the office.[50] Even in these cases the CCS itself decides on the extent to

42 The Constitutional courts and constitutional review were established in socialist Yugoslavia and in its Republics, including Serbia with the 1963 constitutions. See more in Olivera Vučić – Vladan Petrov – Darko Simović: *Ustavni Sudovi Bivših Jugoslovenskih Republika.* [Constitutional Courts of Former Yugoslav Republics]. Dosije studio, Beograd, 2010, pp. 69-93.

43 Alan Brewer-Carrias: *Introduction/Hans Kelsen, Judical Review, and the Negative Legislator.* In: Alan Brewer-Carias (ed.): Constitutional Courts as Positive Legislators. Cambridge University Press, Cambridge, 2011, pp. 6-8.

44 Ustav Republike Srbije [Constitution of the Republic of Serbia], Službeni glasnik Republike Srbije [Official Gazette of the Republic of Serbia], number 98/2006, Art 172. par. 1. and 6.

45 *Ibid*. Art. 172. par. 5.

46 *Ibid*. Art. 172. par. 3.

47 *Ibid*.

48 *Ibid*. Art. 173. par. 2.

49 *Ibid*. Art. 173. par. 1.

50 *Ibid*. Art. 174. par. 2.

which the conditions for dismissal are met, before the National Assembly can decide on the dismissal.[51]

3.2. Competences

On account of, and through its broad competences, the CCS falls within the group of most powerful constitutional courts, allowing the CCS to be significant actor in constitutional and political matters.[52] The competences of the CCS are exclusively regulated by the constitution and they cannot be enlarged by the legislation, yet the constitutional text in this respect is not precise enough.[53] Most of the CCS competences are stipulated in Article 166 of the Constitution, but they are stipulated as well in several other provisions. The competences of the CCS are the following:

- it controls the constitutionality of ratified international treaties, laws and other legislative acts,
- it controls the compatibility of the laws with any ratified international treaties and with the general principles of international law,
- it controls the legality of bylaws,
- it controls the constitutionality and legality of the regulations of autonomous provinces and local self-governments,
- it controls the constitutionality and legality of collective agreements, acts of public institutions, political parties, syndicates, and civic associations.[54]

Any law ruled by the CCS as unconstitutional, such as other general legal acts ruled unconstitutional or unlawful, ceases to exist on the day the decision of the CCS is published in the official gazette.[55] It is notable that the CCS controls the constitutionality and legality of various bylaws and regulations, not only laws enacted in the National Assembly.

Anyone can initiate normative control by the CCS *(actio popularis*) and in these cases the CCS formally accepts or rejects the initiative with an order.[56] If 25 members of the National Assembly, the Government, courts or other empowered state or local authority initiate the control procedure, the procedure begins without the order of the CCS.[57]

There is also an ex ante control of the laws enacted by the National Assembly but not promulgated yet by the President of the Republic, which can be initiated by one third of

51 *Ibid*. Art. 172. par. 3.

52 Violeta Beširević: *Governing without Judges – The politics of the Constitutional Court in Serbia.* In: International Journal of Constitutional Law, 2014/4, pp. 954-979, at p. 964., Boško Tripković: *A Constitutional Court in Transition: Making Sense of Constitutional Adjudication in Post-authoritarian Serbia*. In: Brewer-Carias 2011, pp. 741- 742., Tatjana Papić – Vladimir Djerić: *On the Margins of Consolidation: The Constitutional Court of Serbia.* In: Hague Journal on the Rule of Law, 2018/1, pp. 59-82, at p. 66.

53 Marijana Pajvančić: *Odnos između sudske vlasti i Ustavnog suda– uporedna studija.* [The Relationship between the Judiciary and the Constitutional Court – Coparative Analyses]. Konrad Adenauer Stiftung, Bukurešt-Novi Sad, 2018, p. 31.

54 Constitution of the Republic of Serbia, Art. 166. par. 1.

55 *Ibid*. Art. 168. par. 3.

56 *Ibid*. Art. 168. par. 2.

57 *Ibid*. Art. 168. par. 1.

the members of the National Assembly.[58] In such cases, the CCS shall decide within seven days. If the initiative is rejected, the ex post control is not allowed.[59]

Besides the abovementioned classical constitutional court competences, the CCS can suspend regulations of an autonomous province before they come to force if the Government initiates the control of such regulation before its promulgation.[60] The CCS decides on the constitutionality of individual court and administrative decisions based upon the constitutional complaints of all persons claiming that these final decisions or acts violated their constitutional rights, [61] resolves conflicts of competences between courts and administrative bodies, such as between central, provincial or local administrational bodies[62], decides on electoral disputes not within the competence of regular courts,[63] decides on the banning of political parties, trade unions, civic associations and religious organizations,[64] decides on appeals of dismissed judges[65] and public prosecutors,[66] decides on the violation of the constitution by the President of the Republic within the procedure for dismissal[67] and decides on the complaints stemming from the abridgment of the competences of autonomous provinces or local self-governments.[68]

The CCS decides in sessions with a majority vote of all the judges.[69] Everyone is obliged to obey and implement the decisions of the CCS.[70] If necessary, the CCS decides about the manner by which a decision should be executed.[71] The internal organization, the procedure before the CCS and the legal effects of its decisions are regulated by the Law on the Constitutional Court.[72]

3.3. General Evaluation of the Performance of the CCS

Despite the relatively long history of the CCS, its case law has mainly remained outside the interest of legal scholars (even) in Serbia. Those scholars that have published articles on the CCS in international journals in recent years have emphasized that the CCS, despite its formal strong competences, has demonstrated no will or capacity to become an active actor in the process of democratic consolidation, in actively shaping the institutional and legal framework, in maintaining relationships and a balance between branches of power, or in protecting human rights.[73] On the one hand, the CCS has demonstrated restraint and deference towards the actual ruling majority in political branches of power

58 *Ibid*. Art. 169. par. 1.
59 *Ibid*. Art. 169. par. 4.
60 *Ibid*. Art. 186.
61 *Ibid*. Art. 170.
62 *Ibid*. Art. 167. par. 2. points 1-4.
63 *Ibid*. Art. 167. par. 2. point, 5.
64 *Ibid*. Art. 167. par. 3. and Art. 44. par. 3.
65 *Ibid*. Art. 148. par. 2. and Art. 155.
66 *Ibid*. Art. 161. par. 4.
67 *Ibid*. Art. 118. par. 3.
68 *Ibid*. Art. 193. par. 1. and 2.
69 *Ibid*. Art. 175. par. 1.
70 *Ibid*. Art. 171. par. 1.
71 *Ibid*. Art. 171. par. 2.
72 *Ibid*. Art. 175. par. 3.
73 Beširević 2014, p. 966.

in the exercising of its judicial review powers, while, on the other hand, it has shown more determination in striking down rulings of courts in individual constitutional complaint proceedings.[74] Regarding its deference in the judicial review of legislative acts and executive regulations of the government, authors have highlighted two groups of reasons, both interacting with one another. The first group stems from a culture of restraint or the lack of tradition of judicial independence and judicial power. Generally, justices in Serbia, particularly constitutional court justices, have not been ready or willing to confront those in political power or to involve themselves at all in political disputes.[75] This behaviour requires, and perpetuates, keeping as much as possible to the status quo. The normative pillar of such deference is based on the ideology of legalism, focusing more on the legislative procedure and less on the content of the provision, and also on applying dictionary style, textual interpretation technics, thereby avoiding going beyond the grammatical meaning of phrases interpreting principles and applying constitutional theory.[76] In order to position itself in the favour of the political majority, the CCS has been applying most frequently the so-called "delaying strategy" waiting for a change in, or of, the ruling political majority for the adopting of a law or waiting for the political majority to repeal or amend a law.[77] However, it is worthy of mentioning that not all periods of the CCS should be characterized by equal levels of deference; there are certain cases in which the CCS has invalidated an act of legislation reflecting the will of the political majority, and in doing so gone beyond the ideology of restraint, legalism and grammatical interpretation.[78] In a recent systematic study analysing the web page and media presence of the CCS, it was criticized for its pure invisibility and lack of transparency.[79]

4. Formal Analysis of the CCS Case Law Regarding the Protection of the Rights of National Minorities

In order to determine the real practical weight and importance of these constitutional rights and the actual protection afforded to them by the CCS, prior to in-depth analysis, we will first engage in a general formal analysis of these cases, mainly based on their formal features, such as the overall number of cases, their structure, the subject matter and outcome of the constitutional disputes, the initiators, the direction of initiatives, the length of the procedure before reaching a decision etc.

To identify all the cases of normative control regarding minority rights, research was conducted by reading all the CCS decisions published in bulletins of the CCS from 1990

74 Papić – Djerić 2018, p. 59.
75 Beširević 2014, pp. 972 – 973.
76 Tripković 2011, pp. 744 – 745.
77 Papić – Djerić 2018, p. 69.
78 Papić – Djerić 2018, pp. 72 -73, Tripković 2011, pp. 749, 751.
79 Dubravka Valić-Nedeljković: *Monitoring izveštavanja o delatnosti Ustavnog suda Srbije – Monitoring portala Ustavnog suda i izveštavanja vodećih medija o Ustavnom sudu od januara 2018. do juna 2019. Godine.* [Monitoring of Reporting on the Activities of the Serbian Constitutional Court – Monitoring of the Internet-site of the Constitutional Court and Reporting of Leading Media on the Constitutional Court from January 2018 till June 2019]. In: Slobodan Beljanski – Marijana Pajvančić – Tanasije Marinković – Dubravka Valić-Nedeljković (eds.): Odnos Ustavnog suda i sudske vlasti – Stanje i perspective. [Relationship of the Constitutional Court and Judicial Power – Situation and Perspectives]. CEPRIS, Beograd, 2019, pp. 84-85.

to 2019, as well as by reading and analysing all available court files of identified cases, primarily accessible in various archives.

The conducted research identified a total of 45 rules related to the constitutional rights of national minorities. This number includes both decisions (in which the CCS decided on the cases' merits through complete procedure) and orders (mainly procedural decisions on ill-founded initiatives) in which the court interpreted and applied constitutional provisions guaranteeing minority rights. In 23 cases the CCS ruled on the constitutionality of provisions in the legislative acts of the National Assembly[80], while in 22 other cases the court decided on the constitutionality and legality of provisions in the regulations and bylaws of local and provincial assemblies (in 16)[81], state administration (in five)[82] and in one on state owned company act[83].

Regarding the length of the procedures, there is an indication for the potential presence of the so called *delaying strategy* of the CCS identified by scholars. In 15 cases the CCS reached the decision after more than two years, among which were included relatively simple cases or cases where the procedure was eventually completed with an order rejecting the initiative without merits.

The procedures of the CCS were initiated by groups of deputy members of the National or Provincial Assemblies, political parties, state and local authorities, NGOs and individuals etc. In 15 cases, minority self-governments, minority ethnic political parties, their presidents or NGOs protecting minority rights initiated procedures before the CCS, claiming that the contested provision(s) of a legislative act or a ministerial regulation violated their constitutional rights. In six other cases, Serbian central authorities initiated procedures, in all such cases claiming that local self-government regulations of municipalities populated dominantly by persons belonging to national minorities violated the law and the Constitution. In six further cases, the initiatives were launched by Serbian (mainly nationalist) political parties or NGOs claiming that the contested law or regulation violated the constitution or law in favour of national minorities. In an additional three cases, local

80 Decision IU-330/92 from 14 October 1993, Decision IU-328/92 from 14 October, Decision IU-7/98 from 1 June 2000, Decision IU-178/2000 from 23 November 2000, Order IU-110/2004 from 15 July 2004, Order IU-97/2008 from 18 December 2008, Order IU-78/2008 from 25 December 2008, Order IU-133/2008 from 22 December 2009, Decision IUz-52/2008 from 21 April 2010, Decision IUp-42/2008 from 14 April 2011, Order IUz-883/2010 from 8 December 2011, Order IUz-611/2011 from 22 March 2012, Order IUz-25/2011 18 April 2012, Decision IUz-353/2009 from 10 July 2012, Order IUz-882/2010 from 17 January 2013, Decision IUz-27/2011 from 3 October 2013, Order IUz-116/2009 from 31 October 2013, Decision IUz-882/2014 from 16 January 2014, Decision IUz-479/2014 from 9 April 2015, Decision IUz-166/2014 12 May 2016, Order IUz 248/2017 from 16 April 2019, Order IUz 50/2019 from 18 June 2019, Order IUz-202/2018 from 16 October 2019.

81 Decision IU-409/91 from 24 June 1993, Decision IU-27/99 from 11 January 2001, Decision IU-111/93 from 25 January 2001, Decision IU-350/93 from 25 January 2001, Decision IU-64/94 from 25 January 2001, Decision IU-138/95 from 1 February 2001, Decision IU-171/2002 from 5 June 2003, Order IU 334/2004 from 2 December 2004, Decision IU 294/2002 from 24 February 2005, Order IU-390/2003 from 26 June 2008, Decision IU-446/2004 from 18 February 2010, Decision IU-394/2005 from 22 June 2010, Decision IUo-360/2009 from 5 December 2013, Order IUo-399/2011 from 10 June 2014, Order IUo-199 from 19 February 2015, Order IUo-56/2016 from 28 February 2017.

82 Decision IU-297/96 from 8 February 2001, Order IUp-42/2008 from 8 April 2008, Order IUo-33/2011 from 13 June 2012, Order IUo-1259/2010 from 5 February 2013, Order IUo-272/2015 from 19 July 2017.

83 Decision IU-505/91 from 22 April 1993

authorities initiated a procedure. Finally, in all other cases, various NGOs and individuals without any clear political background initiated the procedures.

The outcome of the constitutional disputes reveals the following: in 27 out of 45 cases, the CCS rejected completely the initiatives and upheld the constitutionality and legality of the disputed provisions, while in 18 cases the court declared unconstitutional, null and void some of the contested provision. In 23 constitutional disputes involving the provisions of the legislative acts of the National Assembly, the CCS declared some provisions unconstitutional only in four cases. In the case of contested provisions in various provincial and municipal regulations, altogether 16 procedures were initiated; in 10 the contested provisions were completely or at least partially declared unconstitutional or unlawful, while in only six cases were the local regulations completely upheld by the CCS. Regarding the provisions of bylaws enacted by central administrative authorities, the initiatives were successful in one case, while in the other four cases the bylaw remained in force after the constitutional scrutiny.

It is interesting to link successful and unsuccessful initiatives with various groups of initiators, as well as with the direction of the claims in initiatives. In doing so, the following relationships become visible:

- In all cases where minority self-governments, minority political parties or NGOs initiated the procedure before the CCS, initiatives were completely rejected by the CCS and the constitutionality of the contested provisions was upheld by the court,[84]
- The CCS has never declared a provision of the law unconstitutional by claiming that such a provision violated a minority right, and only once did in relation to a provision in a local assembly regulation because it violated some minority right.[85]
- The CCS often declared unconstitutional or unlawful provisions granting some rights and privileges to persons belonging to national minorities.[86]

84 Decision IU-328/92 from 14 October 1993, Decision IU-330/92 from 14 October 1993, Decision IU 297/96 from 8 February 2001, Decision IU-7/98 from 1 June 2000, Decision IUp-42/2008 from 21 April 2011, Decision IUz-52/2008 from 21 April 2011, Order IUz-611/2011 from 22 March 2012, Order IUo-33/2011 from 13 June 2012, Order IUo-1259/2010 from 5 February 2013, Decision IUz-479/2014 from 9 April 2015, Order IUo-56/2016 from 28 February 2017, Order IUo-272/2015 19 from July 2017, Order IUz 248/2017 from 16 April 2019, Order IUz 50/2019 from 18 June 2019, Order IUz-202/2018 from 16 October 2019.

85 In Decision 446/2004 from 18 February 2010, the CCS declared unlawful a provision in the regulation of the municipality of Bačka Topola because it restricted the official use of the Slovak and Ruthenian language. B. Topola is a municipality in Vojvodina, dominantly inhabited by ethnic Hungarians.

86 Cases where provisions guaranteeing minority rights were declared unconstitutional or unlawful are the following: Decision IU-505/1991 from 22 April 1993, Decision IU-491/1992 from 24 June 1993, Decision IU-111/93 from 25 January 2001, Decision IU-350/1993 from 25 January 2001, Decision IU-64/94 from 25 January 2001, Decision IU-27/99 from 11 January 2001, Decision IU-294/02 24 February 2005, Decision IUp-42/08 from 8 April 2008, Decision IUo-360/2009 from 5 December 2013, Decision IUz-882/2010 from 16 January 2014, Decision IUz-166/2014 from 12 May 2016.

- All initiatives of central authorities contesting the constitutionality and legality of local self-government regulations were successful and the CCS declared these regulations null and void.[87]
- Out of 23 cases, only in four cases did the CCS declare some provisions of the legislative acts of the National Assembly unconstitutional; in all four cases the CCS did so after the ruling political party which supported the enactment of those laws in the National Assembly lost its power and position in elections.[88]
- Successful initiatives challenging legislative acts were launched once by opposition members of the National Assembly (at the time of the initiative), in two cases by various NGOs, and in one case by an administrative authority.

5. In Depth Analysis of the CCS Jurisprudence

In this section we will try to identify the technics and methodologies of constitutional interpretation used by the CCS in interpreting constitutional minority rights in instances when the court determined in concrete constitutional disputes the basic content, scope and specific weight of these rights in the constitutional order of Serbia. We also seek to establish the existence of consistency or inconsistency in the CCSs applying of some constitutional tests for these minority rights. Finally, we will explore whether there is a connection between the state policy towards national minorities and CCS jurisprudence. With few exceptions, analysis will be limited to cases in which the CCS decided on the constitutionality of the provisions of laws enacted by the National Assembly. Within this group of cases we will focus on those cases in which the CCS interpreted the content, scope, and specific weight of a constitutionally guaranteed minority right, as well as its relationship with other rights and constitutional principles. With good reason, particular attention will be paid to a cornerstone case of the CCS in the area of minority rights from 2014[89] in which the CCS elaborated its general standing regarding constitutionally protected minority rights and its practical accountability therein.[90]

5.1. Methodology of the Constitutional Interpretation applied by the CCS

In assessing which methodologies of constitutional interpretation the CCS has applied in its case law related to minority rights, one might begin with Goldsworthy's division. He groups all methodologies applied by constitutional courts into two groups; in the first, an approach called positivism, are those conceiving the constitution as a set of written

87 Decision IU-505/91 from 22 April 1993, Decision IU-491/92 from 24 June 1993, Decision IU-27/99 from 11 January 2001, Decision IU-111/93 from 25 January 2001, Decision IU-350/93 from 25 January 2001, Decision IU-64/1994 from 25 January 2001.

88 Decision IUz-353/2009 from 10 July 2012, Decision IUz-27/2011 from 3 October 2013, Decision IUz-882/2010 from 16 January 2014, Decision IUz-166/2014 from 12 May 2016. All these legislative acts were enacted during the rule of the Democratic Party in Serbia (2001-2012) and decisions of the CCS were enacted after this party lost its position after the 6 May 2012 parliamentary and the 6 and 20 May 2012 presidential elections.

89 Decision IUz-882/2010 from 16 January 2014.

90 For a complete analysis of this case, see: Tamás Korhecz: *Neteritorijalna samouprava nacionalnih manjina u Srbiji – Pravni okvir i njene nedorečenosti u svetlu odluke odluke Ustavnog suda Srbije.* [Non-territorial Self-governance of National Minorities in Serbia – Legal Framework and its Shortcomings on the Light of the Decision of the Constitutional Court]. In: Anali Pravnog fakulteta u Beogradu, 2015/1, pp. 75-96.

provisions with objective determined meaning, while in the second, termed normativism, are those conceiving the constitution and its provisions as based on deeper principles (principles of political morality, or natural law).[91]

The CCS has usually applied the so-called grammatical interpretation of constitutional principles and provisions (literalism), focusing on the literal, formal meaning of phrases in the constitutional text – narrowly conceived positive jurisprudence.[92] Some authors have called this practice of extreme positivism *literalism* and others *legalism*.[93] In interpreting the constitution, the CCS has only rarely based its interpretation on legal theory (doctrinarism) or on the original intention of the drafter (historic interpretation or originalism), or sought to establish the purpose of the contested provision (teleological) in its interpretation. Even if the CCS has, in its reasoning, gone beyond the grammatical meaning of the provision, applying a teleological interpretation (based on purpose), it has done so indirectly, without explicitly defining the governing purpose, without adequate reasoning [94]. In interpreting constitutionally guaranteed human rights and freedoms, the CCS has often based its interpretation on the reasoning and interpretation elaborated in cases of the European Court of Human Rights (ECtHR) related to those human rights. However, it more frequently references ECtHR case law in deciding on individual constitutional appeals than in adjudicating constitutional disputes related to the constitutionality of the laws enacted by the National Assembly.[95] It is notable that the jurisprudence of the ECtHR helps to little or no degree in interpreting minority rights in the Serbian constitution; hence, these group specific rights (or additional rights as the CCS refer to them) are not guaranteed by the European Convention. The principal issue that must be addressed in decisions of the CCS is whether, and how, constitutionally guaranteed minority rights limit legislative action.

5.2. Scope of legislative liberty/Discretion to Regulate Constitutional Minority Rights

In describing and elaborating upon provisions on minority rights in the Constitution, it was pointed out that these rights usually require positive state action, budgetary funding etc., and that the Constitution stipulates that these rights shall be exercised *in accordance with the Law.* These provisions empowering the legislator to regulate the exercise, enjoyment and scope of these constitutional minority rights elicits a question: to what extent do the constitutional provisions limit the discretion of the legislators to determine the scope of these rights?

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91 Jefrey Goldsworthy: *Constitutional Interpretation.* In: Michel Rosenfeld – András Sajó (eds.): The Oxford Handbook of Comparative Constitutional Law. Oxford University Press, Oxford, 2012, pp. 690-692.

92 Violeta Beširević: *If Schmitt Were Alive...Adjusting Constitutional Review to Populist Rule in Serbia.* In: Violeta Beširević (ed.): New Politics of Decisionism. Eleven International Publishing, Hague, 2019, p.198.

93 Tripković 2011, pp. 745-747.

94 Tamás Korhecz: *Ustavno-sudsko tumačenje i rasuđivanje – sa osvrtom na praksu Ustavnog suda Republike Srbije.* [Constitutional Interpretation with regard on the Practice of the Constitutional Court of Serbia]. In: Pravni život 2018/12, pp. 555-573, at p. 572.

95 Tanasije Marinković: *Analiza uticaja odluka Evropskog suda za ljudska prava na rad Ustavnog suda Srbije*. [The Analysis of the Influence of the Decisions of the European Court of Human Rights on the Work of the Constitutional Court of Serbia]. In: Slobodan Beljanski – Marijana Pajvančić – Tanasije Marinković – Dubravka Valić-Nedeljković (eds.): Odnos Ustavnog suda i sudske vlasti – Stanje i perspective. [Relationship of the Constitutional Court and Judicial Power – Situation and Perspectives]. CEPRIS, Beograd, 2019, p. 59.

In those constitutional disputes in which the initiators contested the constitutionality of the provisions of laws regulating the exercise of constitutionally guaranteed minority rights (limiting it by prescribing some preconditions for enjoyment of those minority rights), the CCS repeated in several decisions that the National Assembly is constitutionally empowered to determine the conditions for exercising these rights and, furthermore, that it has wide freedom in determining these ways and conditions, that such regulation falls within the legislative policy of the National Assembly and that the CCS has no power to control such a legislative policy choice. This kind of reasoning was repeated in several procedures controlling the constitutionality of provisions in laws enacted by the National Assembly regulating the constitutional rights of persons belonging to national minorities for mother-tongue education in 1990 Constitution.[96] Similar arguments were repeated later applying to the guarantees in the 2006 Constitution in relation to minority rights (or state obligations) for preferential representation in the National Assembly[97] or in local assemblies.[98] In these cases the CCS made no reference to Article 18, which prohibits the limitation of the basic content of a minority right by law, nor did it apply any proportionality test.

Contrary to the above mentioned cases, the CCS has generally demonstrated no respect toward the discretion of the National Assembly and the scope of legislative policy in those cases where it declared provisions of laws stipulating the exercise of constitutionally guaranteed minority rights unconstitutional[99] on the grounds that such rights are beyond the scope of minority rights.[100]

Regarding the power of the legislature to regulate the exercise of these minority rights, there is also an important interpretation of the CCS related to the guarantee in Article 20, paragraph 2 of the Constitution. This provision guarantees that the attained level of human and minority rights shall not be diminished. Until 2015, the CCS had avoided interpreting this guarantee. Then, however, in its decision it finally declared that this constitutional principle shall not be applied to cases where the legislature, using its empowerment to regulate the exercise of constitutional rights, diminishes the level of such a right.[101] According to this interpretation of the CCS, in which they went beyond the grammatical meaning, the guarantee of the attained level of human and minority rights only limits the constitution making power in a way that it is obliged to incorporate the existing human and minority rights from the present constitution into an amended new one.[102] This principle, then, would not obligate the legislature to sustain the level of these rights guaranteed by a previous legislatives act.[103]

96 Decision IU-328/1992 from 14. October 1993, Decision IU-7/1998 from 1. June 2000.

97 Decision IUp-42/2008 from 14.. April 2011.

98 Decision IUz-52/2008 from 21. April 2010.

99 Decision IUz-27/11 from 3. October 2013, Decision IUz-882/2010 from 16. January 2014, Decision IUz-166/2014 from 12 May 2016.

100 By stipulating such a competence "the Legislator went outside actions for the implementation of additional rights of persons belonging to national minorities." Decision IUz-882/2010 from 16. January 2014, Part VI., 44 and Decision IUz-166/2014 from 12. May 2016, Part V, 5.

101 Decision IUz-479/2014 8. April 2015, Part IV, 14.

102 *Ibid*.

103 This principle was applied and emphasised not only in the case of minority rights but also in the case of some social rights (pensions) requiring legislative regulation. See: Decision IUz-531/2014 from 23 September 2015 and Order Iuz-351/2015, from 25 April 2019.

5.3. Consistency and Inconsistency in the Jurisprudence of the CCS

The authority of constitutional courts depends a great deal on the consistency of their interpretations and their reasoning in resolving similar constitutional disputes. In this respect, in the area of minority rights, the jurisprudence of the CCS is far from convincing. Changing attitudes of the CCS in relation to some minority rights have often occurred in short periods of time, without valid arguments provided for the changing of its understanding and interpretation of some constitutional provisions. In the area of the official use of minority languages, the CCS modified its position in a short period of time related to the constitutionality of the empowerment of the multi-ethnic Autonomous Province of Vojvodina to regulate in detail the official use of minority languages based on the constitutional provision in Article 79, paragraph 2, which states that the "*additional rights of members of national minorities may be determined by provincial regulations"*. Yet in its decision on the legality and constitutionality of the regulation of the Vojvodina Assembly on the official use of national minority languages, the court offered no objection at all on the entitlement of the Vojvodina Assembly to regulate the official use of minority languages,[104] while through its decisions in 2012[105] and 2013,[106] the court interpreted the Constitution in such a way that the Constitution provides no possibility for the regulation this issue. Furthermore, even the National Assembly Law on these competences cannot delegate such power to the multi-ethnic province of Serbia.

Another example of double standards and inconsistency can be seen in two decisions of the constitutional court enacted in an even closer time range to one another. In these cases the CCS decided on the constitutionality of Article 18 of the Law on Local Elections and on Article 43, paragraph 1 of the Law on the Election of the Members of the National Assembly. The contested provisions stipulate equal conditions for the candidacy for both those lists proposed by ordinary political parties (nation level more or less nationalistic Serbian political parties) and those proposed by political parties of national minorities, while the latter possessed priority in acquiring mandates in local and national assemblies.[107] The constitutional dispute centred on whether the rules on candidacy excluding any preferential treatment for national minority political parties unconstitutionally restricted the rights of national minorities for representation stipulated in Article 100, paragraph 2 and Article 180, paragraph 4 of the Constitution. In both decisions the CCS rejected initiatives arguing that the National Assembly has discretion to choose between various methods of ensuring the representation of national minorities in respective assemblies, and it fulfilled its constitutional obligation by deciding to erase the 5% threshold for national minority political parties. However, concerning the non-existence of beneficiary conditions for the potential candidacy of candidate lists, the CCS argued contrastingly in its decisions. In

104 Decision IU 395/2005 from 22 June 2010 on the constitutionality and legality of the Vojvodina Assembly Decree on the Further Regulation of Some Issues of the Official Language Use of National Minorities on the Territory of the Autonomous Province of Vojvodina.

105 Decision IUz-353/2009 from 10 July 2012 on the constitutionality of some provisions of the Law on the Competences of the Autonomous Province of Vojvodina.

106 Decision IUo-360/2009 from 5 December 2013 on the constitutionality and legality of some provisions in the Statute of the Autonomous Province of Vojvodina.

107 According to these laws, the listed candidates nominated by a national minority political party can take a seat in the assembly if they collect enough votes for only one seat (natural threshold), while other parties are qualified to participate in the distribution of the seats in the assembly if they collect at least 5% of casted votes.

the first case[108], related to the rules of candidacy in the Law on Local Elections (stipulating 30 verified signatures of voters for each candidate on the list), the CCS analysed the possible effects of this rule on the representation of national minorities in local assemblies and considered whether they could prevent national minorities from having representation in local assemblies. After its analysis, the CCS concluded that this rule was not expected to have the effect of preventing the representation of national minorities in local assemblies, in accordance with Article 180, paragraph 4. Yet only a year later, when the CCS examined the constitutionality of a rule which prescribed that all political parties are required to have 10,000 verified signatures for candidacy, the court failed to consider the potential effects of a 10,000 signature rule for the representation of national minorities in the National Assembly. Without any analysis on this front, the CCS simply concluded that the provided threshold was enough to fulfil the obligation stated in Article 100, paragraph 4, and that there was no need to prescribe any preferential treatment in the process of candidacy for national minorities.[109] The empirical electoral data reveal that the 10,000 verified signature rule makes it extremely difficult for minority political parties to produce a candidate for listing in national elections, even for those minorities and parties having realistic expectations for achieving enough votes to qualify a candidate for a seat in the national parliament.

5.4. The Cornerstone Case of the CCS on Minority Rights

The above-mentioned decision (IUz-880/2010 from January 16, 2014) deserves particular attention in the analysis of the case law for several reasons. In late 2009 the Democratic Party led Serbian National Assembly enacted the Law on the National Councils of National Minorities. It was considered as long-awaited and the most important piece of legislation in Serbia ever enacted in the area of minority rights. This complex law regulated in detail the status, registration, competencies and budgetary financing of national councils, and as such it opened the door for direct democratic elections of the members of national councils upon separate voting registers of persons belonging to each national minority.[110] This law made possible the exercise of the collective right of national minorities to self-governance in areas of culture, education, information and official language use. The law was enacted with consensual support of national minority organizations, but it was mainly opposed by Serb nationalist organizations, opposition political parties which claimed that the law empowered national minorities and their elected councils with too much power.[111] Consequently, in 2010 and 2011, eight initiatives were brought before the CCS contesting primarily the competences of these minority councils in various areas, but also challenging the possibility of direct elections of these bodies. The initiators contested various provisions in contained in 37 out of the 139 articles of the law. The large number of initiatives and contested provisions, the innovative character of the law and the poor jurisprudence of the CCS related to minority rights, particularly regarding minority self-government, all spurred the CCS to strive to produce a well elaborated decision with solid doctrinaire foundations. Furthermore, the fall of the Boris Tadić led Democrats in

108 Decision IUz-52/2008 from 21. April 2010.
109 Decision IUp-42/2008 from 14. April 2011
110 Korhecz 2019, p.120.
111 Katinka Beretka: *Fluid Borders of National-Cultural Autonomy: The Legal Status of National Minority Councils in Serbia.* In: Nationalities Papers 2019/2, pp. 273-288, at p. 276.

May 2012 liberated the CCS from its traditionally present deference, culture of restraint towards the ruling political majority. In other words, the new political majority after 2012 had no sympathy towards this legislative act, making it possible for the CCS to decide freely upon its own considerations, and demonstrate strong judicial activism. With a high degree of certainty one can claim that this decision primarily reflected the opinion of judges voting for the decision.

In January 2013 with its decisive order, the CCS rejected as ill-founded initiatives related to the majority of contested provisions addressing separate voting registers, the electoral process, competences in areas of culture and the official use of languages. However, it did decide that the challenged provisions in 14 Articles merited further adjudication.[112] Finally, a year later, in its decision the CCS declared unconstitutional two articles of the law in their totality and several provisions in another eight articles. In the case of four articles, the CCS confirmed the constitutionality of the contested provisions.

Almost all of the invalidated provisions were related to the competences of national minority councils in the area of education and information (media) and their competences and relations towards state and local bodies in protecting minority rights.[113]

The specificity of this decision, which further contributes to the magnitude of its significance, is that its reasoning contains many important general statements of the CCS on the protection of national minorities and minority rights. On the one hand, the CCS stressed the necessity of guaranteeing group specific (additional) rights to national minorities based on the grounds that without them full and effective equality between members of the ethnic majority and national minorities is not possible, equal rights and non-discrimination are not enough for effective equality.[114] On the other hand, the at times general nature of their response was not without serious shortcomings. It omitted several important sources and offered no clear answers to some basic questions regarding the definition and legal nature of national councils,[115] such as what is the purpose of guaranteeing the collective rights for self-governance?

The initiators contested ardently those provisions of the law which empowered respective national minority councils to take part in the decision making processes and in the management of public educational institutions with instruction in minority languages and, furthermore, to become co-founders or founders of these public educational institutions, primarily on the grounds that such powers are in violation of the equality of all citizens,[116] as well as the provision in Article 79 of the constitution stipulating that the right to mother tongue education would be implemented in public educational facilities. The CCS confirmed the constitutionality of these provisions of the law in general on the grounds that the powers of national councils regarding public educational institutions, including the right to become a founder of such institutions, are based on the collective

112 Order IUz-882/2010 from 17. January 2013.
113 Korhecz 2015, pp. 81-82.
114 Decision IUz-882/2010, from 16 January 2014, Part V, 31.
115 Beretka 2019, p. 277.
116 According to the initiatives, persons not belonging to national minorities have no opportunity to influence the decision-making procedure in these public educational institutions; only representatives in national councils.

right to self-governance in Article 75 paragraph 2 on constitutional empowerment and in Article 21 paragraph 4 on the affirmative measures necessary to achieve full equality of persons in substantially unequal positions and on the assumption that the right to mother tongue education cannot be implemented with the exclusion of the representatives of the respective national minority; rather, they declared that their inclusion is essential in decision-making.[117] It is interesting that the CCS supported its own arguments regarding the founding rights of public educational institutions of national minority councils by invoking the practice in Hungary concerning the position of Serb minority educational institutions.

Despite the fact that the CCS upheld the constitutionality of the general concept of the law, it found many of its contested provisions unconstitutional on various grounds.

In the case of numerous contested provisions, the CCS invalidated provisions not because they were directly violating some provisions of the Constitution, but because these provisions were not in harmony with so-called sectorial laws regulating the area of electronic media, administrative procedure, public broadcasting, the educational system etc. Such inconsistencies may violate the constitutional principle of unity of the legal order, Article 4, paragraph 1 of the Constitution. In many of its decisions on individual provisions, the CCS emphasized that the provision of a law regulating a different subject matter cannot change a rule from a law regulating another area of public life without this explicit possibility provided within the law. The essential problem with the application of this rule regarding the concrete competences of national councils is twofold. Firstly, one can argue that national councils and their competences are in a systematic way regulated by the Law on the National Councils of National Minorities and, therefore, have the standing of a subject matter that cannot be regulated systematically by another law. Secondly, by letting a sectoral law provision prevail, the CCS could exclude or drastically limit the exercise of collective rights guaranteed by Article 75 of the Constitution.[118]

In several other cases, the unconstitutionality of provisions was not based on any concrete provision of the Constitution, but rather on the restrictive interpretation of the CCS of the scope of minority rights[119], or, as the CCS articulated it simply; the "*Legislator went outside actions for the implementation of additional rights of persons belonging to national minorities"*.[120] The problem with this kind of court activism is that the CCS provided very weak, or even a complete lack of, argumentation about the constitutional limits of these minority rights, violated by the National Assembly. One could infer, however, that behind these arguments the constitutional guarantees of the ethnically-based nation state and the interest of the dominant ethnic group were present without it being explicitly mentioned.[121] A suitable example of such a restrictive interpretation is the annulment of the provision in Article 12, par. 1, point 5, which stipulated that national minority councils are to participate in the appointment of some school directors via preliminary consent

117 Decision IUz-882/2010 from 16 January 2014, Part VI, 39, 45.

118 Dissenting Opinion Judge Odri Kartag Agnes, Bilten Ustavnog suda 2012-2016 Knjiga 1 [Bulletin of the Constitutional Court 2012-2016, Book 1]. Službeni glasnik, Beograd, 2018, p. 522.

119 Beretka 2019, p. 281.

120 Decision IUz-882/2010, from 16. January 2014, Part VI, 35,.43-45, 57, 68, 70.

121 Korhecz 2018, p. 572.

(veto) power. The CCS tried to defend its argument that participation in decision-making cannot amount to veto power by referring to Article 15 of the Framework Convention for the Protection of National Minorities and the Explanatory Report attached to this convention.[122] In its argumentation the CCS completely neglected to analyse the standings of the Advisory Committee for monitoring the Framework Convention, which could suggest a completely different conclusion.[123] According to various scholars, domestic, constitutional, and legal provisions provide even less of a basis for such a restrictive constitutional interpretation of minority rights. Várady and Beretka argue that constitutional provisions (Article 75, par. 2) stipulate both autonomous decision making and participation in decision making; therefore, preliminary consent cannot violate the constitution – on the contrary, consultation is the lowest level of participation in decision making, if it is a form of participation at all.[124] Odri Kartag refers to the Law on Administrative Procedure, which explicitly stipulates preliminary consent as a means of participation in administrative decision-making.[125]

A third group of provisions was invalidated because the CCS made some rather technical omissions in the interpretation of some provisions of various laws.[126]

The unusual activism of the CCS in this cornerstone case can also be seen in the light of the court acting as a positive legislator. In the case of several provisions, the CCS, interpreted phrases in provisions differently from their literal meaning, and in doing so spared the unconstitutional provision, but under the strict condition that they are interpreted exclusively in the manner stated by the CCS.[127]

Although the reasoning lacks any reference to constitutionally protected values, juxtaposed with the constitutionally protected minority rights, one could see in it the tacit determination of the CCS to protect the centralized ethnic based nation state from collective minority rights aimed to protect ethnic diversity. In this respect one can find a slightly more direct reference to the protection of the position of the titular nation and nation state in another cornerstone case of the constitutional court, in which the CCS declared

122 Decision IUz-882/2010, from 16. January 2014, Part VI, 43-44

123 Norbert Tóth: *A tool for an effective participation in the decision-making process? The case of the national councils of national minorities.* In: Balázs Vízi – Norbert Tóth – Edgár Dobos (eds.)*:* Beyond International Conditionality: Local Variations of Minority Representation in Central and South-Eastern Europe. Nomos, Baden-Baden, 2017, pp. 235-236. Korhecz 2015, pp. 91-92.

124 Tibor Varadi: *Mišljenje o ustavnopravnim pitanjima koja je postavljaju povodom osporenih odredaba Zakon o nacionalnim savetima – Izneto na javnoj raspravi pred Ustavnim sudom 2. jula 2013.godine*. [Opinion on Constitutional Law Question Related to Disputed Provision of the Law on National Councils – Elaborated on Public Hearing Before the Constitutional Court on 2 July 2013.]. In: Pravni zapisi, 2013/2, pp. 419-435, at pp. 427-428, Beretka 2019, p. 281.

125 Kartag 2018, p. 520.

126 Korhecz 2015, pp. 93-94.

127 Milan Stanić: *Doprinos unapređenju pravne države kroz mehanizam ustavnosudske kontrole opštih akata u svetlu interpretativnih odluka Ustavnog suda Srbije.* [Contribution of the Constitutional Court to the Development of the Rule of Law Principle through the Judicial Review of Legislative Acts in the Light of Interpretation Decisions of the Constitutional Court]. Bilten Ustavnog suda. Službeni glasnik, Beograd, 2018, pp. 929-934, Decision IUz-882/2010, from 16. January 2014, Part VI, 37, 59.

unconstitutional the majority of the provisions of the Statute of the multi-ethnic Autonomous Province of Vojvodina.[128]

5.5. Relationship Between Interpretation Methodology, Judicial Activism and Constituency in Jurisprudence and State Policy Towards National Minorities

In the period of our analysis, from 1990 to 2019, the Serbian government has embraced different policies regarding the rights of national minorities. Even without precise, detailed analysis, clear ups and downs and shifts over short time periods are apparent in its policies towards national minorities. This policy is best measured by the content and direction of various legislative acts regulating the rights of national minorities, by the involvement of minority political parties in governments, by the foundation of various institutions for the implementation of minority rights, by the level protection provided to various national identities and by the level of budgetary finances allotted for the implementation of minority rights. Measured by these parameters, the golden age of state policy towards national minorities in Serbia was somewhere between 2001 and 2011[129], while since the political turnover of 2012 some decline in state policy towards national minorities is evident.[130] Over the last three decades, the policy towards national minorities was most restrictive during the Milosević rule in the nineties of the last century.[131] If we juxtapose the periods of ups and downs in the state policy with the decisions on minority rights enacted by the court in those periods we get astonishing concordance. In the period between 2001 and 2011, the CCS declared constitutional and confirmed all contested provisions in the laws enacted by the national assembly which in one way or another broadened the scope of minority rights. One specific decision deserves special attention in this respect. In 2004 the CCS upheld the constitutionality of a provision in Article 13 of the Law on the Election of Members of the National Assembly guaranteeing preferential position of electoral lists proposed by national minority political parties (and *not* applying the 5% threshold requirement) despite the fact that the 1990 Constitution had no provision guaranteeing special representation or affirmative action of national minorities in the National Assembly. The CCS in its reasoning stated that the preferential treatment of minority political parties is not discriminatory towards other citizens, but rather that it guarantees access for minorities to the National Assembly, that it is necessary

128 The CCS declared unconstitutional Article 6 of the Statute guaranteeing equality of all national-ethnic communities including the Serb majority partially on the grounds that according to Article 1 of the Constitution Serbia is the unitary state of the Serb nation; therefore, it is unconstitutional to declare Serbs as a majority national-ethnic community equal with other national-ethnic communities, which are actually defined in the Constitution as national minorities. In this way the CCS clearly protected the specific dominant constitutional position of Serbs in the Serbian nation state, in juxtaposition to national minorities and their position. Decision Iuo-360/2009 from 5 December 2013, 79-80

129 In this period the most important legislative acts on minority rights were enacted (Law on the Protection of Rights and Freedoms of National Minorities (2002), Law on the National Councils of National Minorities (2009), Bilateral Agreements on the Reciprocal Protection of National Minorities with Hungary, Croatia, Romania and FYR of Macedonia (from 2002-2004, etc.) and several public institutions protecting the national identity of national minorities were established; a new university faculty, schools, cultural institutes and centers, theatres (2003-2011) etc.

130 Petar Teofilović: *Trendovi u oblasti prava nacionalnih manjina u Srbiji.* [Some Tendencies in the Area of Minority Rights in Serbia]. In: Tibor Varady (ed.): Prava nacionalnih manjina u ustavnopravnom sistemu Republike Srbije. [Rights of National Minorities Under the Constitutional System of the Republic of Serbia]. Srpska akademija nauka i umetnosti, Beograd, 2019, p. 71, 80.

131 Várady 1997, pp. 21-26.

to protect minorities and that such protection cannot be restricted merely to areas of cultural identity.[132] This case is a clear example of the CCS going beyond the grammatical meaning of constitutional provisions and supporting a pro minority solution with a basis in certain principles and through teleological interpretation. Moreover, in this period, CCS principally confirmed the legality and constitutionality of contested provisions in the regulations of the Autonomous Province of Vojvodina and some municipalities inhabited mainly by national minorities. The CCS upheld the constitutionality of the contested provisions in the provincial regulation on the election of deputies in the Assembly of the Autonomous Province of Vojvodina.[133] The CCS repeated its argumentation related to the preferential treatment of national minority political parties in state level elections, but added that Vojvodina is a specific multi-ethnic region, where such measures are needed. The CCS was similarly positive in confirming some provisions in local regulations. In such a way, the CCS upheld the Statute of Stara Pazova and Bačka Topola. In the first decision, the CCS upheld the provision of the local statute stipulating that local authorities and institutions founded by the municipality are obliged to take into account the knowledge of the national minority language and the national-ethnic proportions of the population in employing new employees. The provisions on the preferential employment of national minorities and the minority language knowledge requirement, and the power of local municipalities to regulate such issues, was upheld on the broad interpretation of the provision in the federal law on the protection of national minorities.[134] In another affirmative decision, the CCS upheld the provision of the Statute of Bačka Topola municipality determining the traditional names of settlements in Hungarian language. Despite its previous interpretation of the respective provisions of the Law on Official Language and Script and the annulment of similar provisions in other Hungarian populated municipalities in 2001,[135] the CCS upheld the provision. The CCS based its reasoning on the provisions of the Framework Convention, on the Bilateral Agreement with Hungary and on the Law on the Protection of National Minorities, all of which make lawful the use of traditional names of settlement in national minority languages, contrary to the Law on the Official Use of Languages and Script.[136]

On the other hand, in other periods, there are decisions in which the CCS interpreted constitutional and legal provisions on minority rights restrictively, allowing various authorities to implement them with wide discretion or not to implement them at all. In previous sections we elaborated many examples in which the CCS respected the wide discretion to the legislature to limit these constitutionally protected rights, however such interpretation of the CCS is present even towards the provisions in the acts of administration or local self-governments. In three cases the CCS failed to declare unconstitutional and unlawful the provisions of the ministerial decree and local self-government regulations

132 Decision IU-110/2004 from 15 July 2004.
133 Decision IU-334/2004 from 2 December 2004.
134 Decision IU-171/2002 from 5 June 2003.
135 Decision IU-111/93 from 25 January 2001, Decision IU-350/93 from 25 January 2001, and Decision IU-64/94 from 25 January 2001.
136 Decision IU-446/2004 from 18 February 2010.

despite their clear, even literal collision with the Laws regulating official language use of minority languages[137] and the Law regulating the financing of minority self-governments[138].

6. Concluding Remarks

The general and dominant characteristics, as well as the chief criticisms, of the CCS identified by scholars are confirmed in the case law analysed in this paper as well. The Court's tendencies to consistently escape conflicts with the actual ruling political majority and to show deference to the legislative and executive power is evident in these cases as well; moreover, the jurisprudence of the CCS typically followed the concurrent track of the actual state policy towards national minorities and their rights.

In the almost 30 years covering the period from 1990 to 2019, the CCS invalidated no provision of law adopted by the national assembly adjudging that it restricted a minority right. Neither did the court ever uphold an initiative launched by members of national minorities or their organizations seeking the protection of a minority right against a violation by a law or regulation. Generally, such initiatives were rejected and the necessity of a law to conform to the constitution was declared on the grounds that the legislature is empowered to stipulate the execution of minority rights, and it has wide discretion in doing so. Contrastingly, the CCS declared in certain cases provisions of the law unconstitutional because they provided too great a degree of minority rights or on the grounds that they were not harmonized with the provisions of some sectorial laws stipulating differently on the same subject matter. In doing so the CCS interpreted minority rights restrictively, not affirmatively to protect them against potential violations,[139] while at the same time giving preference to certain constitutional provisions over minority rights. Contrary to its dominant interpretation methodology (positivism or even literalism), in cases where the CCS invalidated some minority rights guaranteed in legislative acts it tacitly applied normativism as constitutional interpretation methodology. Namely, in these cases the CCS often went beyond the text of the constitutional provision and based its decisions on inherent constitutional values – the protection of the ethnically based nation state, and the position of the titular nation. Unfortunately, the CCS did so indirectly, without openly identifying

137 In Decision IU 297/96 from 8 February 2001 the CCS rejected the initiative against a ministerial decree rendering the exclusive use of only Serb language forms by Birth Registrars in general, despite of the provision of the Law on the Official Use of Language and Script obliging authorities to issue bilingual forms from all public registers in areas in which the language of the national minority is in official use as well. The CCS rejected the initiative on the ground that the Decree is formally not regulating the use of minority languages but only forms, so if some question is not regulated by the legal norm it can not violate higher norm as well. In Order 399/2014 from 10 June 2014 the CCS rejected the initiative against the Statute of the Irig municipality rendering the exclusive official use of the Serb language not regulating the official use of the national minority language contrary to the provision of the laws and provincial regulations obliging all municipalities to guarantee the official status of minority language in settlements where the minority population exceed a percentage of the total population. The court argued that the CCS has no competence to decide in cases in which something was not regulated by the Statute, even if such obligation to regulate might exist.

138 In Order IUo-56/2016 from 28 February 2017 the CCS rejected the initiativinst the Act on Budget of Municipality Novi Pazar for the Year 2016, planning no financial support to the Bosniak National Council contrary to the provision of the Law on the National Councils of National Minorities (Art. 115). The CCS argued that the CCS has no competence to create provisions which were not enacted by the Local Assembly.

139 Kartag 2018, p. 518.

the protected inherent constitutional value or principle, nor did the CCS identify guiding principles for balancing minority rights and constitutional principles guaranteeing the position of the titular nation and nation state.

Despite the above mentioned conclusions, it should be noted that the CCS has made some considerable efforts to interpret the character, position and goals of minority rights in the Constitution using and applying international standards and legal and political theory, primarily in its cornerstone decision from 2014. The constitutionality of many legal provisions guaranteeing special rights was upheld by the CCS on the basis that persons belonging to national minorities cannot be fully equal with other citizens (the majority) without special minority rights, in this way asserting a clear difference between formal equality before the law and effective equality, for which special minority rights are inevitable. These principles, however, were not consequently applied in resolving concrete constitutional disputes. With a great deal of certainty, one may conclude that the CCS has not operated an anti-majoritarian institution protecting the constitutional rights of minorities against potential limitations of the political-ethnic majority governing the legislative and the executive branches. Furthermore, the CCS has not contributed substantially to understanding the basic content of minority rights or their relationship to the constitutional principles protecting the unity of the nation state of Serbia, with Serbs as the dominant ethnicity. On account of this approach, the long catalogue of specific minority rights in the Constitution has been practically degraded to the level of second-ranked constitutional rights, to the status of political proclamations without judicial protection. The best illustration might be the jurisprudence of the CCS concerning the minority right for special representation in assemblies. First, in 2004, the CCS upheld the constitutionality of legal provisions guaranteeing privileged representation of national minorities in the National Assembly and in the Provincial Assembly without invoking any basis in the provision of the 1990 constitution, but basing their decision on general principles,[140] while in 2011, the same court rejected initiatives launched against the lack of affirmative action in the nomination procedures for national minority lists despite the special provision in the Constitution guaranteeing equal representation of national minorities in the National Assembly.[141] This illustrates that if the National Assembly wishes it can provide privileges without a specific constitutional guarantee. On the other hand, a constitutional guarantee does not press the National Assembly to provide suitable tools for effective participation in the national assembly.

This situation gives rise to a question: what can motivate the constituent power to guarantee all these minority rights if there is no judicial intention to effectively protect and implement them? These rights are mainly decorative windows, reflecting the heritage of the Federal Yugoslavia based on ethnic balancing, while posing as a tool for European integration.

140 Order IU-110/2004 from 15 July 2004 and Order IU-334/2004 from 2 December 2004.
141 Decision IUp-42/2008 from 14 April 2011.

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.

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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.

Anikó Szalai:[1]

Mapping the implementation of minority protection in Central European countries by the Council of Europe[2]

1. Introduction

This article examines the implementation of the 1995 Framework Convention for the Protection of National Minorities (FCNM) in relation to six Central European states, namely Serbia, Croatia, Slovenia, Hungary, Slovakia and Romania.[3] Focus is placed on the development between the period of the first report and the last report, which arches over approximately twenty years. All six countries have similar historical-political backgrounds, starting with the close relationship in the Monarchy of Austria-Hungary, later being communist-socialist countries until the end of the Cold War. This generally means similar legal heritage, while in the field of minority protection significant differences can be identified. Owing to the 1920 Peace Treaty of Trianon, after World War I, there was and there is still an inherent difference between the political objective and understanding of minority protection in these countries. Another factor influencing the present-day situation is that while Slovakia, Romania and Hungary experienced a generally peaceful regime change, the dissolution of Yugoslavia was heavily burdened by armed conflicts. The imprint of that is still visible in the reports on Serbia, Croatia and Slovenia, and in parallel in the opinions of the Advisory Committee of the Council of Europe on the implementation of FCNM. A common issue among all six states is the dire social and economic situation of the Roma community, including discrimination in the field of work and work condition and segregation in the field of education.[4]

Owing to the closer relationship, first Serbia, Croatia and Slovenia are examined, then followed by Romania, Slovakia and finally Hungary.

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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.

3 For an analysis on the first twenty years of the application of the FCNM, see e.g.: Erzsébet S. Szalayné: *A nemzetközi jogi kisebbségvédelem színe és fonákja: 20 éves a Kisebbségi Keretegyezmény*. [The color and background of the protection of minorities in international law: the Framework Convention for Minorities is 20 years old.]. In: Közjogi Szemle, 2018/1, pp. 11-15.

4 For detailed analyses of the situation of Roma in Europe see e.g.: Anikó Szalai: *Protection of the Roma Minority under International and European Law.* The Hague, Hollandia: Eleven International Publishing, 2015

2. Serbia

The initial state report was submitted by Serbia and Montenegro in 2002, only three years after the conclusion of the war in Kosovo in 1999. The country was still in a very fragile state and it dissolved in 2006. This was the last event in the history of the dissolution of Yugoslavia, starting in 1991. Problems characteristic of such a situation is clearly recognizable in the opinion of the Advisory Committee.[5] The constitutional structures have undergone fundamental changes and the legislative background of human rights and minority protection has developed significantly. Nevertheless, the legal status of the relevant legislation adopted by the former federal authorities was unclear and limited the cooperation between the federal and state authorities which had resulted in discrepancies. Clarification of the competences, completion of the legislative work with regard to establishing detailed legal guarantees for the protection of national minorities below the level of the already established constitutional rules and provisions and monitoring of the implementation are only a few of the mentioned concerns.[6] At such a transitional stage there is a level of uncertainty as to the future of division of responsibilities between various governmental structures and about the stability of institutions. "Uncertainty and flux, as well as a certain lack of coherence, also characterises the status of the relevant legislation, including new legislation on the protection of national minorities."[7]

The Advisory Committee noted that "the legacy of the aggressive nationalistic policies of the Milosevic regime" were widely felt in the society and that this legacy had complicated the task of the authorities to implement human rights and measures of minority protection. The rebuilding of inter-ethnic tolerance and effective equality were great challenges.[8] Besides the deficiencies of legislation, the actual implementation and execution of many of the minority rights requires active participation, direct investment and financial involvement from the state which was extremely difficult while facing serious economic difficulties.[9]

Similarly to the Croatian situation, owing to the armed conflict of the 1990s and the breakup of Yugoslavia, Serbia also faced a range of difficulties in terms of confirmation of citizenship and reducing statelessness.[10] This was especially dire for the Roma, many of whom did not possess personal documents, which resulted in significant difficulties of identification and confirmation of citizenship, as well as hampered their access to public services and social assistance etc.[11]

Serious problems has been identified by the Advisory Committee in relation to the language use of minorities and declared that it was the obligation of the state to provide for topographical indications and inscriptions at the minority language and to ensure the

5 Opinion on Serbia and Montenegro, adopted on 27 November 2003, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 02 March 2004, ACFC/INF/OP/I(2004)002
6 *Ibid*. p. 3.
7 *Ibid*. p. 7.
8 *Ibid*. p. 6.
9 *Ibid*. p. 8.
10 *Ibid*. p. 10.
11 *Ibid*. p. 14.

public use of the minority language.[12] It was noted that wide variations existed between regions in terms of efforts taken to protect languages and cultures of national minorities, referring to the comparison of Vojvodina with other parts of Serbia.[13]

The latest fourth opinion of the Advisory Committee on Serbia was issued in 2019 and it highlights that Serbia is a multicultural country with a diversity of national minorities, and even though the legal framework is solid, sectoral discrepancies exist and the implementation of laws is not adequately monitored. A clearly visible contrast exists between the different levels of protection of minority rights in the Autonomous Province of Vojvodina and in Central or Southern Serbia. Due to lack of systemic data collection, for example on the level of representation of national minorities in the state administration, some of the improvements are hard to establish. The Serbian state shall set up and operate a sustainable human rights-based data collection framework with proper legal safeguards.[14] Such data collection and database is essential, among others, for producing long-term and measurable progress on the representation of national minorities in the public administration.[15]

Roma still face de facto discrimination with regard to citizenship status, housing, health care, education and employment. The state shall establish, implement, monitor and periodically review a comprehensive strategy aimed at the revitalization of inter-ethnic relations. The subject of which is not only the majority population's relationship to Roma, but all the nationalities of Serbia.[16] For example the Advisory Committee urged Serbian authorities to develop exchange programs between communities as soon as possible in order to promote multicultural and intercultural perspective at every level of education.[17] Another deficiency of education is the lack of proper history curricula and teaching materials which would foster respect for all groups in society and provide broad knowledge on minorities who are an integral part of Serbian society. The state shall promote historical and contemporary research in this field, as well as the state should develop possible models for bilingual and multilingual education.[18]

3. Croatia

Croatia has been a party to the FCNM since 1998[19]. It has submitted the state report in all 5 cycles. Croatia's first report, prepared in 1999, extensively refers to the history,

12 *Ibid*. p. 22. On minority languages in Europe, see e.g.: Gábor Kardos: *The European Charter for Regional or Minority Languages – Specific Features and Problems of Application*. In: Marcel Szabó – Laura Gyeney – Petra Lea Láncos (eds.): Hungarian Yearbook of International law and European Law (2019). Den Haag, Hollandia: Eleven International Publishing, 2020, pp. 259-272.; 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.

13 *Ibid*. p. 37.

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

15 *Ibid*. p. 38.

16 *Ibid*. p. 5.

17 *Ibid*. p. 29.

18 *Ibid*. p. 30.

19 Date of ratification: 11 October 1997; entry into force: 1 February 1998.

legislation and demography issues of the country.[20] It was evident that the legacy of the 1991-1995 conflict severely complicated the implementation of the FCNM and it had negative effect on wide-ranging difficulties, especially with respect to the protection of the Serbian minority. The Croatian government introduced normative improvements already at the second half of the 1990s, but in 1999 it still lacked a proper constitutional law on national minorities and the process was painfully slow. The Advisory Committee found in its opinion that particularly at the local level reluctance among certain authorities could be seen, "not only with regard to remedying the negative consequences of past discriminatory practices and other minority-related problems, but also with regard to ensuring that such problems do not occur in today's Croatia"[21]. At the time of the adoption of the opinion of the Advisory Committee, the area that necessitated the most urgent attention was the protection of the minorities in the field of employment and the situation of the Roma minority, especially their segregation in education and the situation of women.[22]

The opinion of the Advisory Committee already at its introductory remarks highlighted the need for special measures in order to rebuild "inter-ethnic tolerance and true and effective equality in society"[23].

Identification of national minorities had inconsistencies in the legislation and it seemed problematic that the 1997 version of the Croatian Constitution listed only 10 'autochthonous' national minorities, while the Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities, adopted in May 2000, included 22 minorities and envisaged also the inclusion of others in this list. For example, the Constitution did not consider the Bosniacs, Slovenes and Roma to be autochthonous minorities in Croatia, and the influence of this limited listing was also visible in the electoral system.[24]

The collection of statistical data on minorities has long been a problematic issue across Europe, on the one hand it is sensitive data which has to be handled with appropriate legal safeguards, while on the other, the knowledge of the numerical representation of certain groups is necessary for reaching the balance in legislation. The Advisory Committee was of the opinion that personal data relating to the affiliation with a minority shall be collected by authorities during census and deemed it especially relevant owing to the massive population movements that had taken place on the territory of the former Yugoslavia owing to the 1991-1995 armed conflict.[25] Wide discrepancies between the official statistics and the actual numbers on the ground can seriously hamper the ability of the state to fully and effectively implement, ensure and monitor the measures taken.[26]

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20 Report submitted by Croatia pursuant to Article 25 (1) of the Framework Convention for the Protection of National Minorities, 16 March 1999, ACFC/SR(1999)005.

21 Opinion on Croatia, adopted on 6 April 2001 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 6 February 2002, ACFC/INF/OP/I(2002)003, p. 2.

22 *Ibid*. p. 8, 12-13, 16.

23 *Ibid*. p. 4.

24 *Ibid*. p. 5.

25 *Ibid*. p. 6, 8.

26 *Ibid*. 8.

By 2015 the shortcomings were repaired, all 22 national minorities are entitled to protection, though the Advisory Committee's opinion highlights that minority protection is only provided for citizens. The Committee argues that Croatia should pursue an inclusive approach, especially with respect to stateless persons.[27]

While the Advisory Committee acknowledged the improvements in a wide range of Croatian legislation compared to the state of law during and in the close aftermath of the Balkan conflict, it also noted that general and specific anti-discrimination legislation was sporadic and did not cover, for example, the fields of education and housing. The problem was especially visible in relation to the repossession of property by persons belonging to national minorities, especially Serbs and Hungarians, who left their properties owing to the war.[28]

With respect to the implementation of other articles, the Advisory Committee emphasized that more financial support shall be given to minorities for preserving of and practicing their culture. Intercultural dialogue shall be strengthened and expanded, with special regard to telecommunication which shall better promote inter-ethnic understanding. The issue of war crimes shall be treated without ethnic bias. [29]

The legislation on anti-discrimination has improved significantly by 2015, since Croatia implemented the EC Equality Directives in 2009. It is noteworthy that the population is increasingly aware of the complaint procedure to the Equality Body and to the Ombudsperson, which is indicated by a steady rise in the annually received number of complaints.[30]

The Advisory Committee found it problematic that the numerical threshold for the obligatory introduction of minority language in contacts with the local authorities remained high, and it urged municipal and town authorities to provide for the official use of minority languages in their discretionary power. It urged the Croatian Government to enter into bilateral cooperation in order to solve the shortcomings of textbooks in minority language.[31]

There was generally a high level of unemployment for the total population of Croatia, and this had been a worse burden for minorities. Certain laws adopted in the mid-1990s had aggravated that situation further. The Advisory Committee urged Croatia to adopt such

27 Fourth Opinion on Croatia, adopted on 18 November 2015, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 29 November 2016, ACFC/OP/IV(2015)005rev, p. 6.

28 Opinion on Croatia, adopted on 6 April 2001 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 6 February 2002, ACFC/INF/OP/I(2002)003, p. 7.

29 *Ibid*. pp. 8-10.

30 Fourth Opinion on Croatia, adopted on 18 November 2015, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 29 November 2016, ACFC/OP/IV(2015)005rev, p. 8.

31 Opinion on Croatia, adopted on 6 April 2001 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 6 February 2002, ACFC/INF/OP/I(2002)003, p. 11-12.

a new law on minorities, that increases "the stability and foreseeability of the legislative framework pertaining to national minorities"[32].

Even though Croatia has already submitted its state report in the Fifth Cycle in 2019, there is no Advisory Committee opinion available yet. Thus, for comparison hereby the opinion issued in the Fourth Cycle in 2015 is examined. Fifteen years' time passed between the adoption of the first and last available opinions and improvement is still not clearly visible. Even though the authorities have overall been constructive and cooperative toward the Advisory Committee, the situation of minorities has deteriorated owing to an increase in nationalism and political radicalization. While the legal framework is well-constructed and favorable, the practical application is hindered by the absence of a systematic government strategy to promote inter-ethnic dialogue and reconciliation. Problems have especially been visible in areas that were heavily affected by the conflict in the 1990s.[33] The opinion identifies hate speech and repossession of private property as areas of significant issues to be improved. While hate speech is endangering the hard-won peace and security of the country, the slow legal procedures to repossess and reconstruct private property lost or taken during the conflict more than twenty years earlier is impeding the rule of law and such basic human rights as access to justice and the right to fair trial.

Even though the Ombudsperson issued recurring recommendations on the more effective promotion and monitoring of the recruitment of persons belonging to national minorities in public administration and the judiciary, the recommendations have not been followed at the local level. The level of participation at local elections, especially for the national minority councils has not increased and there has been no advance in the funding of these councils nor in their competencies.[34]

Significant efforts have been made with respect to the Roma community, especially in the field of improvement of living conditions, access to rights and access to pre-school for Roma children.[35]

The use of minority languages and scripts have improved significantly in several localities and regions, for example the use of Italian language scripts on public buildings in Istria. However, there have been many protests against the use of Serbian language and Cyrillic letters in the City of Vukovar and it "exposed a serious lack of awareness of or consideration for human and minority rights amongst some parts of local government". Regretfully the application of the Croatian law on the use of languages and scripts of national minorities remains suspended in some localities.[36]

The report notes that most of the civilian victims of the war have not received any official recognition of their suffering neither any form of compensation yet. This is especially

32 *Ibid*. p. 15.
33 Fourth Opinion on Croatia, adopted on 18 November 2015, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 29 November 2016, ACFC/OP/IV(2015)005rev, p. 3.
34 *Ibid*. p. 4.
35 *Ibid*. p. 4.
36 *Ibid*. p. 5.

true in relation to members of minority groups, such as Serbs and Roma. The Advisory Committee urges the recognition of the status and rights of all civilian war victims and calls for the acceleration of appropriate legislative steps based on the principle of equality. Besides legislative shortages, it is also relevant that national minorities are persistently and disproportionately underrepresented in the judiciary, which results in the lower level of trust in the judiciary by person belonging to national minorities.[37]

The general cultural policy shall integrate the promotion of minority cultures as an integral and valued part of Croatia's diverse cultural heritage. Celebration of minority cultures shall not be isolated from the majority cultural events. There is an apparent lack of effort on the side of the government to systematically promote reconciliation and inter-cultural dialogue, there is no state strategy for this issue.[38]

The legislative framework for protection of minority languages has developed, nevertheless, the Advisory Committee encourages Croatia to withdraw the reservation to Article 7.5 of the European Charter for Regional or Minority Languages (namely that protection is provided for non-territorial minority languages as well) and to monitor the proper execution of the law at the local level.[39]

4. Slovenia

The first state report of Slovenia was received by the Advisory Committee in 2000, with 16 months of delay to the original expected date, and the Advisory Committee published the first opinion on Slovenia in 2005[40].

As the FCNM does not provide a definition for the term 'national minorities' and leaves the definitional issues to the state parties, Slovenia, as all other member states of the FCNM, established its own definition, according to which national minorities in Slovenia are "the autochthonous Italian and Hungarian National Minorities"[41]. Since one of the duties of the Advisory Committee is to ensure that such definitions are in line with the related international human rights legislation, they asked for a more detailed concept of the definition from the Slovenian Government which in return replied that the autochthonous settlement by Hungarian and Italian national minorities actually was conceptualized in "ethnically mixed areas". As the explanation refers to geographical as well as demographical elements, the Advisory Committee expressed concern on the fact that national minorities living outside of these areas may not have enjoyed the rights ensured in FCNM. Another source of concern of the Advisory Committee was the possible exclusion of Roma community owing to this definition and with the expression of "ethnically mixed areas", even though the Slovene officials ensured that the FCNM also applies to the Roma

37 *Ibid*. p. 13.
38 *Ibid*. p. 16.
39 *Ibid*. p. 23.
40 Opinion on Slovenia, adopted on 12 September 2002 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 14 March 2005, ACFC/INF/OP/I(2005)002
41 Ibid. p. 7. On the definition of minority see e.g.: Minorité: Peuple qui n'a pas réussi. In: Hervé Ascencio – Mathias Forteau – Jean-Marc Sorel (eds.): Dictionnaire des idées reçues en droit international: Mélanges à l'honneur d'Alain Pellet. Éditions Pedone, Paris 2017, pp. 381-387.

people. Roma national minority's domestic legal status was not the same as the Hungarian and Italian minorities. Referring back to the definitional issues, "autochthonous" term used for defining Hungarian and Italian minorities does not fully fit for the Roma people and there is no "autochthonous" character legally defined for Roma people.[42]
Historical events shaping the current challenges faced by national minorities were visible in Slovenia since it became independent in 1991 from the former Yugoslavia, resulting in that people living in Slovenia from other Yugoslav Republics had become foreigners. Some of these people applied for and obtained Slovene citizenship while some of them chose not to. Called as non-Slovenes of Former Yugoslavia or as ethnic communities which is the term different from Hungarians, Italians and Roma people, these people were left out of the application of the FCNM, as the Slovene Government indicated. Their existing education facilities were abolished and were provided with no other language education.[43]

Slovenia successfully integrated the Hungarian and Italian national minorities providing them proper environment to access education, exercise their culture and languages. Legal framework is well-established and well-practiced in this sense, but situation is not the same for the Roma community. Funding resources at municipal level are available more in favor of the other national minorities than the Roma community[44]. Street signs are designed bilingual in the places considered "ethnically mixed areas", mostly populated with Hungarian and Italian national minorities. For the Hungarian national minority, bilingual primary schools are available even though course materials in Hungarian are not yet at the demanded level. For the Italian minority, there are kindergartens, primary schools and public secondary schools teaching in Italian. The situation for Roma people is not the same as the previously mentioned national minorities and Roma children have a restricted access to those opportunities. Similar to the other countries of the region, Roma children were placed in special schools designed for mentally handicapped children.[45]

Media access and content creation for Hungarian and Italian national minorities were already being funded by the state, and representatives of these minorities have a special place reserved in the organs of Slovene radio and television. It was noted that the Slovenian Government introduced a program about providing funds for publishing and broadcasting opportunities for the ethnic communities outside of the Hungarian, Italian and Roma minorities in 1992. Media content in Romani language is available, even though in a restricted manner.[46]

The use of the languages belonging to national minorities at public administration level is ensured for Hungarian and Italian languages by the Public Administration Act, however, there is a lack of skilled personnel. Romani language, however, is not considered as a communication language in the public administration.[47]

42 *Ibid*. p. 7.
43 *Ibid*. p. 10.
44 *Ibid*. p. 12.
45 *Ibid*. p. 17.
46 *Ibid*. p. 13.
47 *Ibid*. p. 16. On the language rights of minorities in public administration see e.g.: Noémi Nagy: *Language rights of European minorities in the administration of justice, public administration and public services: International developments in 2019*. In: European Yearbook of Minority Issues, 2021, p. 18.

Persons belonging to national minorities participation in the political life in Slovenia has developed positively.[48]

The last opinion of the Advisory Committee on Slovenia was delivered in 2017 on the fourth report. The opinion acknowledges Slovenia's efforts to effectively protect the rights of the national minorities and to fully implement the FCNM, even though the latter aim has not been achieved yet.[49]

First of all, the last report once again ensures the difference between the Italians, Hungarians and Roma people in terms of enjoying better protection of their rights, even though much tangible steps were taken and resulted successful to improve protection of Roma people's rights.[50]

Previously noted as a concern in the first report that the terms and distinction of 'autochthonous' or 'non-autochthonous' still existed but without a significant impact on the policies targeting Roma people since their specific needs were already included in several programs and strategies. Differently, the Sinti community expressed to benefit from the rights ensured in the FCNM. Also, Albanians, Bosnians, Montenegrins, Croats, Macedonians and Serbs were recognized as new national communities. Cultural, media and language-related issues of the citizens of the Republics of Former Yugoslavia was legally initiated by the parliament adopting the Declaration on the Status of National Communities of Members of Nations of the Former SFRY in the Republic of Slovenia in 2011[51]. It is clearly observed that there are two public officials actively contributing to the fight against discrimination in Slovenia. Ombudsperson plays an active role in collecting the complaints from national minorities (submitted mostly by Roma people) regarding maladministration they face at public institutions. It was noted that the Ombudsperson's recommendations to the public authorities were being implemented very slowly and there was a lack of political will of the authorities to find solutions regarding the problems of Roma people[52].

A newer Advocate of the Principle of Equality was created to investigate complaints lodged by the victims of discrimination and was given effective powers in investigation such as ordering adoption of measures, even though as they are not equal to imposing fines or sanctions.[53]

As positive steps, programs and strategies aiming to foster equality of Roma people were taken, together with the successfully ended legislative proposals regarding their "illegal" residence and access to education. Even though it works slowly and sometimes remains inefficient, Roma Community Council plays an active role in reporting problems, offering solutions and increasing interaction between Roma community and the state actors.[54]

48 *Ibid*. p. 20.
49 Fourth opinion on Slovenia, adopted on 21 June 2017 by the Advisory Committee ont he Framework Convention for the Protection of National Minorities, 25 January 2018, ACFC/OP/IV(2017)003
50 *Ibid*. p. 1.
51 *Ibid*. p. 8.
52 *Ibid*. p. 14.
53 *Ibid*. p. 5-6.
54 *Ibid*. p. 6.

The AC noted that there is an increase of hate speech and intolerant discourse from 2015 onwards, mainly directed towards recent migrants, asylum seekers and refugees and based on religion and ethnicity, as the Ombudsperson noted but could not investigate since such complaints are out of her competences. [55]

Overall improvements and tangible steps in language affairs for national minorities and especially Roma are that all legal entities governed by public law have an obligation to communicate and work in the language of the national minority when requested, including for judicial proceedings. Measures are also in place to ensure that administrative forms and acts are available in both languages and that e-administration portals are also available.[56]

5. Romania

Romania submitted its first report in 1999 and the Advisory Committee prepared its opinion in 2002, starting with a general satisfaction with Romania's efforts to consider the protection of national minorities rights in the country.[57]

As the FCNM leaves the margin to the countries in defining the term 'national minorities', Romania considered Magyars/Szeklers, Gypsies, Germans/Swabians/Saxons, Ukrainians, Russians/Lipoveni, Turks, Serbs, Tatars, Slovaks, Bulgarians, Jews, Croats, Czechs, Poles, Greeks and Armenians as national minorities. The position of Csango people who requested from the relevant authorities to be recognized as a national minority was not clear yet, since the Romanian law did not provide a framework for the conditions to be considered when recognizing a national minority, therefore by the time the first report was created, they could not receive any benefit from the FCNM.[58]

Since data is the main input for initiating a policy matter, the AC urged Romania to take actions to solve the problem existing in large discrepancies between official statistics of the Government and the estimates of national minorities about the numbers of persons belonging to national minorities in Romania.[59]

Most of the national minorities in Romania enjoy access to minority language education, textbooks and teachers. The Constitution and the Act on Education expressly guarantee members of national minorities the right to learn and to be taught in their mother tongue. The AC noted that Hungarian, German, Ukrainian, Serb, Slovak and Czech minorities could fully benefit from learning in their own languages, but unfortunately no school was noted teaching in Romani. In the past, Turks, the Tatars, the Russians and the Bulgarians were also taught in their own languages, however they were faced with a shortage

55 *Ibid*. p. 7.
56 *Ibid*. p. 25.
57 Opinion on Romania, adopted on 6 April 2001, by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 10 January 2002, ACFC/INF/OP/I(2002)001
58 *Ibid*. p. 5-6.
59 *Ibid*. p. 7.

of textbooks in their own languages.[60] The Advisory Committee declared that attention should also be paid to minorities of smaller number.[61]

Besides these commendable efforts, the socio-economic situation of Roma gave rise to deep concern, especially the numerous acts of discrimination and the recurring cases of police brutality.[62]

Even though inter-community relations had improved compared to the previous period, and a climate of greater tolerance had developed, the Advisory Committee found that certain media outlets had still been strengthening negative stereotypes especially about Roma, Jews and Hungarians. It concluded that the principles of promotion of a culture of tolerance should be taught to journalist.[63]

The last opinion available for Romania[64] was issued in 2018. The general evaluation section of the opinion concludes legislative and policy issues, for example pointing out that there is still no legislation comprehensively protecting minority rights in Romania, since the Law on the Status of National Minorities was not adopted and was under discussion at the Parliament[65].

There are two positive developments reported in enlarging the scope of the application of the FCNM: Hungarian Csangos and providing e-learning platform, courses and cultural events for the Aromanian language. However, even though they are applied to be classified under the national minorities, their applications received no action.[66]

Since the first report, successful data collection mechanisms have been established which provide better and reliable inputs on the number of persons belonging to national minorities.[67]

There are two institutions active in fighting against discrimination: the National Council for Combating Discrimination and the Ombudsperson. They both receive and investigate complaints lodged by natural persons and are both given ex officio powers. Budgetary shortages of the National Council were importantly noted in the opinion by the AC[68].
Even though the Strategy for the Inclusion of Romanian Citizens Belonging to the Roma minority is considered as a positive policy improvement, the AC criticized the fact that representatives of the national minorities were not included at the drafting stage and their feedback after the strategy published were not taken into consideration. Very importantly, the AC notes that the implementation of the strategy operates mostly through the help of

60 *Ibid*. p.13.
61 *Ibid*. p. 2.
62 *Ibid*. p. 10.
63 *Ibid*. p. 20.
64 Fourth Opinion on Romania – adopted on 22 June 2017 Published on 16 February 2018.ACFC/OP/IV(2017)005
65 *Ibid*. p. 5.
66 *Ibid*. p. 6.
67 *Ibid*. p. 11.
68 *Ibid*. p. 12.

EU funds, drawing an image on the public that the national minorities' issue is related to the EU and not to the state.[69]

The previously noted extreme use of police power on Roma people were intervened by trust building actions between the national minority communities and police, as well as providing relevant trainings for the police. [70]

The overall evaluation of the cultural life of the national minorities shows that they have sufficient funds (mostly Hungarian, German, Roma and Ukrainian benefit). However, cases reported in the opinion reflect serious areas of concerns. One of them is related to state refusal of the use of the name Szeklerland', its symbols and traditions of the Hungarian national minorities in Covasna and Harghita county, and the other one is the failed application to UNESCO for taking on the list of cultural heritage one of the Hungarian populated city, referring to problems in the documentation. "The Advisory Committee finds this regrettable."[71]

In some counties, the street names and signs still remain only in Romanian, even though the 20% rule is applicable in these cases. Furthermore, in few counties (e.g., where Hungarians constitute more than 20% of the population), either the street signs were not updated to be bilingual, or the existing bilingual signs were replaced with only the Romanian ones.[72]

Overall teaching practices in national minorities' languages at school was evaluated quite positively by the Advisory Committee. It was observed that in order to ensure inter-community dialogues, children belonging to majority population could be given more knowledge on the minorities' culture and history. To do that, more qualified teachers at an adequate number could be recruited. The legal efforts banning segregation is positive, but there are still few practices on the contrary.[73]

6. Slovakia

Slovakia has been a party to the FCNM since 1998[74]. While the initial state report was submitted in 1999, the last one was submitted in the fifth cycle in 2019[75]. Even though the first state report was not prepared as detailed as the Advisory Committee expected, it gave a certain degree of explanation about the back then current situation regarding national minorities in the country. According to the first Advisory Committee's opinion[76], positive indicators as well as fields open for improvement was noted.

69 *Ibid*. p. 14.
70 *Ibid*. p. 21.
71 *Ibid*. p. 17.
72 *Ibid*. p. 29.
73 *Ibid*. p. 31.
74 Date of ratification: 14 September 1995; Date of entry into force: 1 February 1998
75 Cf. https://www.coe.int/en/web/minorities/slovak-republic
76 Opinion on Slovakia, adopted on 22 September 2000 Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 6 July 2001, ACFC/INF/OP/I(2001)1.

Among those positive indicators, governmental efforts were made in constructing inter-community relations with Hungarian minorities and there were positive attitudes towards Hungarians where they are in majority of the population, since social interaction between people seemed to be constant. The Treaty on Good Neighborliness and Friendly Co-operation signed in 1995 between Slovakia and Hungary was appreciated. Positive improvements were observed in the introduction of education languages in Hungarian, as well as in Czech, and in Ruthenian group languages (German, Polish and Ukrainian). Furthermore, the minority language program which aimed to increase availability of the contents prepared in minority languages in the public television and radio was welcomed[77]. Also, education materials were evaluated as they were free from negative expressions attempting to negatively identify national minorities. Related to positive implications in minority languages, Law on the Use of National Minority Languages entering into force in 1999 was also reported even though certain weaknesses were noted as it will be discussed below.[78]

On the institutional side, the Advisory Committee noted that a Council of National Minorities and Ethnic Groups which is a consultation body to the authorities assisting in decision-making related to minorities consist of the representatives of the minorities in majority that used to be of government officials[79]. Additionally, the Ombudsman set up by the government was perceived positive in the report[80], the institution that would heavily provide inputs for the Advisory Committee's further reports (e.g., the fourth report). The Government's plans to reform public administration in an inclusive way that it could ensure effective participation of national minorities in public affairs were also welcomed. Besides the above-mentioned positive developments, several concerns were placed in the report. First and the foremost concerns noted in the report were related to Roma minorities, from several point of views. For example, collection of Roma people's personal data by law enforcement officials without a certain legal basis and necessary legal safeguards, as well as without their consent, was criticized[81]. In education and use of minority languages, the country seemed to fail in protecting the interests of Roma minorities effectively. Even though the government realized the problem, it was reported that Roma children were placed in special schools which was designed only for mentally handicapped children, even though some of them did not have any mental handicap. Roma language, on the other hand, is still not recognized in a wide array, the schools lack teachers available in teaching Roma language, as well as in other minority languages. During the practice of minority language programs, Roma language radio programs seemed to have a little broadcasting time and, despite the education materials, media strengthens negative perception towards Roma and other national minorities, and the existed legislation lacked necessary sanctions in case of in-compliance.[82]

The report identifies serious discriminative implementations towards national minorities and especially Roma minorities in different fields; from health care to education,

77 *Ibid*. p. 16.
78 *Ibid*. p. 10
79 *Ibid*. p. 12.
80 *Ibid*. p. 6.
81 *Ibid*. p. 2
82 *Ibid*. p. 9

employment to housing. Moreover, where discrimination occurred, it is unclear whether necessary investigation or trials were held, since the government could not have presented data about.[83] Slovakia also did not have consistent official statistics about the national minorities which made it difficult to refer any demography-related research.
Regarding the use of minority languages, the report identified a lack of resources in terms of developing staff and resources in education and public institutions, as well as raising society's awareness towards these languages. "Even though Article 34 of the Constitution guarantees the right of Slovak citizens belonging to national minorities to receive education in their mother tongue, there are only very limited legislative provisions concerning the implementation of this constitutional guarantee."[84]

Finally, the report noted about the existence of racially motivated violent crimes including the persons belonging to small immigrant groups, even though the situation was already recognized by the government.[85]

The last available Advisory Committee's opinion on the Slovak Republic's compliance with the FCNM is dated in 2014[86]. The report discloses more in-detail evaluation on the articles considered in line with the FCNM. As a general evaluation, it could be stressed that some of the problems noted in the first report remained unsolved, and more anew problems were noted in specific cases. Additionally, positive developments were explicitly mentioned.

Issues raised in the first report and remained unsolved could be summarized as follows: While it was visible also in the first report, Article 34 of the Constitution guaranteeing the right of Slovak citizens to receive education in their own languages was criticized in this report since it limits the application only to those of Slovak citizens, since there are national minorities in the country having different citizenship, such as Czech nationals.[87] Positive metrics in terms of taking steps to create statistical data was welcomed by the Advisory Committee. For example, "A Population and Housing Census" helped to identify the most frequently used languages, as well as defining the demographic situation from the aspect of their living conditions[88]. Another research was conducted for identifying the obstacles the national minorities are facing in employment generated positive results, meaning that, they do not face particular obstacles in labor market, however, the unemployment rate among Roma national minorities is quite high (80-90%)[89].

Previously referred in the summary of the first opinion, the Ombudsperson's reports were actively considered in drafting the present opinion and in identification of the obstacles the national minorities face with in public institutions. Based on the complaints the Ombudsperson received, she initiated the Parliament to have a discussion specific to "human

83 *Ibid*. p.6.
84 *Ibid*. p.12.
85 *Ibid*. p. 8.
86 Fourth Opinion on the Slovak Republic adopted on 3 December 2014 ACFC/OP/IV(2014)004
87 *Ibid*. p. 7.
88 *Ibid*. p. 10.
89 *Ibid*. p. 28.

and minority rights violations, including the right to education for Roma children and the misconduct of police forces" but it was dismissed by the Parliament.[90]

One of the most noticeable negative developments observed in the country in terms of effective protection of the rights of the national minorities was noted as abolishment of the Deputy Prime Minister for Human Rights position in 2012 and moving the Council for Human Rights, National Minorities and Gender Equality under the authority of the Ministry of Foreign Affairs[91]. The Later established Government Plenipotentiary for Roma Communities, instead of the abolished position, was placed under the Ministry of Interior which was observed as a threat towards having a healthy environment for analyzing and making policies in favor of national minorities. It was also noted that the Ministry treats Roma people as a security challenge.[92]

Most of the previously reported challenges the Roma people face with continue based on the Advisory Committee's analysis. There is still no governmental strategy to tackle with anti-Roma propaganda going on within the society and the media. Media actively uses tools to increase prejudices towards Roma people while providing almost no content in Romani language. Assessment on representativeness of the other national minorities' languages shows a similar output even though it is more positive than in the Roma specific case. Also, there is not much effort taken to raise awareness in the society about anti-discrimination, even though it is known that Roma people were referred as lazy, criminal or a burden in the society. Furthermore, it was noted that anti-Roma propaganda was actually practiced by the far-right politicians during their election campaign. [93]

Concerns raised in Roma children's education in the first opinion report still goes on; Roma children are often being placed in schools designated for handicapped children, as the Ombudsperson has continuously proved so.[94] However, a positive metric was noted since teacher assistants (to assist teachers in integration of Roma students) were employed in schools where Roma population is high. In culture specific assessments, although the local and central government actively contributed to opening new museums and culture centers focusing on national minorities both in content and in visitors, the Advisory Committee noticed that the museums could draw a better image about Roma people and their cultural heritage.[95]

While Roma people are still underrepresented at local and central elected bodies, other national minorities are increasingly represented in these bodies. However, it is a problem for all national minorities to participate in the public administration and very few of them could earn a position at administrative bodies.[96]

90 *Ibid*. p. 9
91 *Ibid*. pp. 9-10.
92 *Ibid*. p. 13.
93 *Ibid*. p. 14.
94 *Ibid*. p. 22.
95 *Ibid*. p. 23.
96 *Ibid*. p. 27.

Language specific assessments show that there were minor issues identified in public as "incidents of harassment based on the use of minority languages" in southern Slovakia and mainly Hungary, but the major problem regarding the use of Romani language, for example, the proficiency of the officials working at municipalities is still inadequate.[97]

In education the available education material in minority languages seems still to be in low quality, few in quality and with inaccurate translations.[98]

Among the positive developments, the adoption of Anti-Discrimination Act and the amendments applied consistently considered as an effective tool to fight against discrimination towards national minorities. Safeguarding the Act with an institutional set-up, namely, the Slovak National Centre for Human Rights enhances effective monitoring of the Act. Another legal development was noted in criminal law which foresees punishing racial violence against migrants and minorities as extremist offenses, even though still the investigations are inefficiently handled and cases referred to the courts are quite few. As it was previously reported in the first opinion, police violence continues, but few steps were taken in order to raise awareness in law enforcement, such as delivered trainings. The Minority Language Act was amended and it now includes a provision for providing traffic signs also in minority languages, at least, at municipality level. The broadcasting in national minority languages was strengthen with extra legislative measures. The final positive development belongs to the continuous international cooperation between Hungary and Slovakia which was upgraded with a new agreement aiming to develop infrastructural and economic conditions in southern Slovakia.[99]

7. Hungary

The first state report which was delivered in May 1999 described the relevant legislation as well as the practices existing in the country relevant to the protection of national minorities. The first opinion report[100] acknowledged Hungary's legal efforts in providing a high level of protection for national minorities was appreciable. However, few issues were taken under concern. For example, statistics made available by the Government seemed far different from the estimations made on the demographic data on national minorities. This was due to strict rules protecting people to register themselves in official databases based on their ethnicity or nationality, but it was suggested that Hungary should have found other ways to create consistent statistics about national minorities.[101]

In general and repeatedly, Hungary provided a good level of protection for the rights of the national minorities in its legislative framework, with few issues of concern. Act LXXVII of 1993 on the Rights of National and Ethnic Minorities allows setting up local and national self-governments for national minorities, as well as right to be represented

97 *Ibid*. p. 14.
98 *Ibid*. p. 24.
99 *Ibid*. p. 19.
100 Opinion on Hungary, adopted on 22 September 2000 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 14 September 2001, ACFC/INF/OP/I(2001)4
101 *Ibid*. p. 5.

in the National Assembly, however, the representatives of the national minorities were left out of the law-making procedure. Furthermore, no practice was yet experienced in these senses. Also, a person not belonging to a certain minority never could be elected as a representative of that minority (the so-called "cuckoo-problem")[102].

Throughout the opinion of the Advisory Committee, most of the raised concerns are related to the Roma/Gypsy community. Among those, "well-documented cases of physical attacks/injury and threats against Roma/Gypsies"[103] and weak investigation practices consist the priority action area. Following and in connection with that, lack of public awareness about national minorities, as well as specific to Roma/Gypsy community, giving as a reason that public do not have proper media tools to be informed about their cultural and social life. In fact, the AC notes that Roma people face with "extremely difficult social-economic circumstances" as well as discriminatory and negative images are drawn in the public[104]. Roma community is given less broadcasting time than the other national minorities, in practice, which could have been used for raising public awareness on these problems.

Education and language related problems general to the national minorities were related to a lack of qualified teachers and textbooks which creates an obstacle for providing proper education for national minorities in their language. Specific to Roma children, Hungary also followed the wrong applications of Slovenia and Slovakia where they were placed in special schools designated for mentally handicapped children. Moreover, extremely low number of Roma students could gain a diploma from secondary and high schools. Also, there was a reported de facto separation of schools into Roma and non-Roma by public in a way that not sending their children to Roma populated schools, decreasing the number of students, therefore causing decreases in funds. Besides these observations, the existence of the legal tools allowing the use of national minority languages in public institutions in relation to the administrative issues at local level and laws allowing national minorities to use their names in their own language were noted as positive. Even though not many practices were yet experienced, the domestic law allowing use of bilingual street tables and signs and use of minority languages in judicial proceedings were perceived positively.[105]

The last state report on Hungary was received by the Advisory Committee which led to the preparation of the fifth opinion report in 2020.[106]

The number of national minorities defined by the law was raised to 13 as it includes Armenians, Bulgarians, Croats, Germans, Greeks, Poles, Roma, Romanians, Rusyns, Serbs, Slovaks, Slovenians and Ukrainians. Applications of the persons to be identified as Bunjevci were rejected twice by the authorities. Szekler and Russian minorities are also applied in the same way, fulfilled the criteria to be recognized as national minorities, however,

102 *Ibid*. p. 11
103 *Ibid*. p. 7.
104 *Ibid*. p. 12.
105 *Ibid*. p.7.
106 Fifth Opinion on Hungary, adopted on 26 May 2020 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 12 October 2020, ACFC/OP/V(2020)002Final

Szekler's application was rejected as they constitute "modern Hungarian nation"[107] and Russian's application was rejected as they did not fulfil the criteria considering having a residence over a century in Hungary[108].

Regarding the lack of data specific to minorities referred in the first report, organized census served to fulfil this gap, however, several complaints were lodged about the content of the census questions which helps identifying a person's ethnicity or nationality. Moreover, the planned census in 2021 foresees asking people's names directly. Bunjevci people's answers were not separately considered from Croats, leaving policy makers lack of information specific to this community, especially in relation to the recognition of Bunjevci as part of the nationalities.[109]

Legislative developments regarding the fight against discrimination and equal treatment remained unchanged, but cases about the well-functioning of the Equal Treatment Authority (ETA) were noted. According to the AC, ETA does not have the capacity to fulfil its duties at maximum, since the number of staff and their salaries are not properly placed. Also, ETA's outcomes reporting discriminative acts towards minorities, especially Roma cannot be effective since it could not order compensation. ETA has efficient tools (e.g., advertisements and publications) in terms of melting the communication problems between the public, public institutions and national minorities.[110]

Cultural activities of the national minorities were properly taken into account and funded by the related ministries, even though structural changes in allocation of funds occurred without involving the representatives of national minorities in the decision-making process.[111]

Based on the outcomes of the researches[112] conducted on measuring the public position towards minorities, the AC noted that there is an increased negative perception towards immigrants, as well as asylum seekers and refugees. Rise of far-right oriented speeches lessens the tolerance towards the national minorities, as well as foreigners residing in Hungary. The AC is in a position for Article 6 to be applied inclusively as it could include all persons regardless of their differences, and calls the government officials to operate intercultural communication programs and have the political will to tackle with the problems due to the fact that no tangible step was taken to solve the mentioned problem.

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107 Academy of Sciences, December 2017, (Online) https://mta.hu/mta_hirei/a-szekelyseg-a-magyar-nemzet-resze-108883
«According to the predominant opinions of the historians, archaeologists, ethnographers and linguists, the Szeklers are considered to form part of the modern Hungarian nation in the ethno-cultural sense. Accordingly, the Hungarian Academy of Sciences does not recommend officially recognising Szeklers as a nationality in Hungary."

108 Fifth Opinion on Hungary, p.7.

109 *Ibid*. p. 9.

110 *Ibid*. p. 6.

111 *Ibid*. p. 12.

112 Studies show in particular an important percentage (23%) of "extreme anti-Semitism" in Hungary, see Tom Lantos Institute, *Modern Antisemitism in the Visegrád Countries,* 2017, p. 54., Pew Research Center (Dorothy Manevich), Hungary Less tolerant of Refugees, Minorities than Other EU Nations, December 2016., European Commission, Standard Eurobarometer 82, Autumn 2014, page 16; and Standard Eurobarometer 89, Spring 2018, p. 7.

Further, legislative amendments should be taken to fight against discrimination and hate speech, as the states should protect all persons from ethnically based violence and should comprehensively criminalize such actions.[113]

The AC noted that national minorities, in practice, suffer from exercising their right to establish religious institutions and such institutions face with discrimination in comparison with the big religious institutions in terms of gaining legal personality and tax status.[114] Even though the law allows everyone to use his own language in public administration procedure, and to request to use one's own name in one's own language, still a lack of practice stands as an issue to be solved. For example, the AC noted that "magyarisation" of the names (e.g., using Hungarian letters in writing) in practice blocks the full enjoyment of the right to use one's own name in one's own language.[115]

The use of national minorities' language in media continues comprehensively and good practices do exist in this sense. There are wide range of broadcasters offering contents in different national minorities' languages, even in 24 hours a day, and also including for Roma community. The lack of qualitative and quantitative measures evaluating the content of these broadcasters remains a problem. Also, it was criticized that people could access to the channels offered in neighboring countries only if they pay for the content, limiting their right to engage with media channels in their own language.[116]

In Hungary, attending kindergarten was made obligatory for the children in 2015 which had also encouraged Roma children to attend kindergartens. Scholarship opportunities offered for Roma students encouraged them to participate in education. However, lowering the school leave age from 18 to 16 had negative impacts on Roma students whose school participation significantly decreased.[117]

A solution to the previously reported problem on placing Roma students to special schools designated for mentally handicapped children was due to the European Court of Human Rights, Horváth and Kiss v. Hungary case (Application No. 11146/11, judgment of 29 January 2013).[118]

Finally, experienced segregation of Roma and non-Roma students in particular regions in Hungary was realized even though concrete problems were not properly addressed. As the AC noted, segregation triggers discrimination and prejudices towards Roma people and negatively affects their social inclusion, as well their participation in the labor market.[119] It was also stated that Roma students do not explicitly benefit from structural support from the local authorities since several competences in this sense were transferred to the national self-governments or to the central government. In line with that, it must be stressed that schools designated for Roma students are managed only under state support

113 Fifth Opinion on Hungary, p. 13.
114 *Ibid*. p.16.
115 *Ibid*. p. 18.
116 *Ibid*. pp. 16-17.
117 *Ibid*. p. 19.
118 *Ibid*. p. 19.
119 *Ibid*. pp. 19-20.

or owned only by the state, contrary to the other national minorities, leaving a degree of gap between understanding the local specific needs of Roma people.[120]

Based on the latest AC opinion, the overall assessment of the political participation of national minorities is positive. Especially for Roma people, significant policies and strategies are being implemented which target lifting the general life-matters of Roma people, but also increasing their political inclusion. For example, the Hungarian National Social Inclusion Strategy 2011- 2020 is being monitored by the Roma Coordination Council and that is also delivering inputs for the policy-makers in case revision of the strategy. In order to prevent from and fix the situation related to segregation referred in the education part, Inter-Ministerial Committee for Social Integration and Gypsy Matters specifically delivers opinions. The Human Rights Work Group established by the Ministry of Justice also has a Thematic Work Group for Roma Matters. The articipation of the representatives of Roma people in these committees or during the policy-making procedure relevant to them could ensure finding efficient solutions for the problematic areas.[121]

Unemployment still stands as a serious problem especially among Roma women. The AC notes that Roma people face with more obstacles than the others in accessing to the labor market. The above-mentioned Strategy leaves a section evaluating this issue and notes that Roma people do not participate in labor market not only because of their level of education, but also as a result of discrimination.[122]

Reduction of housing benefits which were already poorly covering the actual Roma people's housing needs caused difficulties. Their housing conditions, in fact, are not in the level of expectations, meaning that they are under the standards.[123]

Even though Health Improvement Offices were set up in the districts where minorities populated, no tangible information was found indicating any improvement for Roma people to access to health-care services. Roma people cannot access health-care services as a result of several obstacles: discriminative treatments at the hospitals, poverty and language obstacles etc.[124]

Hungary took part in inter-governmental meetings aimed at mutually ensuring and protecting the rights of the national minorities, are still in place with regard to the Croat, Romanian, Serb, Slovak, Slovene and Ukrainian minorities. Hungary has also established good communication channels with Germany in protecting Germans in Hungary.[125]

120 *Ibid*. pp.19-20.
121 *Ibid*. p. 23.
122 *Ibid*. p. 23.
123 *Ibid*. p. 25.
124 *Ibid*. p. 27.
125 *Ibid*. p. 28.

8. Conclusions

The great efforts of two decades by the Council of Europe have resulted in a more unified and higher level of protection for the whole region. The more systematic collection of statistical data has shown a clearer situation and made minority protection possible at a higher level.

Although there are significant differences among these six states with regard to the size of the population, the historical attitude toward minorities and the number and size of minorities living in each state, it is clear from the comparison of the reports and opinions that there are lot more similarities than differences. The Yugoslav crisis and armed conflict of the 1990s still exerts some influence on the legislation of Serbia, Croatia and Slovenia. Also, we can see the unifying effect of EU membership (out of the six analyzed countries only Serbia is not an EU member state).

The biggest common problem of these six states is the situation of the Roma minority. Even though great improvement has been reached compared to the situation of the time of the first reports, there are still considerable issues that need to be tackled. These cover the fields of education, labor, employment and socio-economic issues. Systematic segregation and discrimination have been fought with, but subtle forms of it still exist.

The systematic collection of data has improved the implementation and monitoring of minority protection.

The work of the Council of Europe is commendable and there is a clear development in the state of protection for all national minorities.

Katinka Beretka:[1]

Practice of the Constitutional Court of the Republic of Croatia in Field of National Minority Rights, with Special Regard to the Linguistic Rights of the Serbian Community in Croatia[2]

1. Contextualization of the subject

In accordance with the prevailing conceptions of the international literature "the terms historical, traditional, and autochthonous minorities – the 'old minorities' – refer to communities whose members have a distinct language, culture, or religion as compared to the rest of the population and who have become minorities through the redrawing of international borders, having seen the sovereignty of their territories shift from one country to another;"[3] still 'new minorities' are defined as groups formed by individuals and families with migratory background, who have left their homeland because of economic or political reasons (refugees, *migrants*). On the other hand, there is a serious difference between the various categories of new minorities, especially when this notion is explored in a different context, in the light of developments in the Western Balkans since the early 1990s.

In the last three decades, countries in the region have, without exception, faced a number of challenges resulted by political, economic and social transformation since the break-up of socialist Yugoslavia. In addition to building up friendly bilateral relations among the newly constituted independent nation-states in the Balkans, the states had to make serious efforts to alleviate conflicts within their borders, which often arose as a necessary outcome of the changes in the ethnic-linguistic-religious structure of the respective state's population. The former constituent peoples of the member states of the Socialist Federal Republic of Yugoslavia (Serbia, Croatia, Slovenia, Montenegro, Macedonia and Bosnia and Herzegovina) suddenly had found themselves in minority position with similar or the same status, rights and duties as traditional minority communities (namely, nationalities of the SFRY). Citizens who neither belong to national majority of the given country of the Western Balkans, nor held position of national minorities until the fall of the federal

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3 Roberta Medda-Windischer: *Old and New Minorities: Diversity Governance and Social Cohesion from the Perspective of Minority Rights.* In: Acta Universitatis Sapientiae, European and Regional Studies 2017/1, pp. 25–42 at pp. 26–27.

structure, also called new minorities.[4] They have begun to improve their institutions only in recent times, or they are still in the phase of organization,[5] in comparison with the traditional/old minorities who are much more effective in enforcement of their rights because of experience in long-lasting fights for them. Although there is an opinion that differentiation of these minority categories has sense only in context of political attitudes towards them and in reality, both kinds are treated equally,[6] each state has sovereign right to categorize or not categorize its ethnic groups, and to make or not make difference regarding the legal status of old and new minorities. For the sake of example, in Slovenia the Hungarian and the Italian national community are "autochthonous communities" by the Constitution itself, and whose rights are regulated in special law[7,8] still the Roma people (the Roma community) enjoy wide range of rights by special law, as well, but without constitutionally recognized autochthonous status.[9,10] The other minority groups, including new ones, have only limited rights: e.g. they can use their mother tongue in official communication only through interpreter. The constitutional categorization of minorities in this example is not the result of the size of a given minority population in Slovenia, but "the length of their continuous coexistence with the majority Slovenian people in certain parts of today's Slovenia throughout history, and probably their cultural and religious closeness to the majority people."[11]

In the Republic of Croatia there is no legal differentiation between national minorities similar to the Slovenian model. In the historical foundations of the Constitution of the Republic of Croatia, Croatia is defined "as the national state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens,"[12] who are guaranteed equality both with other minorities and the national majority. The legal definition of national minority also does not divide minorities into separate groups: "a national minority […] shall be considered a group of Croatian citizens whose members have been traditionally inhabiting the territory of the Republic of

4 Dario Kuntić: *Minority Rights in Croatia.* In: Croatian International Relations Review 9 2003/30-31, pp. 33−39, at 35.

5 Siniša Tatalović: *Nacionalne manjine i hrvatska demokracija.* [National minorities and the Croatian democracy]. In: Politička misao 43 2006/2, pp. 159–174, at p. 172.

6 Nada Raduški: *Srbi od konstitutivnog naroda do nacionalne manjine.* [Serbs from a constituent nation to a national minorty]. In: Srpska politička misao 36 2012/2, pp. 443−459, at p. 445.

7 Status and special rights of the Italian and Hungarian national community is regulated by the Law on Self-Governing National Communities. Zakon o samoupravnih narodnih skupnostih, *Uradni list* RS, št. 65/94 in 71/17.

8 Ustav Republike Slovenije (Constitution of the Republic of Slovenia), *Uradni list Republike Slovenije,* št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 in 75/16 – UZ70a, Art. 5 and 64.

9 Constitution of the Republic of Slovenia, Art. 65.

10 Status and special rights of the Roma community is regulated by the Law on the Roma Community in the Republic of Slovenia. Zakon o romski skupnosti v Republiki Sloveniji, *Uradni list RS,* št. 33/07.

11 Petar Teofilović: *Praksa Ustavnog suda Slovenije u oblasti prava nacionalnih manjina.* [Practice of the Constitutional Court of Slovenia in field of national minority rights]. In: Petar Teofilovic (ed.): Nation, Community, Minority, Identity: The Protective Role of Constitutional Courts. Innovariant, Szeged, 2020, p. 219.

12 Ustav Republike Hrvtaske (Constitution of the Republic of Croatia), *Narodne novine*, br. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14, Historical foundation, Par. 2

Croatia and whose ethnic, linguistic, cultural and/ or religious characteristics differ from the rest of the population."[13]

According to the population census held in 2011, 7.67% of the 4.284.889 registered inhabitants is (was) a member of a national minority, but none of the minority groups crossed the threshold of 1%, except the Serbian national community that constitutes 4.36% of the total population in Croatia.[14] Because of their specific political-historical position Serbs in the Croatian society are still between integration and assimilation, and towards whom members of the Croatian nation maintain the biggest social distance.[15] Regardless of the formal protection of minority rights, including collective rights, provided for in various legal regulations, Serbs, due to their territorial dispersion, can rarely fully exercise them,[16] especially in case of enforcement of language rights before public bodies. During the fifth monitoring cycle of the application of the European Charter for Regional or Minority Languages in Croatia,[17] the Committee of Experts has highlighted that "difficulty using Serbian and the Cyrillic script were identified as a particular problem" and "Serbian speakers often refrain from using the Cyrillic script because of fear of resentment."[18] This constatation of the Committee has been confirmed in the sixth, ongoing cycle as well, even though they added that the deficits in some fields have even worsened. The first and especially emphasized recommendation of the Committee was to extend equal and official use of Serbian and its script in regional and local authorities to additional municipalities; but the importance of this field is underlined by the fact, too, that the further four recommendations (from the total six) referred to official use of languages as well (and one-one to information and education). It was recommended to take measures in order to promote submission of written applications, publication of official texts and forms in Serbian (Cyrillic script), to use Serbian in public services provided by administrative authorities and promote the use or adoption of place names in this language.[19]

In 1954, in Novi Sad (Serbia) the leading writers and linguists of the Serbo-Croatian, as the language was named in Serbia, and Croato-Serbian language, as it was named in Croatia – agreed on the unification of the terminologies of the Serbian and the Croatian language, and production of common orthography (the so-called Novi Sad Agreement) that was more than desirable for the newly formed community of friendly nations in the atmosphere of brotherhood-unity (Bugarski 2004, 28). But the common language stopped to officially exist by the breaking up of Yugoslavia: "A child of the Yugoslav idea from the very start, it shared its fate and was now buried, appropriately enough, in the same

13 Ustavni zakon o pravima nacionalnih manjina (Constitutional Law on The Rights of National Minorities), *Narodne novine*, br. 155/02, 47/10, 80/10, Art. 5.

14 Državni zavod za statistiku Republike Hrvatske: *Popis 2011 jer zemlje čine ljudi – Popis stanovništva, kućanstava i stanova 2011 – Stanovništvo prema državljanstvu, narodnosti, vjeri i materinskom jeziku* [Census 2011 because people make countries – Census of population, households and flats in 2011 – Population according to citizenship, ethnicity, religion and mother tongue]. Zagreb, Statistička izvešća, 2013, p. 11.

15 Raduški 2012, p. 451.

16 *Ibid.* p. 452.

17 The Charter entered into force in Croatia on 1 March, 1998. Currently the sixth monitoring cycle is pending, and the final recommendation of the Committee of Ministers is waiting for.

18 Committee of Experts, Report of the Committee of Experts presented to the Committee of Ministers of the Council of Europe in accordance with Article 16 of the Charter, Sixth Report. Croatia. Strasbourg, 10 March 2020. No. MIN-LANG (2019) 18, p. 16.

19 *Ibid*. pp. 47–48

tomb with the federation whose precarious unity it had symbolized and in part supported" (Bugarski 2004, 30). That is why it is not surprising that the use of the Cyrillic alphabet, which is the only alphabet mentioned by name in the Constitution of the Republic of Serbia, and which is in official use on the territory of Serbia without the need for further legal elaboration (Constitution of the Republic of Serbia, Art. 10)[20], has become the political symbol of identity politics of the Serbian nation both within the Serbian borders and in the diaspora. "Some Serbs and Montenegrins equalize the Cyrillic script with ethnicity, even with the orthodox religion, still the Latin script with something that is strange to their own culture, with something foreign, with the Catholicism" (Bagdasarov 2018, 51). "The Croatian language and the Latin script shall be in official use in the Republic of Croatia," but under conditions specified by law another language and its script may be introduced into official use in individual local units, as well.[21] The fact that the Cyrillic script is distinctly named in the given constitutional provision – "another language and the Cyrillic or some other script may be introduced into official use" (Constitution of the Republic of Croatia, Art. 12, para. 2) – points out the relevance of this social-political theme not only in the Croatian society as such but at the level of the highest legal act, the constitution, too.

In the last times, regulation of the status of different languages in official communication has got more attention which is stipulated by two processes: 1) formation of new nation states in which the state power tries to homogenize otherwise heterogenous population by a common language (state language or official language), and 2) exchanged role and extended functions of states in almost every field of social life has increased the number of interactions between citizens and public authorities that might be more efficient and effective only in language.[22] Having in mind that nation states have often emerged on multilingual, multicultural territories where people used different languages, it is understandable that forcing use of one single, acceptable language – usually the language of national majority – on the rest of the population might cause resistance by other nationalities, both old and new national minorities. On the other side, these linguistic rights have the most (direct) contact with politics, and as such may more reliably reflect the actual political and social relations in the country.

Besides general presentation of legal regulation of nationalities' linguistic rights in Croatia and basic competences and portfolio of the Constitutional Court's practice in field of protection of these rights, the paper is searching for the answer to the question whether the Constitutional Court of Croatia succeeded to remain politically neutral in usually politically motivated or inspired processes when it had to make decision about right of minorities on use of their mother tongue and script in official use – especially in case of linguistic rights of the Serbian community living in Croatia. Or whether at least he was trying to be protective of national minorities.

20 Ustav Republike Srbije (Constitution of the Republic of Serbia), *Službeni glasnik Republike Srbije,* 98/2006.
21 Constitution of the Republic of Croatia, Art. 12.
22 Tamás Korhecz: *A hivatalos nyelvhasználat szabályozása Svájcban* [Regulation of official use of langauge in Switzerland]. In: Létünk, 2013/special edition, pp. 92–112. at pp. 95–96.

2. Language rights of national minorities in Croatia

The Article 15 of the Constitution of the Republic of Croatia, even though scantily regulates minority rights, guarantees equality for members of any national minority, as well as freedom to express their nationality, freedom to use their language and script, and cultural autonomy, and right to elect their representatives to the Croatian Parliament. The legislator is tasked with the further refinement of minority rights who has adopted the so-called Constitutional Law on The Rights of National Minorities. Although it is called a *constitutional* law, it is an ordinary organic law passed by the Croatian Parliament by two-thirds majority vote of all representatives.[23] This qualified majority is required for alteration of the state borders of Croatia,[24] restriction of human rights during a state of war or emergency,[25] initiating the proceeding for the impeachment of the President of the Republic in the Croatian Parliament and deciding upon his/her liability by the Constitutional Court,[26] ratification of international treaties[27] and joining associations with other states.[28] According to the Constitution, two-thirds majority is required only for the amendment of the Constitution itself,[29] and it is not a condition for adoption of any other "ordinary" organic law, except the Constitutional Law on minority rights.[30] Other organic laws "which elaborate the constitutionally defined human rights and fundamental freedoms, the electoral system, the organization, authority and operation of government bodies and the organization and authority of local and regional self-government shall be passed by the Croatian Parliament by a majority vote of all representatives."[31] The fact that the same majority is necessary for the adoption of the law on minority rights and the amendment of the Constitution points out the enormous importance of this material in the country; in which the demand for political compromise is much more expressed regarding this issue than in any other field – at least by the constitution-maker. On the other side, in Croatia, in the hierarchy of legal sources the Constitutional Law on The Rights of National Minorities neither ranked higher than other laws, nor ranked equally with other *real* constitutional laws, as the Constitutional Law of the Constitutional Court of the Republic of Croatia that has character of constitutional law not only by its name but by the special procedure of its adoption, as well: it shall be passed in the proceeding prescribed for the amendment of the Constitution.[32] According to the Constitutional Court of Croatia, *falsa nominatio* does not change the legal nature of a law.[33] Thus, in the case of conflict between the two mentioned constitutional laws the court gave priority to the Constitutional Law on the

23 Constitution of the Republic of Croatia, Art. 83, Par. 1.
24 *Ibid*. Art. 8.
25 *Ibid*. Art. 17, Par 1.
26 *Ibid*. Art. 105, Par. 2–3.
27 *Ibid*. Art. 133, Par. 2.
28 *Ibid*. Art. 135, Par. 3.
29 *Ibid*. Art. 138.
30 Two-thirds majority is required for the adoption of the Constitutional Law on the Constitutional Court of the Republic of Croatia, as well, but contrary to the Constitutional Law on minority rights this law is a "real" constitutional law that should be adopted in the procedure prescribed for the amendment of the Constitution, still the Constitutional Law on minority rights, according to the Croatian Constitutional Court, is an organic law.
31 Constitution of the Republic of Croatia, Art. 83, Par. 2.
32 *Ibid.* Art. 127.
33 Point 5 of the decision of the Constitutional Court of the Republic of Croatia, No. U-I-774/2000 as 20 December 2000.

Constitutional Court over the Constitutional law on minority rights.[34] This issue may seem theoretical, but in the practice of the Constitutional Court of Croatia it has gained its practical dimension in the event of a conflict between the Constitutional Law on Minority Rights and other organic or "ordinary" laws. One of the examples will be analyzed later because of its close connection with the subject of this paper.[35]

The Constitutional Law on The Rights of National Minorities contains the classic catalog of individual and collective minority rights, as right to use of their language and script, private and public, as well as official use; education in their language and script; the use of their insignia and symbols; cultural autonomy through the preservation, development and expression of their own culture; practicing their religion and establishing their religious communities; access to the media and public information services in their language and script; self-organization and association in pursuance of their common interests; proportional representation in public authorities; and participation of the members of national minorities in public life and local self-government through the Council and representatives of national minorities.[36] Of course, minority rights are regulated by many other special laws that are referred to directly or indirectly by the Constitutional law itself, e.g., the Law on The Use of Language and Script of National Minorities.[37]

Speaking about the linguistic rights of national minorities it is important to note that, on the one side, the Constitutional law guarantees typical language rights, mostly those related to the official communication, still on the other side, other rights in which someone's native language is not the primary subject of protection, but the realization of this group of rights is unimaginable without free use of mother tongue, such as the right to education or information.[38] Anyway, most human rights are solidly connected with the dilemma of the so-called freedom of language: it actually means that a "full-blood" realization of almost any basic human right is impossible (neither for the national majority, nor for national minorities) without universal recognition of their right to use mother tongue or freely chosen other language. For the sake of example, freedom of speech does not worth a straw without freedom of use of someone's language, or without freedom of language itself,[39] or whether right to education has sense if a kid does not understand the language in which the lecture is conducted. However, we have to emphasize again, that the paper focuses only on those cases before the Croatian Constitutional Court that directly concern use of minority languages in official communication.

Because of its character of framework law, the Constitutional Law on Minority Rights does not go into details regarding any group of rights but contains guidelines for their

34 Point 5–8 of the decision of the Constitutional Court of the Republic of Croatia, No. U-I-1029/2007 of 07 April 2010.

35 Decision of the Constitutional Court of the Republic of Croatia, No. U-III-4856/2004 of 12 March 2007, the case of bilingual ID.

36 Constitutional Law on The Rights of National Minorities, Art. 7.

37 *Ibid*. Art. 12, Par. 2.

38 Katinka Beretka: *A nyelvi jogsértések szankcionálhatóságának tételes jogi és nemzetközi jogi dimenziói*. [Probability of sanction imposition for violation of linguistic rights in domestic and international law]. In: Tanulmányok 2019/2, pp. 41–58. at p. 43.

39 György Andrássy: *A nyelvszabadságról és a nyelvszabadság jelentőségéről.* [On freedom of language and its significance]. In: Létünk, 2013/special edition, pp. 7–19. at p.12.

further regulation by other special laws. It provides that members of national minorities may use their native language under equal conditions with Croatian, if members of the respective national minority make at least one third of the population in the territory of a self-government unit;[40] but equality in the official use of a minority language and script shall also be practiced when so envisaged in international treaties and when so stipulated in the statute of a local or regional self-government unit, pursuant to the provisions of the special Law on the Use of Languages and Script of National Minorities in the Republic of Croatia.[41] Otherwise, this law, instead of a one-third census, stipulates a stricter condition: for the introduction of one minority language into official use, members of that national minority should make up the majority in the local population.[42] This collision might be explained by the chronological order of the adoption of the Constitutional law and the Law on use of languages (the Constitutional law was passed later), and harmonization of the texts has not been completed up to now. In accordance with the principle *lex posterior derogat legi priori,* a later law repeals the earlier one, namely the Constitutional law that contains a softer condition in the current case.[43]

The sixth periodical report of Croatia presented during the monitoring of the application of the European Charter for Regional or Minority Languages in Croatia indicates that, based on the required threshold from the law, Czech, Hungarian, Italian and Slovakian is introduced into official use in one-one local municipality, while Serbian in 23 municipalities. Two municipalities have voluntarily introduced the equal and official use of the Czech language, three municipalities the Hungarian, 19 municipalities the Italian and one-one municipality the Serbian and the Ruthenian language, even though the respective minority does not cover one-third of the local population in any of the cases.[44]

To fulfill one of the conditions to join the EU,[45] Croatia has ratified the two most important international-regional document of the Council of Europe: the already mentioned European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities.[46] In its annual reports, the European Commission referred to the constatations that experts made during the monitoring of the application of the mentioned conventions, and deemed that the practice of the use of minority languages is correct in general,[47] even though the Commission did not go deeper concerning the real situation of minorities and their languages. Besides multilateral treaties, Croatia signed bilateral ones, too, with Italy, Hungary, Macedonia, Serbia, Montenegro, Czechia,

40 Constitutional Law on The Rights of National Minorities, Art. 12, Par. 1.

41 *Ibid.* Art. 12, Par. 2.

42 Zakon o uporabi jezika i pisma nacionalnih manjina u Republici Hrvatskoj (Law on the Use of Language and Script of National Minorities in the Republic of Croatia), *Narodne Novine*, br. 51/00, 56/00, Art. 4, Par. 1.

43 Antonija Petričušić: *Ravnopravna službena uporaba jezika i pisma nacionalnih manjina: izvori domaćeg i međunarodnog prava*. [Equal official use of language and script of national minorities]. In: ZPR 2, 2013/1, pp. 11–39. at p. 18.

44 Committee of Experts 2020, p. 8.

45 Marina Andeva – Katinka Beretka: *The (Non)-Existing EU Standards in National Minority Protection as Prerequisites for Successful European Integration: The Case of Macedonia and Serbia.* In: Thirteenth annual international academic conference on European Integration Europe and the Balkans, Skopje: University American College, 2018, pp. 165–184, at p. 168.

46 Croatia ratified the Framework Convention on 11 October, 1997, and entered into force on 1 February, 1998.

47 Tatalović n.d., p. 8.

and Austria in the field of protection of rights of national minorities.[48] Although bilateral treaties might serve as legal sources of minority language rights according to the Constitutional law on minority rights, instead of regulating new rights or conditions of realization of these rights, they contain *soft law* measures without effective mechanisms for control of their fulfilment.

Pursuant to the Constitutional law on minority rights, official use of minority languages means use of a language in representative and executive bodies, in procedures before administrative bodies of local and regional self-government units, in first-instance procedures before government bodies, in first instance court proceedings, in procedures conducted by the Public Attorney's Office, notaries, public and legal persons with public powers,[49] and the Law on the Use of Minority Languages and Script should regulate in detail all the circumstances of equal and official use of minority languages before these authorities and organizations. For the sake of example, in case of bilingual or multilingual operation of local and/or regional representative and other bodies text of seals and stamps, nameplates and headings of official documents in minority language shall contain letters of the same size as the Croatian version, materials and calls for sessions, minutes and decisions, and other official information shall be published in minority language, as well.[50] Furthermore, citizens may ask for notarial documents in minority language and bilingually printed official forms,[51] and their private documents written in minority language should be recognized as valid,[52] but the law is silent on the possibility of oral communication between clients and officials in minority languages.

With regard to the use of the language of a national minority in proceedings, it is important to note that the equality of the Croatian and minority languages can only be achieved when all procedural actions are taken over in the minority language, as well; which practically means that all participants, starting from the party, through the recorder all the way to the judge, official conducting the procedure, speak (or at least understand) the same language. If the client should ask for assistance of an interpreter (which right is otherwise guaranteed, for example, to the suspected, accused or prosecuted person who do not understand the language used in the court, irrespectively of his/her ethnicity),[53] there is no right to use mother tongue in parallel with Croatian in proceedings. The law on the use of languages and script of national minorities provides that clients may use their language in the proceedings, to make statements in the chosen language,[54] and the language of the first submission made by the client seems to be the language in which the client would communicate hereafter.[55] Later the client may submit documents either in Croatian, or in his/her native language, according to free choice.[56] The first official written information shall always be submitted in Croatian and all other languages that are introduced into

48 Mirjana Radaković – Ljubomir Mikić: *Priručnik o Ustavnom zakonu o pravima nacionalnih manjina*. [Manual on the Constitutional Law on The Rights of National Minorities]. Zagreb, WYG savjetovanje d.o.o, p. 14.
49 Constitutional Law on The Rights of National Minorities, Art. 12, Par. 3.
50 Law on the Use of Language and Script of National Minorities, Art. 8.
51 *Ibid*. Art. 9.
52 *Ibid*. Art. 5, Par. 2.
53 Constitution of the Republic of Croatia, Art. 29, Par. 2, Point 7.
54 Law on the Use of Language and Script of National Minorities, Art. 12. Par. 1.
55 *Ibid*. Art. 13. Par. 2.
56 *Ibid*. Art. 16. Par. 2.

official use in the territory of municipality, town or county,[57] and the competent authority should provide conditions for client's involvement in the chosen language, including transcriptions of acts adopted during the proceeding, both in Croatian and in the language the client used.[58] Appeal proceedings are conducted in the Croatian language and Latin script.[59] According to the formulation of the mentioned provisions, it can be concluded that in Croatia the right to real multilingual proceedings does not exist; minority languages might be used only at first instance, probably through an interpreter. Contrary to the Croatian model, in Serbia the Law on Official Use of Languages and Scripts regulates this issue more clearly: "The first instance administrative, criminal, civil or any other procedure in which citizen's rights and duties should be decided on is conducted in the Serbian language. The procedure may be conducted in a language of a national minority, as well, that is in official use in the authority or organization that governs the proceeding."[60]

In field of visual use of languages, traffic signs, names of streets, squares and settlements shall be displayed bilingually or multilingually in the entire territory of the local municipality or only in some parts of it, in accordance with the municipality's or town's statute; but the statute may regulate, as well, whether traditional minority names may be publicly used, and if yes, in which parts of the village.[61] The Constitutional law on minority rights prescribes that local statutes and/or the Law on the use of minority languages may create measures in order to preserve classic names and designations in areas where members of national minorities traditionally live or live in significant number, and to name settlements, streets and squares after personalities and events that are/were important for the history and culture of the respective minority group in Croatia.[62]

The official use of languages is subject to other material[63] and procedural laws, too[64], that might be relevant for regulation of linguistic rights in general; however, according to the examined practice of the Croatian Constitutional Court who have mainly built its decisions upon on the above mentioned two laws,[65] deeper analyses of any other laws is irrelevant in this paper.

3. Short summery of the competences of the Constitutional Court of Croatia

The Republic of Croatia has adopted the German-Austrian constitutional court system that is also seemed to be the classic European-continental model. Regarding the constitutional legal status of this body, there is no noteworthy difference between Serbia and Croatia: in both states this is the only special judicial authority which is vested by the

57 *Ibid*. Art. 13. Par. 1.
58 *Ibid*. Art. 14.
59 *Ibid*. Art. 19. Par. 1.
60 Zakon o službenoj upotrebi jezika i pisama (Law on Official Use of Languages and Scripts*), Službeni glasnik Republike Srbije*, br. 45/91, 53/93, 67/93, 48/94, 101/2005 – dr. zakon, 30/2010, 47/2018 i 48/2018 – ispr., Art. 12 Par. 1–2.
61 Law on The Use of Languages and Script of National Minorities, Art. 10.
62 Constitutional Law on The Rights of National Minorities, Art. 13.
63 Act on birth registers, IDs, travel documents and, local municipalities, etc.
64 Act on civil, criminal and administrative procedure, etc.
65 The constitutional law on minority rights and the law on the use of minority languages.

competence to determine the explicit and the implicit meaning of constitutional legal norms by checking on the conformity of any act with the constitution, and to grant legal priority of the constitution over laws and any other acts.[66]

The Constitutional Court of Croatia primarily "decides on the conformity of a law with the Constitution", "on the conformity of other regulations with the Constitution and the law," and "may assess the constitutionality of laws and the constitutionality and legality of other regulations that have ceased to be valid"[67] (which is called normative control or review of constitutionality and legality) furthermore, "decides on constitutional complaints against individual decisions of state bodies, bodies of local and regional self-government units, and legal entities with public authority when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government."[68] Regarding the possible outcomes of the proceedings, during the normative control, in case of determining the inconsistency of laws and other regulations with the Constitution and / or laws, the court may repeal the entire regulation or some parts thereof, or may annul the subject of constitutional and legality assessment *in toto* or *in parte*, bearing in mind the intensity of the violation of the Constitution, the law, and the interests of legal security: "if they infringe human rights and fundamental freedoms guaranteed by the Constitution; if they unreasonably put individuals, groups or associations in a more favorable or unfavorable position."[69]

Resolving constitutional complaint, the Constitutional Court may accept the complaint and repeal the disputed act as a whole or in part (just some its provisions) by which a constitutional right has been violated; in case of passing a new act to replace the act that was repealed by the court decision the competent body is obliged to obey the legal opinion and eventual instructions of the Constitutional Court. The second option is to refuse the constitutional complaint as not grounded.[70] In these procedures the court examines only those violations of the constitutional rights that were expressed in the constitutional complaint, or in other words, the applicant shall state constitutionally relevant reasons of violation.[71] The court does not consider those cases when the complaint does not deal with the violation of a constitutional right, or any other right of material or procedural character.[72] In this context, constitutional right means a human right or fundamental freedom, or right to local and regional self-government, guaranteed by the Constitution.[73] But any violation of the Constitution does not lead automatically to the acceptance of the constitutional complaint: the violation of right has to be of such an importance and

66 Slobodan Vučetić: *Uloga ustavnog suda u procesu tranzicije u Srbiji.* [The role of the Constitutional Court in the process of transition in Serbia] In: Ustavni sud Srbije – u susret novom ustavu – Zbornik radova – referati. [The Constitutional Court of Serbia – meeting the new constitution − Collection of works − Reports]. Beograd, Ustavni sud Srbije, 2004, pp. 13−19 at p. 13.

67 Constitution of the Republic of Croatia, Art. 125, Par. 1, Items 1–3.

68 *Ibid*. Art. 125, Par. 1, Item 4.

69 Ustavni zakon o Ustavnom sudu Republike Hrvatske (Constitutional Law on the Constitutional Court of the Republic of Croatia), *Narodne novine*, br. 99/99, 29/02, 49/2002 – prečišćen tekst, Art. 55.

70 *Ibid.* Art. 73–77.

71 Decision of the Constitutional Court of the Republic of Croatia No. U-III-540/1999 of 17 May 2000.

72 Constitutional Law on the Constitutional Court of the Republic of Croatia, Art. 71, Par. 1–2.

73 *Ibid.* Art. 62, Par. 1.

intensity that justifies assessment of the court about the existence of the violation of the applicant's constitutional right.[74]

Looking at the figures of the submitted constitutional complaints and requests/proposals for normative control from 2000, namely in the period that constitutes the timeframe of this research, a continuous increase can be detected in both the number of normative controls and procedures initiated by constitutional complaint; but there is no significant percentage difference in distribution of subjects of one or another kind of procedure in comparison with the statistics of the first decade (1990-1999).[75] Domination of cases regarding constitutional complaints in the activity of the Constitutional Court is the logical consequence of the universal character of this special legal remedy that might be lodged with the court literally by everyone "who deems that the individual act… has violated his/her human rights or fundamental freedoms."[76] On the other side, it is interesting that there were more requests for normative control than constitutional complaints regarding cases resolved by the Croatian Constitutional Court in field of minority rights.

From the almost hundred thousand resolved cases in the last twenty years, only few ten were dealing with (alleged) violation of minority rights in Croatia (according to the results of the research conducted by the author examining the available cases of the Croatian Constitutional Court, published on its official website).[77] For example, in Hungary the percentage of cases of this kind is under 1% in the last three decades.[78] In Croatia 38 decisions adopted in 51 cases are mostly results of normative controls (four times the Constitutional Court merged the cases because of common decision making regarding preferential representation of members of national minorities in representative bodies). In 20 reviews of constitutionality of laws and six reviews of constitutionality and legality of lower legal acts, the Constitutional Court has annulled provisions of laws and other regulations eight times, still in the other proceedings, requests were refused or not accepted. Three decisions were made concerning legality of elections, one decision concerning constitutionality and legality of state referendum when the court has determined that the proposed referendum question was not in accordance with the Constitution, and further eight proceedings were analyzed, as well, instituted by constitutional complaints in which complaints were refused as not grounded, each time. It is important to note that during the selection of cases that are determined as cases related to minority rights in the constitutional court practice of Croatia, only those cases were selected in which there is a clear motivation to protect the rights of national minorities or majority people in relation to other ethnic communities. Those court decisions that in some way may have points of contact with minority rights (for example, the universal human right to education), but are

74 Decision of the Constitutional Court of the Republic of Croatia, No. U-III-2432/2008 of 07 October 2009.

75 Resolved cases by the Croatian Constitutional Court in the period between 1990 and 30 June, 2020. See: https://www.usud.hr/sites/default/files/dokumenti/Pregled_rijesenih_predmeta_u_razdoblju_od_1990._do_30._lipnja_2020.pdf, Applications to the Croatian Constitutional Court in the period between 1990 and 30 June, 2020. See: https://www.usud.hr/sites/default/files/dokumenti/Pregled_primljenih_predmeta_u_razdoblju_od_1990._do_30._lipnja_2020.pdf

76 Constitutional Law on the Constitutional Court of the Republic of Croatia, Art. 62.

77 For the constitutional court practice in Croatia visit: https://sljeme.usud.hr/usud/praksaw.nsf.

78 Noémi Nagy: *,Nyelvében él a nemzet(iség)' avagy a magyarországi nemzetiségek nyelvi jogainak alkotmánybírósági védelme.* [,The nation(ality) lives in its language or protection of language rights of nationalities in Hungary before the constitutional court']. In: Fundamentum, 2019/3-4, pp. 86–98, at p. 86.

not primarily aimed at protecting a specific right of a national minority (for example, the right to education in mother tongue, namely in the language of a national minority), were not classified in the analysis group.

The fact that comparing with the numbers in general statistics among the cases related to minority rights there are significantly more requests or proposals for assessing constitutionality and legality than constitutional complaints, as a rule reflects the logical behavior of members of minority communities not only in Croatia but also in general. Fear from eventual repression, misunderstanding of rights and mechanisms for their enforcement are only few examples of possible reasons why members of minorities do not ask for protection before the Constitutional Court. Otherwise in most of the analyzed cases applicants of the constitutional complaints were lawyers or employees in the public sector who, regarding their profession, already knew the basic human and minority rights, and who stated in the respective cases that their ethnicity as a basis for positive discrimination was not considered during electoral procedure or employment, contrary to the law[79].

Regarding their themes the cases are various: 1) proportional representation in public administration and judiciary, 2) preferential representation in representative bodies and right to double vote during elections of these bodies, 3) issues concerning bodies of cultural autonomy of national minorities, and 4) official use of native language (regulation of official status of minority language either at local, or at regional level, visual use of languages on nameplates of towns, streets, squares, on seals, bilingualism of public documents). In the next chapter, we deal with cases from this last group in order to find answers to the questions: whether the Constitutional Court has consistently interpreted the right of national minorities to official use of their mother tongue in different proceedings; whether the court acted protectively towards all minorities in the same way, and finally, whether he based the decisions on the letter and/or the spirit of the Constitution.

4. Constitutional court practice in field of official use of minority languages – case studies

The Association of Croatian Doctors of Military Volunteers 1990-1991 (*Udruga hrvatskih liječnika dragovoljaca 1990-1991*) has requested the review of constitutionality of the Article 4−20 of the Law on use of languages (actually the entire Section 2 of the Act) and the Article 10 of the Constitutional Law on minority rights (in two separate proposals), affiliated with the freedom of use of mother tongue privately and publicly, and freedom of display of signs, titles and other information in minority language, because the respective provisions are not in accordance with the Article 16 of the Croatian Constitution that says: "Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health." The Association stated that the allegedly unconstitutional legal provisions did not regulate any restrictions for members of national minorities regarding use of languages in order to protect rights of other persons on use of their language. Notwithstanding, the Constitutional

79 Decisions of the Constitutional Court of the Republic of Croatia No. U-III-4681/2008 of 30 June 2010, No. U-III-4079/2010 of 17 November 2010, No. U-III-5760/2008 of 17 November 2010, No. U-III-2989/2010 of 31 May 2012, No. U-III-1286/2012 of 11 December 2014, No. U-III-1897/2013 of 05 March 2015.

Court rejected the Association's both proposals because the concrete reasons for instituting a normative control must be presented in understandable, precious way to decide about the essence of the subject; according to the court, this requirement was not fulfilled in these proceedings[80].

However, the practice of the Croatian Constitutional Court in the field of minority rights is not so simple than it was exposed in the previous example. In this section we present in detail two important decisions that are seemed to be foundation-stones of the court's practice in determining the basic constitutional values of the Croatian society, and a less known decision that illustrates quite well the court's approach to politically sensitive themes. Off course, there are more proceedings in which the Constitutional Court decided about linguistic rights of minorities, but they are not so relevant for enforcement of rights of new minorities, more preciously the Serbian minority community. For example, the Italian Union in Rijeka (*Talijanska Unija, Rijeka*) has disputed some of the provisions of the Law on Territories of Counties, Cities and Municipalities in the Republic of Croatia because the Articles did not contain the names of some local municipalities in Italian, only in Croatian. The Constitutional Court drew the applicant's attention on the competence of the local municipalities in Croatia to introduce a minority language into official use by the local statute, even if the legal conditions were not fulfilled regarding the size of the respective minority population in the given city, municipality; and in accordance with the language's official status public titles, including municipality and city names should be displayed in the official, minority languages, as well, in the concrete case in the Italian language. It follows that the court did not accept the proposal to initiate the normative control procedure[81]. The second subject, materially similar to the previous one, contains a reverse request. The Community of Croatian Associations in Istria (*Zajednica hrvatskih udruga u Istri*) initiated a review of constitutionality and legality of the Ruling on Giving Names to Streets and Renaming Streets in the Territory of the Bale Settlement No. O.U. 3/3-94 of 14 September 1994. "By enforcing the aforementioned Ruling, the proponent considers that Article 12 of the Constitution has been violated, which stipulates that the Croatian language and Latin alphabet are in official use in the Republic of Croatia because it finds that mostly Italian street names avoid the use of the Croatian language. He considers that the disputed Ruling does not have a sufficient representation of deserving personalities of the majority people in the naming of streets and that it lacks the Croatian language as the official language of the Republic of Croatia, and that the rules of Croatian grammar and spelling are not respected"[82]. The Constitutional Court has decided that the request was not grounded because: 1) the Statute of Bale regulates equality of Croatian and Italian and the Latin script in official use of languages, and grants the right to display names of streets, squares, settlements and other geographic localities bilingually, and 2) correction of eventual grammatical mistakes and deficiencies is a competence of the public administration, but not of the Constitutional Court.

80 Decision of the Constitutional Court of the Republic of Croatia No. U-I-1000/2013 of 19 June 2018 and No. U-I-1003/2013 of 19 June 2018.

81 Decision of the Constitutional Court of the Republic of Croatia No. U-I-1682/2003 of 26 October 2005.

82 Point 2 of the decision of the Constitutional Court of the Republic of Croatia No. U-III-2432/2008 of 7 October 2009.

number and date of the decision	kind of the proceeding	applicant – presenter	subject	decision
U-I-847/2001 09 March, 2005	review of constitutionality of law	Hrvatska čista stranka prava (Croatian Clear Party of Rights)	introduction of a minority language and script into official use at the level of a county	ruling on refusal of the proposal
U-II-425/2002 16 January, 2008	review of constitutionality/ legality of a statute	private persons from Zagreb	regulation of use of minority language at the county level	ruling on refusal of the proposal
U-II-2648/2002 29 September, 2010	review of constitutionality/ legality of a regulation	Zajednica hrvatskih udruga u Istri (Community of Croatian Associations in Istria)	too many names of streets in Italian, instead of names in the Croatian language	ruling on refusal of the proposal
U-I-1682/2003 26 October, 2005	review of constitutionality of law	Talijanska Unija, Rijeka (Italian Union, Rijeka)	names of towns and villages are determined in the law only in Croatian	ruling on refusal of the proposal
U-III-4856/2004 12 March, 2007	constitutional complaint	private person from Rijeka	refusal of ID card in the Serbian language and Cyrillic script	decision on refusal of the constitutional complaint
U-I-1000/2013 19 June, 2018	review of constitutionality of law	Udruga hrvatskih liječnika dragovoljaca 1990.-1991. (Association of Croatian Doctors of Military Volunteers 1990-1991)	there are no limits of official use of minority language in the Constitutional Law on the Minority rights.	ruling on non-acceptance of the proposal
U-I-1003/2013 19 June, 2018	review of constitutionality of law	Association of Croatian Doctors of Military Volunteers 1990-1991	there are no limits of official use of minority language in the Law on the use of minority languages	ruling on non-acceptance of the proposal
U-II-6110/2013 12 August, 2014	review of constitutionality/ legality of a statute	Government of the Republic of Croatia	exemption of the territory of Vukovar from the application of the Law on the use of minority rights	decision on repealing the provision
U-VIIR-4640/2014 12 August, 2014	review of constitutionality of a referendum question	the Croatian Parliament	aggravation of the threshold prescribed for the introduction of a minority language into official use	referendum question is unconstitutional
U-II-1818/2016 02 July, 2019	review of constitutionality/ legality of a statute	the Croatian Parliament, the Committee for Human Rights and Rights of national minorities	regulation of official use of languages in Vukovar	refusal of the proposal decision on repealing the provision

Table 1. Cases before the Constitutional Court of Croatia in field of official use of minority languages (composed by the author)

4.1. Identity card in the Serbian language and Cyrillic script

The Police Department of the Primorje-Gorski Kotar County rejected the request of the applicant of the constitutional complaint from Rijeka to get a bilingual, more preciously a trilingual ID card: in Croatian and English and Latin script, and in the Serbian language and the Cyrillic script. The applicant of the constitutional complaint appealed against the Police Department's decision to the Ministry of Interior Affairs of the Republic of Croatia. Because the Ministry did not act on the appeal, the applicant filed a lawsuit in the Administrative Court of Croatia because of silence of the administration. In accordance with the Administrative Court's order the Ministry finally adopted the second-distance decision that has confirmed the first-instance decision of the police department, namely rejected the request again to issue a bilingual/trilingual ID card, so, the applicant of the constitutional complaint has extended his claim, which was submitted to the Administrative Court, on the content of the second-instance decision. In the analyzed case, the proceeding before the Constitutional Court was initiated against the Administrative Court judgment No. Us-9774/03-11 of 14 October 2004 which rejected the lawsuit challenging the Ministry's second-instance decision No. 511-01-72-UP/II-943/1-03 of 3 October 2003.

The applicant of the constitutional complaint has referred to his right from the Article 9, paragraph 2 of the Constitutional Law on minority rights that regulates the possibility to print and fill in the form of ID cards in language and script of a national minority, as well. According to his words, right to bilingual document "belongs to each member of a national minority who asks for it, anywhere in the Republic of Croatia; notwithstanding whether the respective local municipality where the person has his registered residence and has requested issuance of his ID card regulates equality of minority language and script in official use"[83]. The applicant explained his position by the fact that the Constitutional Law in the provision on the right to bilingual identity card[84] does not mention the official status of the minority language at all, nor does it refer to another law.

In the Constitutional law bilingual ID card as such is specially mentioned. There is no word about other public documents or forms in the given legal provision, there is no need for further elaboration in other laws in order to realize this right, that is, otherwise, the case with the right to personal name regulated in the same provision. According to the Constitutional law, "members of national minorities shall have the right to use their family name and first name(s) in the language they use… , in accordance with current regulations of the Republic of Croatia"[85]. On the other side, according to the sectorial law on ID cards the basic rule is that the form of an ID card should be printed in Croatian and English and Latin script, and to be filled in exclusively in the Croatian language. The form for needs of a concrete person – member of national minority may be printed in minority language, as well, and to be filled in in the respective minority language and script, besides Croatian, if a special law or a treaty regulates so.[86] Law on use of languages that has character of special law in this case prescribes: if a minority language is introduced

83 Point 2 of the decision of the Constitutional Court of the Republic of Croatia No. U-III-4856/2004 of 12 March 2007.

84 Constitutional Law on The Rights of National Minorities, Art. 9. Par. 2.

85 *Ibid.* Art. 9, Par. 1.

86 Zakon o osobnoj iskaznici (Law on ID cards), *Narodne novine,* br. 11/2002, Art. 8.

into official use in the municipality, city or county, public documents shall be issued bilingually or multilingually and other official designation forms shall be also printed in more languages[87]. Similar solution is accepted by the bilateral treaty concluded between Serbia and Croatia on mutual protection of national minorities: "the contracting parties commit themselves to granting official use of languages and script of national minorities in territories where members of national minority live, in accordance with the internal legislation and adopted international legal standards, as follows: … in case of issuance of notarial documents, verifications and certifications; … in use of bilingual forms of state authorities "[88].

Because the Constitutional law unconditionally recognizes the right to bilingual ID card in the entire territory of the state, on the one side, and the Law on use of languages binds realization of this right to the official status of the respective minority language, on the other side, a typical example of collision between the two laws exists. However, the court did not enter into deeper analysis of this problem: on the contrary, it has interpreted the discussed Article 9, paragraph 2 of the Constitutional Law together with its Article 12, paragraph 3 that prescribes that detailed elements and mode of the official use of minority languages shall be regulated by the Law on use of languages and scripts of national minorities, notwithstanding that the Constitutional Law does not refer to the provisions of this legal act in the concrete Article. "Actually, the court has given priority to a sectorial law over the Constitutional Law when it decided the case and rejected the constitutional complaint[89], disregarding the fact that in this way it has denied enforcement of a linguistic right"[90].

Based on the Maxim *lex specialis derogat legi generali*, the special law (either the Law on use of minority languages, or the Law on ID card) should apply that corresponds to the Constitutional Court's approach in this issue. But whether it is fair to apply an act, either of general, or special nature, that contains less rights? This question is especially interesting in light of the practice of the Constitutional Court, deciding about an electoral case in which it has adopted a reverse decision.[91] According to the court's explanation, the Constitutional law prescribes "that minimum of rights that members of national minorities must have in field of minority representation in representative bodies of local and

87 Law on the Use of Language and Script of National Minorities, Art. 9, para. 1.

88 Zakon o ratifikaciji sporazuma između Srbije i Crne Gore i Republike Hrvatske o zaštiti prava srpske i crnogorske manjine u Republici Hrvatskoj i hrvatske manjine u Srbiji i Crnoj Gori (Law on Ratifikacion of the Treaty between Serbia and Montenegro and the Republic of Croatia on the Protection of Right of the Serbian and the Montenegrin Minority in the Republic of Croatia and the Croatian Minority in Serbia and Montenegro), *Službeni list SCG – Međunarodni ugovori,* br. 3/2005, Art. 6, para. 2, point 4, 6.

89 Decision of the Constitutional Court of the Republic of Croatia No. U-III-4856/2004 of 12 March 2007.

90 Katinka Beretka: *Ustavnosudska praksa u Republici Hrvatskoj u oblasti zaštite prava nacionalnih manjina.* [Constitutional court practice in the Republic of Croatia in field of protection of national minority rights]. In: Petar Teofilovic (ed.): Nation, Community, Minority, Identity: The Protective Role of Constitutional Courts. Innovariant, Szeged, 2020, pp. 41–58. at p. 271.

91 In the Brod-Posavina County the members of the Serbian national minority did not get adequate representation in the county's parliament, because the Croatian State Electoral Commission has based its decision on the Article 20 of the Constitutional Law instead of the Article 104 paragraph 1 of the Law on local elections. The latter would guarantee one parliamentary seat for the Serbian community, still according to the Constitutional Law (that was applied in the respective case) they got zero mandate. The Constitutional Court has annulled to the electoral results (decision of the Constitutional Court of the Republic of Croatia No. U-VII-3122/2013 of 4 June 2013).

regional municipalities (counties) (5% of the local population or right being regulated by the local/regional statute), still by a special law, in this case by the Law on local elections […] this right might be even extended"[92]. In this case the situation was converse than in the case on bilingual ID cards, because the Constitutional Law as *lex generalis* contain more rights than the *lex specialis*.

"According to the Croatian constitutional practice, the Constitutional Law seems to be *lex generalis* if it is in conflict with a special law, notwithstanding, whether it contains more rights for national minorities or not, in comparison with the sectorial law (*lex specialis*)"[93]. The Constitutional Court did not discuss at all the opportunity of the issuance of ID cards in Serbian and Cyrillic script in a local municipality, in which territory the Serbian language did not have the status of equal official language because that was not regulated by special law; even though the court should be guided by principles that ensure "respect for the members of national minorities and other citizens of the Republic of Croatia to promoting understanding, solidarity, tolerance and dialogue among them"[94] in case of any doubt regarding the interpretation of the Constitutional Law's provisions and other acts in field of minority rights.

In a hypothetic case of accepting the constitutional complaint, the Constitutional Court decision would create potential for issuing ID cards in the Serbian language and Cyrillic script in the entire territory of Croatia that was not the legislator's goal in accordance with the court's latent explanation. Such extensive interpretation of the legislator's intention might be seemed even as court activism in the respective case: "Court activism arises when courts are concerned not only about adjudication of legal disputes, but their goal is to create social policies by which their capture much more people and interest than in deciding individual cases"[95].

On the other side, the applicant of the constitutional complaint has based its claim on the violation of constitutional rights guaranteed in the Article 14, paragraph 1 (prohibition of discrimination), the Article 14, paragraph 2 (equality before law), the Article 15, paragraph 4 (freedom to use minority language and script), the Article 29, paragraph 1 (right to a fair trial) and Article 32 of the Constitution (liberty of movement and freedom to choose residence) which rights, according to the Constitutional Court's analysis, were not violated by the refusal to issue a bilingual ID card; as it was already stated noticed in the previous chapter the court examines the possible violation of rights only within the reasons explicitly indicated in the constitutional complaint. The applicant of the constitutional complaint would probably have a better chance of "winning" if he invoked a breach of legal certainty due to a clear conflict between the regulations in the present case.

92 Point 3 of the decision of the Constitutional Court of the Republic of Croatia No. U-VIIA-3004/2013 of 26 May 2013.

93 Beretka 2020, pp. 272.

94 Constitutional Law on The Rights of National Minorities, Art. 8.

95 Arsen Bačić: *O sudskom aktivizmu ili o političkoj ulozi sudova*. [On court activism or political role of courts] In: Politička misao –Croatian political science review, 2008/2, p. 106.

4.2. Referendum question on official use of minority languages

The Citizen Initiative "Headquarters for the Defense of the Croatian Vukovar" (*Stožer za odbranu hrvatskog Vukovara*) submitted a request to the Croatian Parliament on 13 December 2013,[96] to call for a referendum with the following question: "Do you agree to amend the Article 12 paragraph 1 of the Constitutional Law on The Rights of National Minorities ('Narodne novine', No. 155/02., 47/10., 80/10. and 93/11) as follows: "Equality in the official use of a minority language and script shall be exercised in the territory of a local self-government unit, state administration and judiciary if the members of a national minority make at least one half of the population of that unit"?" Based on the parliament's request to determine the constitutionality of the question's content and fulfillment of the constitutional preconditions for calling a referendum, the Constitutional Court determined that although the conditions were met, this issue was not in accordance with the Constitution[97].

The Constitutional Court found that the proposed amendment to the legal norm was incorrectly formulated, because Article 12, paragraph 1 of the Constitutional law on minority rights spoke of the territorial use of minority languages, and the state administration and the judiciary are not administrative-territorial units. But the court did not engage with further interpretation of that part of the question because increasing the census threshold from one-third to one-half by itself was against the Constitution.

During the validity period of the previous law on minority rights (1991-2002), a stricter condition was in force regarding the threshold for the introduction of a minority language into official use. Instead of the currently applicable one-third, in municipalities (but not in cities) the respective minority community had to make up at least one-half of the local population in order to introduce its language into official use[98]. But it does not mean the possibility of returning to the old state.

Since the Constitution, as a rule, does not determine any preconditions for the introduction of minority languages in official use in local self-government units, but leaves it to the legislator, the Constitutional Court could not find a clear legal basis in the Constitution. Instead of referring to an explicit constitutional restriction, the court emphasized that the implicit features of a democratic society should be considered, which are reflected in pluralism, tolerance, freedom of thought, expression of ethnicity and emphasis on minority consciousness[99]. "The individual right of persons belonging to national minorities to freedom to use their language and script… requires from the Croatian people, as the majority, tolerance and understanding, a constant reminder of the values of the Constitution

96 Registered under No. 361-13-03-1787, class: 014-01/13-01/06.

97 Decision of the Constitutional Court of the Republic of Croatia under No. U-VIIR-4640/2014 of 12 August 2014.

98 Ustavni zakon o ljudskim pravima i slobodama i o pravima etničkih i nacionalnih zajednica ili manjina u Republici Hrvatskoj (Constitutional Law on Human Rights and Freedoms and Rights of Ethnic and National Communities and Minorities in the Republic of Croatia), *Narodne novine,* br. 65/91., 27/92., 34/92. – pročišćeni tekst, 51/00., 105/00. – pročišćeni tekst, Art. 7, para. 2.

99 Decision of the Constitutional Court of the Republic of Croatia under No. U-VIIR-4640/2014 of 12 August 2014, Point 10.2.

and the limits of permissible behavior towards minorities set by the Constitution"[100]. So, from the non-existence of written provisions in this issue the court could not make "a conclusion on the a priori and unconditional admissibility of increasing the threshold for the official use of the language and script of national minorities. In this matter, the Constitution sets requirements arising from a democratic society based on the rule of law" (point 10). Therefore, any change affecting the exercise of linguistic rights of national minorities, including an increase in the threshold for the official use of a minority language must be reasonably justified, which according to the court's interpretation implies the following elements: 1) to have a clear legitimate aim that it is in the public interest; 2) must be necessary (or proportional to a legitimate aim) in the conditions of a democratic society, and 3) there must be an urgent social need for change in a given area[101].

The Constitutional Court decision about the referendum question is of enormous importance because of more reasons: on the one side, it determines the basic, universal constitutional values which cannot be given up or deviated from, on the other side, it is based on the spirit of the Constitution instead of the mostly favorized method of constitutional interpretation: the textualism. However, this decision has another important dimension, the political one. Although the referendum question referred to the amendment of the Constitutional Law that applies equally to all national minorities in Croatia, it is no secret that it was motivated by life facts and factual circumstances that govern Vukovar: "The Cyrillic alphabet in the City of Vukovar suffered to finally explain the goal of the proposed referendum by the right of citizens to "decide what they want with Vukovar and what rules must prevail in Vukovar but also in the whole of the Republic of Croatia" as it stated in the point 28 of the decision in which the court quoted the referendum request of the Organizing Committee. According to the Constitutional Court, there is no reason to doubt that all actions of the signatories of the initiative and the Organizing Committee were taken in good faith, in order to solve some problems as a result of the war through a referendum. But the attack on one alphabet, in this case Cyrillic, as a universal civilizational heritage of humanity that determines the very identity of the Croatian constitutional state is a deeply disturbing, even irrational act. Reading the second part of the decision, we have the feeling that the Constitutional Court is trying to justify its decision and express latent solidarity with the initiators of the referendum: "The Constitutional Court believes that the Organizing Committee and the citizens of Vukovar, as well as all signatories in the Croatian Constitution and never agree to actions contrary to the Constitution, no matter how difficult it may sometimes be to accept the implications arising from some of its requirements"[102].

In this subject the Constitutional Court has adopted a really advanced view regarding the interpretation of the constitutional provisions in field of minority rights, even though the decision was overshadowed by the mentioned political elements of the explanation. "It

100 *Ibid*. Point 13.
101 *Ibid*. Point 14.
102 *Ibid*. Point 29.

is impossible to resolve political disputes and conflicts totally by law, without danger of turning "juridization of politics" in "politization of the constitutional court'"[103].

4.3. Use of the Serbian language in Vukovar

The last case that attracted the attention of the political, professional and lay public both in the country and abroad in July 2019 was the decision of the Constitutional Court to repeal certain provisions of the Statutory Decision on equal official use of languages and scripts of the Serbian national minority in the city of Vukovar, which decision, in addition to the classical language rights, also touches on some sensitive issues in the process of reconciliation between the two nations.

Back in 2013, the Government of the Republic of Croatia submitted a request for normative control of Article 22 of the Statutory Decision on Amendments to the Statute of the City of Vukovar[104] which exempted the entire territory of Vukovar from the use of the Law on the Use of Languages and Scripts of National Minorities in the Republic of Croatia.[105] Although according to the results of the 2011 census, the percentage of the Serbian local population was more than one third in Vukovar[106], and the the city was obliged by law to introduce the Serbian language and Cyrillic alphabet in equal official use, this was not done because "the area of the City of Vukovar is a place of special reverence for the victims of the Homeland War"[107]; and until the conditions of Article 8 of the Constitutional Law on the Rights of National Minorities are met[108], the Croatian language together with the Latin alphabet will remain the only official language in the city. In 2014, the Constitutional Court repealed the disputed Article 22 of the Statutory Decision, explicitly accepting the position of the Government of Croatia that said: the provision "is in direct conflict with the highest values of the Constitution and the constitutional order of the Republic of Croatia and as such cannot exist in a democratic state governed by the rule of law"[109]. The City of Vukovar was given a year to regulate the individual rights of persons belonging to national minorities in the field of official use of languages and scripts on its territory, which was done within the deadline. The City Council of the City of Vukovar amended its Statute and the Statutory Decision on Equal Official Use of Languages and

103 Duška Šarin: *Ustavni sud Republike Hrvatske kao institucionalni zaštitnik ljudskih prava i temeljnih sloboda*. [The Constitutitional Court of the Republic of Croatia as an institutional defender of fundamental human rights and freedoms]. In: Zbornik radova Pravnog fakulteta u Splitu [Collection of works of the Faculty of Law in Split]. 2015/3, p. 756.

104 Statutarna odluka o izmjenama i dopunama Statuta Grada Vukovara (Statutory Decision on Amendments to the Statute of the City of Vukovar), *Službeni vjesnik grada Vukovara,* No. 7/13.

105 Until the amendments made by the Statutory Decision, Article 61 paragraph 3 of the Statute of the City of Vukovar prescribed that members of the Serbian national minority had the right to free use of the Serbian language and Cyrillic alphabet in both private and public life, including official communication in the Vukovar self-governing area (point 4 of the decision of the Constitutional Court of the Republic of Croatia under No. U-II-6110/2013 of 12 August 2014).

106 Državni zavod za statistiku Hrvatske 2013, pp. 46−47.

107 Art. 1, Par. 1 of the Statutory Decision on Amendments to the Statute of the City of Vukovar.

108 Art. 22 of the Statutory Decision on Amendments to the Statute of the City of Vukovar.

109 Point 4 of the Decision of the Constitutional Court of the Republic of Croatia under No. U-II-6110/2013 of 12 August 2014.

Scripts of the Serbian National Minority in the City of Vukovar[110] according to court orders in 2015, against which the Committee on Human Rights and National Minority Rights submitted a request for assessment of constitutionality and legality in 2016. The procedure was completed in July 2019.

In this second procedure, due to direct opposition to Articles 8, 9 and 11 of the Law on the Use of Languages and Scripts of National Minorities, the Constitutional Court repealed Article 5, paragraphs 1−2 of the Statutory decision on equal official use of languages in parts which conditioned the right of members of the City Council from the Serbian national minority to receive session materials in their own language and script by submitting a special request and providing earmarked budget funds, and Article 6, paragraph 1 due to the connection of the right of citizens to transcripts of documents in the Serbian language and Cyrillic by the existence of a legal interest. Article 6, paragraph 2 was repealed without reference to a specific legal basis, considering that "there is no acceptable reason"[111] "why the printing of the text of stamps in the same font size in all languages in official use should be ensured *only when conditions are met*"[112].

On the other hand, maintaining Article 7 of the Statutory Decision on Equal Official Use of Languages in force, which states: "[c]ollective rights of the Serbian national minority in the City of Vukovar are ensured when the conditions from Article 61, paragraph 3 of the Statute of the City of Vukovar are met," the Constitutional Court acted more like a politician. The City Council of Vukovar considers the achieved level of understanding, solidarity, tolerance and dialogue among the citizens of Vukovar and "decides on the possibility or need to expand the scope of individual rights of members of the Serbian minority live in the City of Vukovar with new rights from the catalog of rights provided by the law on the use of languages and scripts of national minorities in the Republic of Croatia"[113]. According to the Constitutional Court, "there is no reason why this provision should be repealed in the circumstances of the present case"[114], but at the same time this provision "must not be abused in such a way as to be a mere promise of the rights of persons belonging to national minorities"[115, 116]. Bearing in mind that in the framework of this paper we primarily deal with the linguistic rights of minorities, we do not analyze in particular how the Constitutional Court has coped with this specific political reality. It is only important to note that instead of citing a specific constitutional provision, he gave a very

110 Statutarna odluka o ostvarivanju ravnopravne službene uporabe jezika i pisma srpske nacionalne manjine na području Grada Vukovara (Statutory Decision on Equal Official Use of Languages and Scripts of the Serbian National Minority in the City of Vukovar), *Službeni vjesnik Grada Vukovara,* br. 7/15.

111 Point 27.2 of the decision of the Constitutional Court of the Republic of Croatia under No. U-II-1818/2016 of 2 July 2019.

112 Beretka 2020, p. 284.

113 Art. 61, Par. 3 of the Statute of the City of Vukovar, and Art. 5, Par. 3 of the Statutory Decision on Amendments to the Statute of Vukovar (Statutarna odluka o izmjenama i dopunama Statuta Grada Vukovara, *Službeni vjesnik Grada Vukovara,* br. 7/15)

114 Point 28.1. of the decision of the Constitutional Court of the Republic of Croatia under No. U-II-1818/2016 of 2 July 2019.

115 *Ibid*. Point 22,

116 With this reasoning in relation to the Amendments to the Statute, the Constitutional Court rejected the request by which the applicant challenged the consent of Article 5, paragraphs 3 and 4, Article 6 and Article 7, paragraph 2 of the Amendments to the Statute with the Constitution and the law (decision of the Constitutional Court of the Republic of Croatia under no. U-II-1818/2016 of 2 July 2019).

simple answer that neither the content nor the time frame of the disputed positions regarding the collective rights of Serbs in Vukovar are inconsistent with the Constitution[117].

This case was given a special place in the last report of the Committee of Experts, in which the Committee reminded the competent Croatian authorities of their obligation to use the Cyrillic alphabet in the administration, especially because the Cyrillic alphabet is used not only by members of the Serbian but also Ukrainian and Ruthenian communities[118]. "Public protests against the introduction of the Cyrillic alphabet in Vukovar point to the illegitimacy of minority provisions in the eyes of the majority and are much more an expression of the government's failure to explain the need for minority rights to Croatian citizens than an expression of collective desire to deny the rights of Serbs. In the community of disturbed interethnic relations, we should strive for solutions that contribute to reconciliation and re-establishment of disturbed trust, but not at the expense of positive legal regulations"[119].

Especially in the first proceeding on the use of Serbian in the City of Vukovar the Constitutional Court has really tried to make balance between the majority and minority interests, and stated that prescribing rights in accordance with the law should correspond to life facts and factual circumstances in Vukovar, which at the same time "respects the needs of the majority Croatian people that stem from the still living consequences of the Grate Serbian aggression in the early 1990s and the need for fair and proper treatment of the Serbian national minority"[120]. On the other side, such balancing and political correctness in any sense calls into question the Constitutional Court's principled position on the necessary refrain from engaging in politics: the court "is not a participant in political debates, nor is it an arbiter in resolving political disputes that arise in Croatian society. There is no other means to solve the problems than a comprehensive political dialogue conducted in good faith, no matter how unpleasant that dialogue may sometimes be"[121].

5. Conclusions

The original question we asked in this paper refers to the manner in which the Croatian Constitutional Court approaches the linguistic rights of minorities in the field of official communication: whether the court was consistent; with the help of which technique he interpreted the relevant provisions of the Constitution; whether he took into account the spirit of the Constitution, and not only its text; how much the current policy has influenced decision-making, etc. Based on the analysis of several cases from constitutional court practice, it can be concluded that sometimes the court really tried to protect the linguistic rights of minorities, even without a specific constitutional basis, basing its decisions on some general values of both the state and the highest legal act. "The individual

117 *Ibid*. Points 20.3 and 20.4.
118 Committee of Experts 2020, p. 8.
119 Petričušić 2013, p. 37.
120 Point 9 of the decision of the Constitutional Court of the Republic of Croatia under No. U-II-6110/2013 of 12 August 2014.
121 Point 33 of the decision of the Constitutional Court of the Republic of Croatia under No. U-VIIR-4640/2014 of 12 August 2014.

"right to freedom" of use of one's own language and script has neither a temporary nor a transitional character. It forms the essence of the identity of every nation and is universal in nature. It belongs to the brightest civilizational achievements of humanity," as it is in the decision on the referendum issue[122]. However, it would be too idealistic to say that the court has every time decided in favor of minorities or minority rights. It is enough to remember on his attitude regarding the relationship of the Constitutional law and other sectorial laws, when the affirmative provisions of the Constitutional law were often derogated by not so protective special laws.

On the other hand, the court tried to soften his advanced interpretations with explanations that have a more political than legal character, expressing latent sympathy for the opponents of minority language rights. According to the literature, such framework, put forward by the Constitutional Court, "properly balancing between majority and minority legitimate constitutional interests" forms part of the Croatian constitutional identity[123]. Although this statement was made considering the case on the referendum issue, it might be applicable on the Vukovar case, as well. Such balancing, however, carries the danger that the court contradicts himself regarding judicial neutrality in politically inspired cases, notwithstanding that in the end it did not affect the final decision − at least when it comes to the right to official use of the mother tongue of national minorities. The situation is more complicated in the last example of the paper regarding the expansion of the collective rights of the Serbian national community in Vukovar, when the Constitutional Court was not so protective and explained the decision in the light of the current political situation in the city, but that is another story.

122 *Ibid.* Point 13.

123 Jurij Toplak – Đorđe Gardašević: *Concepts of National and Constitutional Identity in Croatian Constitutional Law.* In: Review of Central and East European Law, 2017/4, pp. 263−293. Available online: https://brill.com/view/journals/rela/42/4/article-p263_263.xml?rskey=xdebZf&result=2.

Petar Teofilović:[1]

The Interpretation of Positive Discrimination in The Practice of Constitutional Courts of Slovenia and Croatia[2]

1. Introduction

Positive discrimination, lately often alternatively called affirmative action, is carried out by introducing various measures that give advantage over people who have traditionally been more powerful to particular minority groups that are often treated unfairly, and thus meet obstacles in the enjoyment of guaranteed rights because of their ethnic belonging, race, sex or some other personal trait that makes them exposed to discrimination and inequality in comparison to the majority. Measures taken to promote such groups may relate to various areas of life, such as employment, education, use of languages, participation in governing public affairs, personal status and the like. Their aim is to raise the level of enjoyment and protection of guaranteed rights of vulnerable minority groups in order to aid those groups to reach equal status, or at least get closer to the rest of the population in respect of using the benefits of certain rights when that is not feasible without implementing such measures. They are usually temporary because once their intention is met, they need not be applied any more and may be withdrawn, unless where members of the minority group would meet serious impediments in enjoying certain rights without such measures. The advantages introduced by those measures are not considered to be discriminatory against the others, but an instrument to secure equal status to members of vulnerable groups in the access to rights guaranteed to all citizens that those groups cannot fully enjoy as members of a minority.

The application of such measures may cause conflicts with some constitutional rights guaranteed to all or raise other related issues such as who are considered to be members of the group entitled to invoke privileges meant to improve their status, whether the measures used are adequate to target the existing inequality of minority groups in certain areas of life and the like. The application of measures of positive discrimination and the consequences they produce may be a matter of judicial review, but in the final instance the interpretation of whether they are justified or not fall within the competences of constitutional courts of the countries that introduced such measures. Thus constitutional courts play an important role in the explication of the scope and content of constitutional rights in general, and in particular of challenged measures of positive discrimination taken.

Republic of Slovenia and Republic of Croatia, independent states since 1990, were former members of a federal state of Yugoslavia. Today they are both members of the

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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.

European Union (Slovenia since 2004, Croatia since 2013). According to the Eurostat data for 2020, Slovenia has about 2.100.000 inhabitants, while Croatia has 4.060.000 inhabitants.[3] Part of the population in both countries are members of several minority ethnic groups which make about 17% of the total population in Slovenia,[4] and about 7.6% of the total population in Croatia. Both countries guarantee some special minority rights, and their constitutions contain clauses of the application of positive discrimination in relation to ethnic minorities as a general criterion and a corrective mechanism that is applied in cases where minority rights are curbed by, or in conflict with guarantees of some other constitutional rights. Both of them guarantee special rights only to some of the ethnic minorities dwelling in their territories – Slovenia to those that are granted a status of autochthonous minorities, Croatia to ethnic groups that are present in a portion above the defined percentage in the whole or in a part of the state territory.

This paper compares the interpretations of positive discrimination measures in relevant decisions of constitutional courts of the Republic of Slovenia and the Republic of Croatia. After an overview of the relevant law in two countries, we analyze whether, to what extent and for what reasons these two constitutional courts have supported the use of positive discrimination measures related to national minorities and their members so far, and whether their approaches provide an effective protection of such special rights. Conclusive remarks contain an assessment of the extent and consistency of standpoints of the two courts in respect of practical application of measures of positive discrimination.

2. Relevant law relating to minority rights in Slovenia

The constitution of Slovenia of 1991[5] contains several Articles relating to the status of national minorities living in Slovenia, including those that guarantee some special rights to particular ethnic minority groups denoted as autochthonous. The protection of ethnic minorities is based on the principle of territoriality (members of autochthonous minorities enjoy special rights in the areas nominated by a statute as ethnically mixed), and the principle of community (special rights are granted regardless of the size of a particular ethnic group or the proportion of its members in the ethnically mixed territory).[6]

The members of all ethnic groups are guaranteed certain rights that apply to all minorities: the right to freely express belonging to their nation or ethnic group, to nurture and

3 Eurostat, Country profiles – Population of 1 January (2020); Available online: https://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00001

4 The percentage of members of minority ethnic groups rose from 3% in 1953 to 17% in 2002 – Zlata Ploštajner: *Autochthonous and Newly-Formed Minorities: Two Different Approaches.* In: N*ational Minorities in South- East Europe,* FES, Zagreb, 2000.

5 The Constitution of the Republic of Slovenia (RS), Official Gazette of RS no. UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 and 75/16 – UZ70a.

6 Sigrid Lipott: *The Hungarian National Minority in Slovenia: Assessment of Protection and Integration after EU Accession.* In: Romanian Journal of European Affairs, Vol. 13, no. 3/2013, pp. 64-89, at p. 70. See also: Antonija Petričušić: *Slovenian legislative system for minority protection.* In: Noves SL. Revista de Sociolinguistica, Autumn 2004, pp. 1-9, at. p. 4. Available online: http://www.gen.cat/llengua/noves/noves/hm04tardor/docs/petricusic,pdf

express their culture, and use their language and alphabet.[7] As for the rest of guaranteed minority rights, the constitution makes distinction between three categories of national communities living in Slovenia: the autochthonous national communities, the autochthonous Roma community and the other (non-autochthonous) minority ethnic groups. Two ethnic minority groups, Italians and Hungarians, have the status of autochthonous national communities under the constitution, and as such are granted some additional special rights regulated in more details by a separate statute.[8] This way these two ethnic minorities are given a privileged status among all the others dwelling in Slovenia. The special constitutional status of the autochthonous Italian and Hungarian national communities in Slovenia is a result of historical reasons and their traditional presence.[9] Besides the rootedness of these ethnic groups in Slovenia, their status is also based on earlier agreements on these matters between Slovenia and Italy, i.e. Hungary. Given that only the Italian and Hungarian communities enjoy the autochthonous status under the constitution, special rights of such communities are fully guaranteed only to them. Special minority rights and the level of their protection are significantly lower in respect of other national minority groups. Neither the constitution nor any relevant statute contains the criteria for establishing if a particular national community is autochthonous or not. There is no widely accepted definition of autochthonous minorities in theory.[10] This term often has different meaning depending on whether it is used to denote indigenous people (when it is mainly a descriptive term) or national (ethnic) minority (when it is used to make distinction between traditional, long time present minorities and immigrants who do not enjoy the same level of legal protection).[11] The status of minorities in theory and in legislation of concrete countries is often linked with their long-term presence in the host country, the length of which may vary[12] or is not specified at all. In addition, autochthonicity is not considered to be a condition for the enjoyment of minority rights. Some other ethnic groups living in Slovenia, such as the Croats or Serbs who have been present in Slovenia for several centuries and make a multifold larger portion of the population than the two autochthonous ones, are generally considered to be newly formed minorities as a residue from the former Yugoslav federation. Although they and the Bosnians required to be recognized the same

7 The Constitution of Slovenija, Art. 61.

8 *Ibid*. Art. 5, and Art. 64. The status and special rights of the Italian and Hungarian autochthonous ethnic minorities are regulated by the Act on Self-Governing Ethnic Groups, Official Gazette of RS, no. 65/94 and 71/17.

9 Vera Klopčič: *Legal Protection of National Minorities in Slovenia.* In: Innovative Issues and Approaches in Social Sciences, Vol.11, no. 2/2018, pp. 38-50, at p. 39.

10 The Charter of the Federal Union of European Nationalities (FUEN) defines autochthonous national minorities /ethnic groups as minorities that came into being as a result of the changes of state borders or other historical events, and the peoples of Europe who have never established a state of their own and who live as a minority in the territory of a state. Available online: https://www.fuen.org/en/article/Autochthonous-minorities-in-Europe Obviously, this definition is too vague since it does not contain any specific characteristic of such minorities. On the other hand, the Minority Secretariat of the four autochthonous minorities in Germany uses a definition that enumerates the same traits that are used in theory for defining national minorities in general, and is not specific for autochthonous ones. See: https://www.minderheitensekretariat.de/fileadmin/user_upload/PDFs/2018-02-14_Folder-englisch-MS-2016.pdf

11 Ana Horvat: *Autohtone nacionalne manjine i ustavne promjene 2009-2010,* u: Zbornik Pravnog fakulteta u Zagrebu, 2010/2, pp. 555-585, at p.562. [Autochthonous National Minorities and Constitutional Changes of 2009-2010], in: Collected Papers of Zagreb Law Faculty, 2010/2. pp. 555-585, at p.562). Available online: https://hrcak.srce.hr/51988

12 The minimal length is at least 2 generations of a minority members present in the host country. Hungary explicitly requires the length of at least 100 years.

status and special rights as the Italian and Hungarian communities,[13] their arguments for such stand have not been recognized so far.

The Roma community enjoys a different kind of special status. The formal difference between the Italian and Hungarian community on one side and Roma community on the other is that the former are nominated in the constitution as national communities, whereas the latter is labeled as a community. The Roma community is also an autochthonous ethnic group under the constitution but does not enjoy special rights guaranteed by the constitution to the Italian and Hungarian autochthonous communities in Slovenia. The constitution does not enumerate special rights of the Roma community and its members as it does in respect of the autochthonous minorities but provides that their status and some special rights are to be regulated by a special statute.[14] This was done in 2007 by adopting the Act on Roma Community in the Republic of Slovenia[15], which regulates the status and lists some special rights to this ethnic group. Under the Act the Roma community is considered autochthonous, whereas their special rights are to be prescribed by statutes governing particular areas. The Act provides that the Republic of Slovenia ensures the exercise of special rights in the field of education, culture, employment, spatial planning and environmental protection, health and social care, information and co-decision-making in public matters relating to members of the Roma community.[16] Statutes regulating the enumerated fields must elaborate special rights of the Roma in those areas. Individual members of the Roma community enjoy special rights in multiethnic territories where they reside. However, unlike the Italian and Hungarian minorities the population of Roma is not concentrated in particular territories but rather scattered over the country. Besides, many Roma do not register as members of the Roma community in the census, so the number of registered members of Roma community is lower than the requirement set by legislation which prevents this minority from enjoying the level of protection that it could achieve according to the constitution. Finally, rights guaranteed by the constitution apply only to the members of Roma community who have the autochthonous status, while the rest of Roma (e.g. those who migrated to Slovenia in the 1990's) are not entitled to the special protection.[17]

13 See e.g. Svetlana Vasović-Mekina: *Slovenija i manjine – priznati i nepriznati,* Vreme br. 581, 21. 02. 2002. [Slovenia and Minorities – Recognized and Unrecognized], in: Vreme no. 581, 21. 02. 2002. Available online: https://www.vreme.com/cms/view.php?id=308400; Svetlana Vasović-Mekina: Manjine – državna tajna, Vreme br. 741, 17. 03. 2005. [Minorities – State Secret], in: Vreme no. 741, 17. 03. 2005. Available online: athttps://www.vreme.com/cms/view.php?id=409533; D. Su./HINA: Hrvati u Deželi: Dajte nam konačno status autohtone manjine [Croats in Slovenia: Give Us Already the Status of Autochthonous Minority], T-portal, 06. 04. 2018. Available online: https://www.tportal.hr/vijesti/clanak/hrvati-u-dezeli-dajte-nam-konacno-status-autohtone-manjine-foto-20180406/print

14 The Constitution of Slovenia, Art. 65.

15 The Act on Roma Community in the Republic of Slovenia, Official Gazette of RS, no. 33/07.

16 *Ibid*. Art. 3.

17 Antonija Petričušić: *Slovenian Legislative System for Minority Protection*. In: Noves SL. Revista de Sociolinguistica, Autumn 2004, pp. 1-9, at p. 2.

Other national communities[18] are not considered autochthonous and thus they enjoy general constitutional rights guaranteed to all citizens, but no additional special rights granted by the constitution or sectoral statutes to the members of autochthonous ethnic groups. Any changes in this direction would require amendments to the Constitution (*nota bene*, one of the arguments against proposals to widen the circle of autochthonous communities enumerated in the Constitution states that it would be impossible to reach the required majority in the Assembly for such a change). In order to address the issue of new minorities, namely those that migrated to Slovenia from other republics during the existence of Yugoslavia (Albanians, Bosniaks, Montenegrins, Croats, Macedonians and Serbs), whose rights are not regulated by the constitution, the State Assembly of Slovenia adopted the Declaration of the Republic of Slovenia on the Status of national communities of the Nations of Former Yugoslavia in February 2011.[19] At the beginning of 2018 the draft Act on the Implementation of Collective Cultural Rights of National Communities of the Nations of the Former Socialist Federal Republic of Yugoslavia in the Republic of Slovenia was prepared and sent to the parliamentary procedure, and is still pending.[20]

The Slovenian Constitution contains a rather extensive list of special rights guaranteed to autochthonous ethnic communities and their members. They include the rights to freely use their national symbols and establish their organizations; to develop research and publishing activities in order to preserve their national identity; the right to education in their own language and to conceptualize such education, while the law defines the areas in which bilingual education is obligatory; the right to maintain relations with their kin-states and people; the right to establish autonomous national communities in the territories where they live, and to which the state may convey certain tasks from its jurisdiction and related budgetary funds. They are guaranteed direct representation in the representative bodies of multiethnic local communities and in the State Assembly.[21] Along this line, Article 80 of the Constitution expressly provides that one representative of each of the Italian and Hungarian national communities shall be elected to the State Assembly. The status and the enjoyment of rights of the two autochthonous communities in the territories they inhabit, the obligations of local communities in this respect, and the rights that members of autochthonous communities enjoy even beyond territories where they live are regulated by the law. The rights of both ethnic communities and their members are additionally fostered by the guarantees of their rights regardless of the number of their members. No general legal act that relates to the enjoyment of rights or the status of autochthonous national communities may be enacted without consent of their

18 Žagar divides those other ethnic minorities and their members, the common trait of which is that they have the citizenship of Slovenia, in two groups: very small autochthonous ethnic groups (or rather their remnants), and non-autochthonous minority groups who migrated into Slovenia relativelly recently, mostly since 1960's, which include members of national communities from other republics of former Yugoslavia who migrated to Slovenia („immigrant" or „new" minorities). Mitja Žagar: *Položaj i prava nacionalnih manjina u Republici Sloveniji* [Status and Rights of National Minorities in the Republic of Slovenia]. In: Politička misao, 2001/3, pp. 106–121, at p. 111.

19 Declaration of the Republic of Slovenia on the Status of National Communities of the Nations of Former Yugoslavia in the Republic of Slovenia, Official Gazette of RS no. 7/11.

20 The text of the current version of the draft act is available online at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7844

21 *Ibid*. Art. 64, Par. 1-3.

representatives, which is effectively a veto-right of the minorities in respect of any law that deals with their guaranteed rights.[22]

According to Art. 12 of the Constitution, besides Slovenian language the languages in official use in the local communities where members of the two autochthonous communities live are also the Italian and Hungarian language and alphabet, respectively. There are 30 bilingual settlements and 3 bilingual municipalities where Hungarian is in official use, and 25 settlements in 4 municipalities where Italian is in official use.

Many laws regulating various areas contain provisions that elaborate relevant special rights of autochthonous minorities in those particular fields. Particularly important are the Act on Self Governing National Communities,[23] which regulates the status and special rights of the Italian and Hungarian national communities in Slovenia, and the Act on Roma Community in the Republic of Slovenia,[24] which defines special rights of the Roma community and their members, their participation in enjoying those rights, and the authorities of state and local organs in the effective enjoyment of special rights.

3. Relevant law relating to minority rights in Croatia

Fundamental principles of the constitution of Croatia state that Croatia is a nation state of Croatian people and state of the members of national minorities having Croatian citizenship. Altogether 22 national minorities (plus others) are expressly enumerated as those who are guaranteed equality with the citizens of Croatian nationality and enjoyment of national rights in accordance with democratic norms of the UN and countries of the free world.[25] The list of constitutionally guaranteed rights of national minorities is much shorter. Besides general warranty of equality for all members of national minorities, only a few rights are explicitly guaranteed by the constitution to all national minorities: freedom to express their national belonging, freedom to use their own language and alphabet, and cultural autonomy. In addition, besides general electoral right a special right to elect their representatives to the Croatian Assembly may be granted to members of national minorities by a statute. Finally, the key provision is that the equality and protection of rights of national minorities are regulated by a constitutional law adopted in the procedure for adopting organic laws.[26]

Organic laws work out the most important constitutional matters (including constitutionally guaranteed human rights and fundamental freedoms), and the conditions for their adoption are stricter than those for regular laws. However, organic laws that regulate the rights of national minorities must be adopted by a qualified 2/3 majority of all deputies,[27] which is the highest threshold prescribed for the adoption of laws by the Croatian

22 *Ibid*. Art. 64, Par. 4-6.
23 The Act on Self Governing National Communities, Official Gazette of RS no. 65/94 and 71/17.
24 The Act on Roma Community in the Republic of Slovenia, Official Gazette of RS no. 33/07.
25 Constitution of the Republic of Croatia, Fundamental Principles, section 2, Narodne novine (Official Gazette of Croatia) no. 56/90., 135/97., 113/00., 28/01., 76/10. and 5/14., Constitutional Court of Croatia, 15. January 2014.)
26 *Ibid*. Art. 15, Par. 1-4.
27 *Ibid.* Art. 83, Par. 1.

constitution,[28] except for the Constitutional Act on the Constitutional Court which is adopted in the procedure prescribed for the adoption of the constitution which makes it of the same rank as the constitution itself.[29] Because of this requirement the statutes governing rights of national minorities are the highest ranking ones, immediately after the constitution. They are not easily amended or altered so the guarantees contained within are strong, and their rank in the hierarchy makes those guarantees quite constitutional-like.

The Constitutional Law on the Rights of National Minorities was adopted in 2002.[30] It gives a definition of a national minority,[31] and contains provisions that enumerate the rights of national minorities, conditions for their enjoyment, and in some cases the measures of positive discrimination giving an advantage to their members if otherwise they could be discriminated in enjoying certain rights. The enumerated rights pertain to various areas and include the right to freely declare one's belonging to a national minority, a ban on discrimination because of such belonging, and guarantees of equality before the law. The law prescribes that conditions for enjoyment of certain rights may be provided by other special laws or may depend on the share of the minority in the population on the part or in the whole of the state territory, on the acquired rights, or on international agreements that make a part of the internal legal system of Croatia. It bans any measure that changes the structure of the population in areas inhabited by members of national minorities, providing that those measures aggravate the enjoyment or limit the rights and freedoms prescribed by this constitutional law or other special laws.[32]

Further on, the constitutional law guarantees special individual or collective rights to members of national minorities, particularly to use their own language and alphabet (in private, in public and for official purposes); the right to education in their own language and alphabet; to use their national symbols; the right to cultural autonomy through preservation, development and expression of their own culture; the right to exercise their religion and to establish religious communities with others; to access means of public communication and to perform activities of public information in their own language and alphabet; to organize and associate with others in order to achieve common interests; to be represented in the representative bodies at state and local levels, and in administrative and judicial bodies; to participate in the public life and administer local affairs through their councils and representatives; to be protected from any activity that may endanger their survival and enjoyment of their rights and freedoms.[33] Provisions of laws that regulate rights of national minorities must be construed and applied with respect for the members of minorities and Croatian people, and with understanding, solidarity, tolerance and dialogue among them.[34]

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28 Besides this, 2/3 majority is required only for a parliamentary decision about the change of state borders.

29 Constitution of the Republic of Croatia, Art. 127, Par. 1 and 2.

30 The Constitutional Law on the Rights of National Minorities, Narodne novine (Official Gazette of Croatia) no 155/2002. and 47/2010. – Decision of the Constitutional Court no. 80. of 28.06.2010. and no. 93. of 10.08.2011.

31 Art. 5 defines national minority as a group of Croatian citizens whose members traditionally inhabit the territory of Croatia, who share ethnic, linguistic, cultural or religious characteristics different from other citizens, and a wish to preserve those characteristics.

32 Constitutional Law on the Rights of National Minorities, Art. 4.

33 *Ibid*. Art. 7.

34 *Ibid*. Art. 8.

The law further elaborates some concrete rights and conditions for their enjoyment. In some cases the enjoyment of rights is made dependent on the share of the members of particular national minority in the population in the respective territory (e.g. the right to the official use of their language and alphabet, the right to representation). Sometimes the law prescribes affirmative measures to the advantage of members of national minorities in order to facilitate their exercise of certain rights, some of which have been challenged before the Constitutional Court. The law also regulates the right of national minorities to elect their representatives and councils who participate in the public life and administration of local affairs, specifies the criteria for their election and composition of councils, their authorities, funding and functioning, while the fourth section regulates those issues in respect of the Council of National Minorities that is established on the state level.

Many statutes that regulate enumerated areas also contain provisions that provide some kind of preferential treatment to members of national minorities. Some of them deal exclusively with rights of national minorities in certain areas (for instance the Act on Education in the Language and Alphabet of National Minorities,[35] Act on the Use of Languages and Alphabet of National Minorities in the Republic of Croatia[36]), while others grant special rights to national minorities in the matters they govern (such as the Act on the Election of Deputies to the State Assembly,[37] or Act on the Election of Members of Local and Regional Assemblies[38]). Besides the constitutional law on rights of national minorities, certain provisions of these and other special statues were also an object of review by the Constitutional Court of Croatia.

4. Comparison of Slovenian and Croatian constitutional courts practice regarding special rights of national minorities

This chapter compares relevant decisions by the Constitutional Court of Croatia (CCC) and by the Constitutional Court of Slovenia (CCS) in matters where special rights and/or positive measures to the benefit of national minorities were the subject of review of constitutionality. The analysis is directed primarily at the courts' understanding of positive discrimination that can be derived from those decisions, and their interpretations of the admissibility of particular measures of the kind in various fields of life.

4.1. The right to representation and the right to be elected for public offices

The representation of national minorities in the state, local and regional representative bodies is an important element of their participation in decision-making and in public life. On the other hand, because of their minority status in most cases national minorities

35 The Act on Education in the Language and Alphabet of National Minorities, Narodne novine (Official Gazette of Croatia) no. 51/00 and 56/00.

36 The Act on the Use of Languages and Alphabet of National Minorities in the Republic of Croatia, Narodne novine (Official Gazette of Croatia) no. 51/00 and 56/00.

37 The Act on the Election of Deputies to the State Assembly, Narodne novine (Official Gazette of Croatia) no. 116/99, 109/00, 53/03, 69/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, 19/15, 104/15 and 98/19.

38 The Act on the Election of Members of Local and Regional Assemblies, Narodne novine (Official Gazette of Croatia) no. 33/01, 10/02, 155/02, 45/03, 43/04, 40/05, 44/05, 44/06 and 109/07.

would be underrepresented or would have no representatives at all if general rules related to elections, distribution of seats and participation in decision making in representative bodies applied to them in the same manner. Thus various models have been developed with the aim of securing at least a minimal representation of national minorities in such bodies and seeking to prevent the terror of the majority over the minority. Both Croatia and Slovenia apply a variant of a model of reserved seats in the parliament as a form of positive discrimination in favor of minorities,[39] and constitutional courts of both countries had to deal with some controversies arising from the model applied.

In Croatia the Constitutional Law on the Rights of National Minorities guarantees the right to representation of national minorities in the State Assembly and in the local and regional assemblies. The number of guaranteed seats depends on the share of a particular minority in the total population of a respective territorial unit. The Constitutional Law also prescribes the criteria to calculate the number of those representatives and the procedure for filling those seats, while statutes governing the elections to representative bodies on various levels also contain provisions related to details in this issue. In practice there were several occasions where applications were filed to the CCC because of the alleged violation of this right, or its alleged overbroad and thus unconstitutional application.

In 2011 the CCC decided upon several applications that challenged the constitutionality of multiple Articles amending the Constitutional Law on the Rights of National Minorities,[40] and repealed its Article 1.[41] The contested Article introduced two models of positive discrimination of national minorities: those exceeding 1.5% in the total population, using general electoral right, elect at least three representatives from the lists of minority political parties or lists put together by voters belonging to the minority, while members of minorities who do not exceed this limit may cast two votes – one using their general electoral right, and the other using the special right to elect the guaranteed five representatives of national minorities in a separate electoral unit. Only the Serb minority passes the 1.5% threshold (4.5% at that time). Several applicants challenged this Article generally stating that this amendment was discriminatory and thus unconstitutional. The CCC identified three constitutional issues to be resolved: 1. Is it constitutional to guarantee certain number of seats to national minorities within the framework of the general electoral system based on a general and equal electoral right? 2. Is it constitutional to grant an additional vote in the elections only to members of national minorities? 3. Is it constitutional to grant the members of small minorities one vote more than to members of the largest minority in Croatia?

The CCC found that the text of the challenged Article was unclear and allowed for opposite interpretations, so in order to decide these issues the CCC looked into the Constitution as a whole, and its fundamental values among which is the respect for and protection

39 More on these models see in: Dragan ĐUKANOVIĆ: *Izborni sistemi u zemljama nekadašnje Jugoslavije* [Electoral Systems in Countries of Former Yugoslavia], In Međunarodni problemi no. 2006/4, Belgrade, pp. 513-536, at pp. 518-521.

40 Constitutional Law amending the Constitutional Law on the Rights of National Minorities, Narodne novine (Official Gazette of Croatia) no. 80/10.

41 Decision of the CC of Croatia (further on CCC decision) U-I-3597/2010 (U-I-3847/2010; U-I-692/2011; U-I-898/2011; U-I-994/2011) of 29 July 2011.

of rights of national minorities.[42] As for the first issue, the CCC deemed that guaranteeing three deputies to largest national minority within the general electoral system divides the Croatian people in two parts based on their (non) belonging to a particular national minority: the Serb minority makes up its special lists of candidates, but all the Croatian citizens regardless of their national belonging may vote for those, or any other general lists. Such a solution primarily contributes to a political instead of a constitutionally allowable goal (achieving equality of the minority with the majority) and is unconstitutional as such.[43] Election of a guaranteed number of Serbian representatives must be done either outside the general electoral system or by introducing affirmative measures into it. As for the second issue the CCC concluded that an additional vote to members of national minorities is in breach of the equal electoral right of all citizens even more than granting guaranteed seats in the parliament, and annulled that section of the contested Article as disproportionate.[44] As for the third issue, the fact that small minorities are given an additional vote need not mean that the large minority is discriminated against; in the current electoral system small minorities enjoy an exclusive active and passive electoral right within the separate electoral system, while the large minority enjoys only the exclusive passive, but not an exclusive active electoral right, which also might be to the advantage instead of to the detriment of the large minority. Thus CCC found that an extra vote for members of small minorities in comparison with the large one is not contrary to the constitution.[45] It stated that the system of guaranteed seats for minorities within the general electoral system violates the constitutionally guaranteed equal electoral right of all citizens, and gave prevalence to the general constitutional electoral right over the special right of the minority to elect its representatives within the framework of the general electoral system. Accordingly, in this case the CCC gave priority to a guarantee of one right contained in *lex generalis* (equal vote of all citizens in general elections) over the other provided for by *lex specialis* as a positive measure (the right of national minorities to a guaranteed representation in representative bodies).

In 2013 the CCC decided two more cases related to electoral disputes in regional elections. The Constitutional Law on the Rights of National Minorities grants one seat in regional assemblies to minorities who participate with at least 5% but less than 15% in the total population, but prescribes that local and regional authorities may set a lower threshold for the guaranteed seat for minorities, or may grant more seats to minorities than what they would be entitled to according to their size.[46] As an additional measure of positive discrimination the Act on Local Elections contains a formula for calculating the number of guaranteed seats for minorities, according to which minorities may get a seat (or more) in the assembly even if their share in the population is under 5%.[47] Besides, each local unit may guarantee one or more seats to national minorities on its territory regardless of the share of the minority in the population of that unit.[48] The number of seats for each

42 *Ibid*. Art. 28.
43 *Ibid*. Art. 32.
44 *Ibid*. Art. 34, 35.
45 *Ibid*. Art. 58.
46 Constitutional Law on the Rights of National Minorities, Art. 20, Par. 2. and Art. 21.
47 The Act on Local Elections, Narodne novine (Official Gazette of Croatia) no. 144/12, 121/16, 98/19, 42/20, Art. 104, Par. 1.
48 *Ibid*. Art. 105.

national minority that meets the requirements for entering the assembly is to be published on the internet page of the competent administrative body before the elections.[49]

The first case before the CCC was initiated because of alleged irregularities in the elections for the assembly of Zadar district.[50] The Serb minority, which made less than 5% of the district population, did not win any seat in the general elections. The District Electoral Board applied the rules of minority representation under privileged circumstances from the Act on Local Elections and assigned one seat to the Serb minority. The applicant claimed that the representative of the Serb national minority was elected contrary to relevant electoral legislation since the share of Serbs was under the limit prescribed by the Constitutional Law. The CCC rejected the application as unfounded because it ignored the mentioned formula from the Act on Local Elections according to which the Serb minority was entitled to one seat in the regional assembly.

In another case that originated in the regional elections in Brodsko-Posavska district the issue was inverted – the representative of the Serb minority was not elected to the regional assembly in the general elections, while the Regional Electoral Board found that this minority did not meet the requirements for a guaranteed representative because their share in the total population (2.6%) was under the prescribed share of at least 5%.[51] Before the elections the Ministry of Administration published on its internet page that the Serb national minority in this district is entitled to one representative. The CCC found that the Electoral Board erroneously applied the relevant law. It disregarded the information from the Ministry's internet site, and instead of the formula in the Act on Local Elections it applied the stricter general provision from the Constitutional Law on the Rights of National Minorities. For those reasons CCC annulled the Board's decision on the results of the elections and ordered the Board to publish a new decision which includes one representative of the Serb minority. In both cases the CCC upheld the measures of positive discrimination that regulate the representation of minorities in local and regional assemblies under privileged circumstances, and thus enabled the entry of minority representatives into regional parliaments.

Closely related to the previous issue is the election of other officials, i.e. guarantees to members of national minorities to participate in the executive and judiciary. The CCC has decided a number of cases related to the election of judges and public prosecutors. The Constitutional Law prescribes that national minorities are guaranteed representation in the state and local executive bodies and in the judiciary, with respect to the relevant special law and employment policy, minority's share in the population, and vested rights of the minorities. If the candidates evenly satisfy the conditions, precedence in filling those posts is to be given to representatives of national minorities.[52] This positive measure was challenged before the CCC as allegedly discriminatory against Croat majority. The CCC stressed that this advantage is a special positive measure introduced intentionally to favor particular groups with the aim of removing their actual inequality arising from their belonging to minority. The legislator was authorized to prescribe the mentioned measure,

49 *Ibid*. Art. 104, Par. 3.
50 CCC decision U-VIIA-3004/2013, 26 May 2013.
51 CCC decision U-VII-3122/2013, 4 June 2013.
52 Constitutional Law on the Rights of National Minorities, Art. 22.

which is considered justified until reasons for its introduction exist, and if it does not violate the principle of proportionality from Art. 16 of the Constitution. Thus it does not amount to discrimination that is forbidden under Art. 14, sec. 2 of the Constitution.[53] The CCC upheld the use of positive measures in this case, but its reasoning shows a reserved stand towards the application of positive discrimination in practice which is deemed justified only within rather strict limits prone to further interpretation.

The CCC had several opportunities to test this stance in practice. Members of national minorities who were not selected for the post of a judge or a public prosecutor and who unsuccessfully appealed to the Administrative Court filed applications with the CCC arguing that their special right to precedence under equal circumstances was violated by the selection of the majority member. In several decisions the CCC reiterated that it normally does not determine whether the court correctly established the circumstances and assessed the evidence, but only if the applicant's constitutional rights were violated.[54] Some authors note that the CCC has not established a consistent set of basic principles in respect of the limits of its engagement in the content of the challenged individual act, but from its practice follows that it will react whenever the decision has no foundations in the material law.[55] In cases dealing with this issue the CCC restricted its review to the legality of the procedure before competent bodies, while refraining from the analysis of other potentially relevant aspects of the concrete case. It upheld decisions on the selection of a majority candidates in all related cases. As a general rule, it accepted the findings that the majority candidate had some advantage over the minority candidate, so they did not evenly satisfy general and special conditions for the post.[56] Therefore their national belonging was irrelevant, i.e. there was no grounds to apply positive measures in those cases. CCC also found that the right of minority candidates to challenge such decisions before the Administrative Court was not violated since the courts' explanations of decision upon complaint were not arbitrary.[57] So, the CCC construed positive discrimination measures restrictively, as they may be applied only where candidates are even in all other relevant elements. It is of course a positive measure, but the requirement for its application makes it applicable in a very limited number of cases. On the other hand, extending the criteria for equal position beyond general conditions to special ones (which may vary), the CCC basically narrowed the probability of applying positive discrimination in cases related to the selection of officials.

53 CCC Decision U-I-2767/2007, 31. March 2009; also: U-I – 402/2003 and U-I-2812/2007, 30 April 2008 (Initiative for the review of constitutionality rejected as unfounded).

54 E.g. CCC decision U-III-4079/2010, 17 November 2010; U-III-1286/2012, 11 December 2014.

55 Dubravko Ljubić: *Granice ustavnog sudovanja iniciranog ustavnom tužbom.* [Limits of Constitutional Adjudication Initiated By a Constitutional Complaint]. In: Zbornik radova Pravnog fakulteta u Splitu (Collection of Papers of the Split Law Faculty), year 50, 2013/1, pp. 159-176, at p. 163.

56 CCC decisions U-III-1897/2013, 5 March 2015 (better results of the selected candidate in the test of knowledge); U-III-4681/2008, 30. June 2010; U-III-3862/2010, 23 May 2012 and U-III-2989/2010, 31 May 2012 (richer and/or more relevant previous working experience of the selected candidate); U-III-1286/2012, 11 December 2014 (fulfillment of additional special requirements besides general ones); U-III-5760/2008, 17 November 2010 (previous work and capabilities of the candidate who belongs to national minority do not secure advantage in his favour in comparison with other candidates, no grounds for the application of affirmative measure).

57 CCC decision U-III-4079/2010, 17 november 2010.

As for Slovenia, the CCS decided a case in this field in 1998 when it reviewed the constitutionality of several legal acts regulating the elections for assemblies on state and local levels. The Act on the Elections for the State Assembly and the Act on Local Elections[58] prescribe that members of the autochthonous Italian and Hungarian national communities are entitled to cast two votes in the elections – one using the general electoral right to vote for any candidate, and the other using the special right of these national communities to elect their representatives in the assembly. Applicants deemed that this special right of national communities violates the principle of equality of citizens since others may cast only one vote.[59] In addition, Article 22 of the Act on the Registry of the Electoral Right[60] prescribes that separate electoral lists for the election of guaranteed representatives of two national communities are prepared by their boards and confirmed by the competent administrative body; individuals of Italian or Hungarian origin who do not dwell in the areas that have the status of ethnically mixed settlements may also be added to these lists upon their personal request. The applicants argued that this is an unconstitutional extension of special electoral right to non-autochthonous members of national communities.[61]

The CCS noted that the Constitution guarantees autochthonous national communities the right to be directly represented in the local representative bodies and in the State Assembly, which is the source of their right to a guaranteed seat. It allows them to participate in the decision making process regardless of their size or the type of the electoral system, while their constitutionally established right to veto general acts that regulate the rights of national communities ensures that majority representatives may not overpower those of the minority in issues related to constitutional rights and status of national communities. Two reserved seats for the autochthonous national communities in the State Assembly are filled in elections in special electoral units formed in the areas inhabited by their members, from the list which is separate from the general list of voters. The CCS stated that the possibility to cast two votes in these elections is indeed a departure from the principle of equality of electoral rights, but this form of positive discrimination is not contrary to the constitution because the constitution itself instructs the legislator to digress from it for the sake of the protection of the autochthonous national communities. Therefore, the introduction of this special right into the electoral system by the legislator does not violate the constitution.[62] As for the possible extension of this special right to non-autochthonous members of national communities the CCS had to construe the notion of autochthonicity, since dual vote is not granted to all Italians and Hungarians but only to autochthonous members of these communities. However, this term is not defined by law. In the absence of criteria to establish who is autochthonous and given that lists are assembled by the boards of national communities, it follows that autochthonous are those who are on the lists. This may lead to arbitrariness in their composition. The CCS refrained from entering into deliberation on the issue of autochthonicity, but instead concluded that there is a legal gap in the relevant legislation and ordered the legislator to prescribe the criteria for

58 The Act on the Elections for the State Assembly, Official Gazette of RS, no. 109/06, 54/07 – decision of the Constitutional Court, and 23/17; The Act on Local Elections, Official Gazette of RS, no. 94/07, 45/08, 83/12 and 68/17.

59 CCS decision no. U-I-283/94, 12 February 1998, pt. 3.

60 Act on the Registry of the Electoral Right, Official Gazette of RS, no. 46/52.

61 CCS decision no. U-I-283/94, pt. 5.

62 *Ibid*. Pt. 30-37.

validating one's belonging to autochthonous Italian and Hungarian national community. The CCS added that the Constitution prescribes that special rights of the members of autochthonous national communities regardless of the territory they live on are regulated by statute, so the constitution does not prohibit persons who live outside ethnically mixed areas to be counted as members of those communities.

In this case the CCS also deliberated on the constitutionality of Art. 53 of the Statute of the Municipality of Koper which, among others, prescribed that if the Mayor of Koper is not a member of the Italian national community, the Deputy Mayor must be from that community. The applicants argued that persons who are not members of the Italian community are discriminated against because they are prevented from filing their candidacy for the seat of Deputy Mayor.[63] The CCS stated that the constitution does not ban direct representation of national communities in other representative bodies besides state and local ones. Although this solution constitutes a departure from the principle of equality of votes and puts individuals who are not Italians in a less favourable position, such departure is justified from the point of view of special protection of national minorities imposed by the very Constitution and is thus not unconstitutional.[64] In a similar case the CCC found the dual vote of national minorities unconstitutional as it violated the principle of equal electoral right of all citizens. The CCS took a completely opposite stance on the additional vote to members of autochthonous national communities and, consequently, on the aim and limits of positive discrimination measures. In the electoral dispute CCS understood positive discrimination broadly, as legitimate means for achieving equality of all citizens and prevention of discrimination of minorities. The Court's reasoning was that measures such as special rights of minorities as vulnerable social groups are so important that they may prevail even over some general principles, but also need and deserve stronger defense than the rights guaranteed to all. Constitutional provisions allowed for and supported such an interpretation, so in this case the CCS demonstrated a strong inclination towards favorable interpretation of the scope and applicability of measures of positive discrimination.

4.2. Official use of minority language and alphabet

The issue of the official use of minority languages and alphabets is a sensitive one and often a cause for controversies. The regulation of this issue most frequently covers their use in public – in state agencies (courts, administration etc.), in personal documents, toponyms and the like. Language and alphabet are important elements of national identity, and various measures of positive discrimination are necessary to secure their enjoyment. Constitutional courts of both countries have deliberated upon some aspects of this issue.

In Croatia the applicant filed an application to the CCC because his request to has his ID issued as bilingual (in Croatian and Serbian languages and printed in Latin and Cyrilic letters) was rejected. The reasoning stated that he was not entitled to such request since Serbian language and Cyrilic letters are not in official use in the local community where he resides. The applicant argued that members of national minorities in Croatia have the

63 *Ibid*. Pt. 6.
64 *Ibid*. Pt. 47-49.

right to bilingual documents regardless of whether in the community of their residence the minority language is in official use or not, because Art. 9, Sec. 2 of the Constitutional Law on the Rights of National Minorities prescribes no additional conditions for the enjoyment of that right. The CCC, however, pointed out that Art. 9, Sec. 2 of the Constitutional Law must be construed in relation to Art. 12 of the same Law, which prescribes that conditions for the even (*official, note P.T.*) use of minority language and alphabet in local communities are set by the act that regulates the use of minority languages. That Act enumerates conditions none of which was met in this case. Given that relevant Articles of the Constitution, the Constitutional Law, and the Act on the Use of languages all prescribe that the equal use of minority language in local communities is subject to conditions, the CCC concluded that it applies to bilingual documents as well – they may be issued only in local communities that meet those conditions.[65] The CCC did not investigate whether the requirements set by the lower ranking act collide with the formula of unconditional right from the higher ranking act, or whether the right to bilingual documents may be one of those that belong to the individual member of the national minority regardless of the place of his/her residence (for which Art. 9, Sec 2 of the Constitutional Law might give sufficient grounds, and which could be defended from the prospective of positive discrimination). Instead it accepted the concept of territoriality of all national minorities' rights, according to which they apply only in territories where the prescribed general conditions are fulfilled. Thus this decision seems to be an opportunity lost to apply the provision of the Constitutional Law stating that the rights of national minorities... enjoy special support and protection, including positive measures to their benefit.[66]

The CCC decided three cases, two of them on the same day in 2014, relating to the highly sensitive issue of the official use of Serbian language and Cyrillic alphabet in the City of Vukovar which was the site of a siege and numerous victims in 1991 in the war between Croatian and Yugoslav Army/Serbian forces. The first dealt with the issue of whether the Constitution allows a district referendum on the increase of the threshold for the use of rights of national minorities above the one prescribed by Art. 12, Sec. 1 of the Constitutional Law on national minorities' rights[67] (at least 1/3 of the total population). The State Assembly received a motion to announce a state referendum on whether this threshold should be raised from 1/3 to 1/2 of the minority in the total population and passed it to the CCC asking whether such request is in accordance with the Constitution. The key part of the decision relates to the contents of the referendum question which proposed a stricter precondition for the continuation of the use of minority language and alphabet in local communities for the whole territory of Croatia. The CCC stated that obligations of majority towards minorities should be understood as a constant pursuit for balance that secures fair treatment of minorities and avoids any abuse of the majority status. The focus is on the legal obligation of competent state bodies to secure the official use of minority language and alphabet where legal conditions are satisfied. The Constitution explicitly guarantees free use of minority language and alphabet as a vital part of the minorities' identity, which demands tolerance by the majority and constant reminding of the constitutional limits of allowable behavior towards minorities. There is no explicit ban on the increase of the threshold, but the general posture of the Constitution requires that such

65 CCC decision U-III-4856/2004, 12 March 2007.
66 The Constitutional Law on the Rights of National Minorities, Art. 3, Par. 1.
67 CCC decision U-VIIR-4640/2014, 12 August 2014.

increase must be justified by reasons acceptable in a democratic society based on rule of law and protection of human rights. Reviewing the proposal through this filter the CCC found no relevant and sufficient reasons arising from the pressing social need to increase the threshold on the national level. Being without rational grounds the proposed modification is unjustified. Besides, the formulation and content of the proposed referendum question point to a hidden illegitimate goal. On these grounds the CCC concluded that the increase of the threshold would not be in accord with the Constitution. The CCC found it necessary to stress that it is not an arbiter in political issues in the Croatian society, and that their resolution requires political dialogue instead of repressive means. The CCC also obligated the City Council of Vukovar to regulate on the individual rights of members of national minorities to use their language and alphabet, and on the obligations of state and public authorities, in a way that does not encroach on the essence of those rights, and with respect to the needs of the majority Croatian population arising from the still vivid consequences of the Serb aggression and the need for a fair treatment of the Serbian national minority in Vukovar.[68] This part of the CCC's decision is quite controversial, but it is discussed a bit later within the analysis of another linguistic case.

In the second case the Croatian government as applicant contested the constitutionality of an amendment to the Statute of the City of Vukovar regarding conditions for the official use of minority language and alphabet, which the CCC repealed after establishing its unconstitutionality.[69] Article 12, Sec 1 of the Constitutional Law on the Rights of National Minorities sets the 1/3 of the population threshold for the right to official use of minority language. According to the 2011 census in Croatia Serbs made 34.87% of the Vukovar population, so this condition for the official use of languages was fulfilled. However, in November 2013 the City Council of Vukovar adopted several amendments to the city Statute.[70] Amendments to Art. 2 added that Vukovar is the site of distinct piety for the victims of the Homeland War, and that Croatian language and Latin alphabet are in official use in the territory of Vukovar. Grounded on those, the challenged amendment to Article 61 of the Statute prescribed that the territory of the City of Vukovar is exempted from the application of the Act on the Use of Languages and Alphabet of National Minorities in the Republic of Croatia and Article 12 of the Constitutional Law until the requirements from Article 8 of the Constitutional Law are fulfilled.[71] By suspending provisions of relevant higher ranking legal acts for an unspecified period and introducing vaguely formulated conditions for the withdrawal of such suspension these amendments would have prevented the Serbian minority from the use of their language and alphabet as official. The applicant argued that the aim of Art. 8 of the Constitutional Law is to promote diversity and tolerance and may not be used as grounds for arbitrary suspension of the application

68 *Ibid*. Par. III of the dictum.

69 CCC decision U-II-6110/2013, 12 August 2014.

70 Statutory Decision Ammending the Statute of the City of Vukovar, class: 012-03/09-01/01, no. 2196/01-01-13-31 of 4. November 2013, Official Gazette of the City of Vukovar no. 7/13.

71 Art. 8 of the Constitutional Law reads that its articles, and the articles of special statutes regulating rights and freedoms of members of national minorities, shall be construed and applied with the respect for national minorities and for the Croatian people, with the aim to improve understanding, solidarity, tolerance and dialogue among them. Before amendments, Art. 61 of the Statute prescribed that members of the Serbian national minority have the freedom to use Serbian language and cirilic alphabet in social and public life, and in official communication in public affairs within the competences of the City of Vukovar, in accordance with the Constitutional Law on the Rights of National Minorities.

of law in force. Statutes of local communities, as their fundamental legal acts, must be in accordance with the Constitution and positive law; however, the challenged amendment is in direct contrast with highest values of the Constitution and legal order of Croatia, and as such may not exist in a democratic state. After citing the relevant law, the CCC agreed with the applicant's reasoning, and stated that it deems it obvious and unnecessary to explain why the challenged amendment is contrary to the Constitution.

The next case in this area was in fact a continuation of the previous two. The mentioned CCC's referendum decision obligated the City Council of Vukovar to regulate individual rights of members of national minorities to use their language and alphabet and specify the obligations of the authorities in this respect and gave general guidelines for such regulation. In 2015 the City Council adopted a Statutory Decision regulating the even official use of the language and alphabet of the Serbian minority in Vukovar[72] (Statutory Decision). The applicant disputed several Articles of the Statutory Decision which prescribed certain conditions and limitations to the exercise of certain aspects of the official use of Serbian language and alphabet.[73] Article 5 prescribed that the Serb representative in the City Council may obtain the Council's documents in Serbian language and in Cyrillic upon written request containing the specification of requested documents, and that minority representative may exercise this right until the amount allocated in the budget for this purpose for the particular month is spent. Same rules apply to a Deputy Mayor from the Serbian minority in respect of documents from the Mayor's office. Article 6 stated that the City shall issue transcripts of local documents in Serbian and in Cyrillic to members of Serbian minority living in Vukovar who submit a written request and prove their legal interest for that. Bilingual headings in such documents are printed in letters of the same size, while in bilingual stamps letters shall be of the same size when conditions from Article 61, Sec. 3 of the Statute are fulfilled.[74] Article 7 stated that collective rights of the Serbian minority shall be ensured when conditions from Art. 61, Sec. 3 of the City Statute are met. The CCC found that by introducing conditions for the enjoyment of these minority rights the contested Articles contradict the provisions of the Constitutional Law on the Rights of National Minorities, the Act on the Use of Minority Language and Alphabet in Croatia and the Constitution of Croatia, and repealed their respective parts as unconstitutional. As for conditions for introducing collective rights the CCC found that they are not contrary to the Constitution and relevant statutes since they permit gradual introduction of collective minority rights with respect for the needs of the majority population, but the CCC also stated that such regulation may not be prolonged indefinitely and ordered the City Council to adopt a decision that regulates the way of widening the scope of individual and collective rights of the Serb minority in Vukovar with those prescribed by the law.

Relying on the Constitution and its fundamental values in the first two linguistic cases, the CCC demonstrated readiness to support and provide protection for special rights of

72 Statutory Decision on the Enjoyment of Equal Official Use of the Language and Alphabet of the Serbian National Minority in the City of Vukovar, 17. August 2015, Official Gazette of the City of Vukovar no. 7/15.

73 CCC decision U-II-1818/2016, 2 June 2019.

74 The cited article of the Statute of Vukovar stated that each October City Council of Vukovar shall review the acchieved level of understanding, solidarity, tollerance and dialogue amond citizens… and decide whether to broaden the individual rights guaranteed to members of Serbain minority in Vukovar with additional rights from the Act on the Use of Minority Language and Alphabet in Croatia.

minorities where defined conditions in respect of the size of the minority were met. It did so to some extent in the third case too by annulling the sections that introduced additional conditions and limits to the enjoyment of special rights, but refrained from dismissing provision that enabled delays in the introduction of other rights already enumerated by the law. The CCC explained that part of its decision by reasons that are rather of political than legal nature, and tacitly allowed that the enjoyment of minority language rights may be delayed and subjected to limitations the removal of which depends on the current level of tolerance between the majority and minority. In other words, referring to political concerns the CCC did not sustain the stand on an unconditional and full enjoyment of guaranteed linguistic rights of minorities. As stated in the partially dissenting opinion of judge Abramović, the CCC effectively gave permission to the authorities in Vukovar to decide which minority rights to official use of languages guaranteed by the relevant statute shall apply in the city, depending on a previous agreement in the City Council; this way guaranteed minority rights were degraded from the constitutional and legal to a mere political category, which is unacceptable and unconstitutional.[75] In another dissenting opinion it was stressed that the flexibility of the legal framework mentioned in the decision may not extend to the measure that local by-laws exclude the application of guarantees contained in provisions of the Constitutional Law and other relevant statutes in the territory of a local community.[76] Some authors concluded that the legal regulation of the rights of national minorities in Croatia is adequate, but problems arise in its implementation.[77]

As for Slovenia, the CCS had also decided several cases related to the official use of languages and alphabet of national communities. In the first case the applicants challenged the constitutionality of Article 1 of the Act on the Protection of Consumers[78] in the part where it ordains business entities in territories inhabited by members of an autochthonous national community to use the language of that community in their communication with consumers, arguing that it puts companies who deal with consumers in those areas in an unequal position in comparison to others, and thus hinders free economic initiative guaranteed by the Constitution.[79] In addition, the obligation applies only to business entities that deal with the consumers, and violates the principle of equality of those entities. The CCS noted that the right to free economic initiative does not mean that every regulation of economic activities is an obstruction of that freedom. The Constitution authorizes the legislator to regulate the exercise of human rights, which in this case produce certain rules regarding the use of languages that businesses in certain territories must respect; the issue

75 CCC decision U-II-1818/2016, dissenting opinion of Judge Abramović.

76 *Ibid*. dissenting opinions of Judges Kušan and Selanec.

77 Goranka Lalić Novak –Tijana Vukojičić Tomić: *Integracija stranaca i manjina u lokalnu zajednicu kao zadatak lokalne samouprave.* [The Integration of Foreigners and Minorities to Local Community as a Task for Local Self-Governance]. Presentation at the annual scientific conference *Citizens, Public Administration, Local Self-Government: Are Trust, Cooperation and Support Feasible?*, Zagreb, 16. February 2016, 6. See also: Aleksandar Vukić: *Položaj Srba u Hrvatskoj u procesu pridruživanja Europskoj uniji* [Status of Serbs in Croatia in the Process of Joining the EU. In: Dragutin Babić – Drago Župarić-Iljić (eds.): Nacionalne manjine kao faktor stabilnosti u međunarodnim odnosima Hrvatske i Srbije [National Minorities as a Factor of Stability in International Relations Between Croatia and Serbia], Institute for Migrations and Minorities, Zagreb, 2010, 169-183; Nada Raduški: *Srbi od konstitutivnog naroda do nacionalne manjine.* [Serbs From the Constitutive People to National Minority]. Serbian Political Thought 2012/2, Belgrade, pp. 443-459 at p. 451.

78 Act on the Protection of Consumers, Official Gazette of RS no. 20/98, 25/98, 110/02, 14/03, 51/04 and 98/04.

79 CCS decision U-I-218/04-31, 20 April 2006.

was not whether this is allowed but whether it was justified in this case. The CCS stressed that the use of languages in business is linked with the protection of autochthonous national communities. When regulating their special rights the legislator is not limited by the principle of equality, and that is justified by the constitutional obligation of the state to protect and guarantee the rights of national minorities. As for the second argument, the CCS noted that the principle of equality does not ban different regulation of certain issue, but only that such differentiation may not be arbitrary. High level of protection of national communities is a prerequisite for their equal participation in all aspects of social life including economy, so the legislator had a reasonable and viable reason for making such distinction in this case. The CCS concluded that this positive measure does not encroach on the freedom of economic initiative nor on the principle of equality and is thus not in contrast with the Constitution.

In another case the applicant of the Italian origin claimed that his right to fair trial was violated because he did not understand the language of the court well enough to comprehend the consequences of his actions in the proceedings, which resulted in the rejection of his claim. The CCS established that all the documents submitted by him through his proxy were in Slovenian, that he rejected the right to use an interpreter or have a trial in Italian language claiming that he understands Slovenian, and that he explicitly withdrew his claim on an occasion when his proxy was not present. On these grounds the CCS found that the applicants' rights were not violated. However, two judges submitted a dissenting opinion in which they disagreed with the decision, arguing that, given the importance of the constitutional protection of these rights, the CCS should have applied positive protection of members of autochthonous national communities instead of relying on the general ban of discrimination because of one's language.[80]

The third decision in this area was, among others, related to the provision of the Act on Societies[81] which provided that the name of a society must be in Slovenian language, and if its seat is in the local community where a language of an autochthonous national community is in official use the name may also be in that language as a translation of the name in Slovenian. The applicant deemed that such a solution is not in accord with the guaranteed equality of languages in official use. The CCS reiterated that guaranteeing special rights to national communities and their positive protection is not contrary with the Constitution. The challenged provision did not prescribe the possibility of exclusive use of minority language in areas where it is in official use, and thus the CCS concluded that it was not in accord with the constitutionally guaranteed rights and gave a year to the State Assembly to rectify that inconsistency.[82]

In the area of linguistic rights of the autochthonous national communities the CCS again demonstrated consistency and firmness to provide high level of their protection. Even if they did not seem to be the central issue of a particular application, the CCS did not hesitate to regard the controversy in question from the point of the protection of special rights of minorities. These special rights were generally understood as rights that need and deserve strong protection, and even in the case where the CCS found no violation

80 CCS decision Up-404/05-13, 21 June 2007.
81 The Act on Societies, Official Gazette of RS, no. 60/95, 49/98, 89/99, 80/04, and 61/06.
82 CCS decision U-I-380/06-11, 11 September 2008.

because the applicant was not able to produce strong arguments in this respect, two dissenting judges deemed that the Court did not apply the positive discrimination provision from the Constitution as the correct one in assessing whether a special right was violated, although it should have done so.

4.3. Education and other issues related to special minority rights

One of the key rights of members of national minorities is the right to education in their own language. Language is the fundamental constituent of individual's national identity and the possibility to attend schools in mother tongue is highly important for mastering it, but education is also crucial for getting to know the cultural heritage of one's national community, its history, tradition and beliefs. Consequently, it contributes a lot in preserving the national identity of the minority members. Different models of education for national minorities have been established in different countries, but their common trait is that minorities usually need additional support and application of positive measures in order to build and maintain an effective and quality system of education for their members. Protecting rights of national minorities in this area may be particularly complex.

The minority educational system in Slovenia is tailored according to the areas where the autochthonous minorities live. The Act on the Organization and Financing of Education[83] prescribes that the language of education in pre-school institutions and schools is Slovenian, in multiethnic territories inhabited by members of Italian community special institutions are established that work in Italian language, whereas in multiethnic areas inhabited by members of the Hungarian community educational institutions are bilingual and work in Slovenian and Hungarian languages. The applicants challenged the constitutionality of the provision on bilingual education in Slovenian-Hungarian territories, arguing that this violates constitutional guarantees of equality before the law because it requires the Slovenian children to put in more efforts into learning than those who attend schools in Slovenian in order to achieve same results.[84] They required that the bilingual education in those territories be replaced with the model applied in multiethnic territories inhabited by the Italians. The CCS pointed out that national communities have a constitutional right to be educated in their own language, while the territories with compulsory bilingual education are set by the law. The proposal to apply the same model as in Slovenian-Italian areas would remove bilingual education completely, and the CCS could not support that. It emphasized that the aim of bilingual education is to provide education in mother tongue to Hungarian children, and the level of education in Slovenian and Hungarian that enables the students to continue their participation in education and in life both in Slovenia and in Hungary. Provision on equality before the law does not mean that the status of different groups may not be regulated differently; however, the distinction may not be arbitrary, but must pursue the constitutionally allowed and rational goal, and must be an adequate means for achieving that goal. The establishment of bilingual schools is required by the Constitution itself, and because of historical circumstances was imposed in the areas inhabited by Hungarians, but not in those inhabited by Italians. School program sets what is to be taught in both and in only one of the languages, so it is not necessary to speak

83 The Act on the Organization and Financing of Education, Official Gazette of RS, no. 12/96.
84 CCS decision U-I-94/96, 22 October 1998.

both languages equally good to be able to learn what is required. The obligation of Slovenian children to learn a minority language applies in all areas inhabited by members of autochthonous national communities, so they are in the same position in bilingual areas as in those where Italians live. Bilingual school does not hinder the right of Slovenian children to use their language and alphabet. The CCS deemed that with regards to the quality of education the applicants did not demonstrate that children in bilingual schools are discriminated against and decided that the challenged provision is not contrary to the Constitution. The CCS upheld the legislation that provided for bilingual education in order to secure the system of education in the language of a minority community that proved to be effective.

As for Croatia, in 2010 the CCC decided a case where the applicant claimed that the provision in the Constitutional Law on the Rights of National Minorities, allowing representatives of national minorities and the Council for national minorities to submit constitutional complaints to the CCC on behalf of the members of national minorities if they deem that their rights were violated, is unconstitutional.[85] The Constitutional Law on the Constitutional Court of Croatia[86] prescribes that everyone may submit a constitutional complaint, providing that the applicant is the holder of the right at issue, and that he/she was the victim of the violation, which does not encompass third persons or organizations who were not victims. After reviewing the enumerated authorities of minority's representatives, boards of national minorities and the Council for National Minorities under the Constitutional Law on the Rights of National Minorities, the CCC established that none of them were vested with the authority to submit constitutional complaints. The CCC concluded that the contested Article extended the circle of persons who may submit such complaints under the Constitutional Law on the Constitutional Court. Given that the Law on the Constitutional Court is higher ranking than the one regulating the rights of national minorities, the CCC concluded that the disputed Article was contrary to the Constitution and to the Constitutional Law on the Constitutional Court and revoked that Article. The outcome is that the representatives and organizations of national minorities may not act on behalf of their compatriots or members to protect their rights. Obviously, no measure of positive discrimination was applied in this case although there was room for that: the Law on Constitutional Court was adopted in 1999, before the Law on minorities' rights (2002), and so the representatives and organizations of minorities from the latter could not have been enumerated in the former; it would be quite logical and to the benefit of the members of national minorities to authorize these persons to submit complaints to relevant bodies, including the CCC; the state is bound by the law to protect the rights of national minorities, and to use positive measures to that end. If it were eager to apply such measure, the CCC might have required the legislator to amend the relevant statute adding such an authority at least to those organizations, but that seems to have been too far fetched.

85 CCC decision U- I – 1029/2007, 1030/2007, 7 April 2010.
86 Ustavni zakon o Ustavnom sudu Republike Hrvatske, "Narodne novine", broj 99/99., 29/02. i 49/02.

5. Conclusive remarks on the Slovenian and Croatian models of positive discrimination

When it comes to the scope and content of the guaranteed rights of national minorities, even fine differences and nuances in formulations related to them sometimes produce very different interpretations in similar cases occurring in different countries, which may seriously affect their enjoyment and implementation in practice either to the detriment, or to the benefit of the members of national minorities. The same applies to measures of positive discrimination, such as certain improvements and/or privileges intentionally introduced to facilitate the enjoyment of certain rights to minorities and their members. In this paper we have dealt with the interpretations of positive discrimination by the Constitutional Courts of Croatia and Slovenia in order to compare their approaches. Constitutions of both countries provide for measures of positive discrimination in respect of minorities. However, the wording of particular Articles, the elaboration of measures by relevant legal acts, some doctrinal concepts or the context (historical, political) in which they are to be applied in practice may strongly affect the interpretation of the scope and validity of measures of positive discrimination in different countries. A look into decisions of two constitutional courts in this area reveals differences between the two models of positive discrimination.

As Žagar notes, the positive concept of protection of autochthonous minorities developed in Slovenia considers minorities as active subjects in the political process and requires the state to have an active role in securing conditions for the enjoyment of rights.[87] The reasonings in the decisions of the Slovenian Constitutional Court show that it has consistently interpreted positive measures extensively, defining no strict limits for their appropriateness. Relying on relevant constitutional provisions it understands positive discrimination as constitutionally allowed means for securing guaranteed minority rights. It construed positive measures as allowed and appropriate in most cases, and generally upheld legislation prescribing such measures. The aim of protecting autochthonous national communities is in the center of its deliberations on the constitutionality of measures intended to improve or at least maintain their current social status. On these grounds the CCS has normally given priority to special rights of autochthonous national communities over certain general rights of citizens. As for controversies related to the autochthonous status of the Italian and Hungarian national communities, the CCS avoided any attempt to define the meaning of autochthonous so far, pointing out that the theory is yet to discuss on this matter, while it is up to the legislator to define it. According to the doctrine the CCS applies regarding positive discrimination, special rights of members of autochthonous national communities are necessary for securing their equality with others in all areas of life, and for creating favourable conditions for the preservation of their national identity; positive measures that pursue that end inevitably produce discrimination in favour of a minority, but if they were reasonable and proportionate to the intended goal the Court consideres them justified. As such, positive measures do not constitute a form of prohibited discrimination. Interpreting positive discrimination widely, in some decisions in this area the CCS found that special rights were justified even where they contradicted

87 Žagar 2001, pp. 113-114. In contrast, within the "negative concept" of minority protection the state intervenes upon a request of an actively legitimized applicant only in the case of concrete violation of an individual right guaranteed by the Constitution of legislation.

the general constitutional principle of equality of all citizens, or where they collided with some other constitutionally guaranteed rights such as the right to receive education in one's own language. In its decisions in this area the CCS further developed and refined the concept of positive discrimination provided for in general terms by the Constitution, and its doctrinal positions are well grounded and argumented. Because of that, the CCS has also remarkably contributed to the implementation of this concept in practice, acting as a reliable protector of special rights of national communities so far.

As for Croatia, its constitutional and legislative approach to the protection of national minorities' rights stands on different grounds and produces a different model of positive protection of minority rights. Under that model special minority rights are regarded vis-a-vis corresponding general rights and with respect of the needs of the majority. The Constitutional Court of Croatia comprehends positive discrimination much narrower than the Slovenian court. In some cases the CCC supported certain measures intended to secure the enjoyment of rights of national minorities under privileged circumstances and did not declare the challenged regulation as contrary to the Constitution. However, it did so restrictively, usually providing for various conditions for the application of such measures and upholding them within certain, sometimes rather strictly defined limits. Relying on some of the constitutional provisions it found it acceptable to put constraints on this concept for various reasons, sometimes by upholding legislation that effectively delays the introduction of certain special rights of national minorities, in other cases by invoking the general principle of equality as subordinate to special rights. In other cases the CCC demonstrated an inclination to restrict the application of special measures, and in defending such a stand it sometimes even resorted to arguments that are rather political than legal. The CCC also stresses that special rights of national minorities are entailed by obligations of the state to secure their enjoyment, but its decisions show that it deems that the activities of the state in this respect should remain within certain limits. Unlike the Slovenian court, the CCC does not regard special rights of minorities as deserving a higher level of protection than others. When deliberating on whether those rights were transgressed, the CCC usually refrained from extensive interpretations of their scope and justifiability. More than once it found that they contradict the principle of equality of all citizens, although positive discrimination by definition produces inequality. In effect, such an approach sometimes reduces the possible reach of measures of positive discrimination. This is not to say that positive discrimination is lacking in the practice of the CCC, but only that in the context of the Croatian legal system the acceptability and scope of positive measures are interpreted more restrictively.

Zsuzsa Szakály:[1]

Intertwined – The Notion of Nation and Identity in the Constitutions of the West Balkan[2]

"Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,"[3]

1. Introduction

The aim of this paper is to analyze the concept of nation and identity in the constitutions of the Western Balkan. The issue of the interpretation of nation and identity connected to the understanding of sovereignty and national minorities, and the choice between cultural and political nation. The constitution is the highest law of a state, so the decisions regarding the above mentioned will be determinative to the law system.

This question earned special attention in the constitutions and legal systems of the former member states of Yugoslavia after the Yugoslav Wars. As the states of the Western Balkans move further with the negotiations of joining the EU, approaching the Copenhagen Criteria becomes more and more crucial. Some of these states are candidate countries – Albania, Montenegro, North Macedonia and Serbia – and some are potential candidates: Kosovo and Bosnia and Hercegovina. The proper respect of the national minorities is part of the criteria. This must appear in the practice and in the written law as well. As I see, the wording of the constitution in the issue of nation, nationalities and identity is relevant as the source for the laws and judicial decisions of the state.

Firstly, I will examine the concept of nation, then the position of the citizens living abroad in this context. Afterwards, I would like to shed light on the issue of the source of sovereignty in the constitutions of the Western Balkan states and the theory of nationality and identity. Then I will examine the minority rights and the EU enlargement negotiations in the constitutional texts. Finally, I will summarize my ideas and results.

The aim is to show the different paths the states took when they drafted the constitutions, albeit there were determining international factors during the adoption.

The first task is to define the scope of the examination. The term "states of the Western Balkans" will be used for the following states: Albania, Bosnia and Hercegovina, Croatia, Kosovo, Montenegro, North Macedonia, Serbia and Slovenia. Clearly, there could be

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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.

3 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992, Preamble

different ways to define the territory of the analysis. Nonetheless, the member states of the former Yugoslavia have the common historical point of view in the question of constitution-making, as these constitutions were adopted after the Yugoslav Wars. Albania was included in the process as a result of the close connection with the other states. The 'Balkans' could mean other states as well, albeit their development differs from these countries, and the shared history and circumstances suggests this distinction.

The various ethnic, religious and political conflicts which caused the wars can be related to different roots.[4] As the Kingdom of Serbs, Croats and Slovenes were formed in 1918, parts from the Austro-Hungarian Empire which had advanced economy and social structure in the time period were united with parts from the Ottoman Empire where the economic and social affairs were on quite a different state of development.[5] The different religions and the awakening national movements also caused concern.[6] The expression "the powder keg of Europe" was in use for this part of Europe. After the dissolution of Yugoslavia, the presentiment proved true: the Balkan Wars showed that the forced union of different nations is dangerous.

In the aftermath of the war, new states emerged. The new states adopted new constitutions, and because of the new state borders, several people became minorities in the new states. If one examines the national populations, the following can be said: there are minorities in the states. The status of the minorities is defined in the constitutions. In my view, the constitution-makers aimed to create rights for the minorities after the Yugoslav Wars. As the tragedies of the Balkan Wars came to the light, the states whose predecessors were involved in the conflicts tried to protect the rights of the minorities in a wide scale.

The texts of the constitutions show this caring attitude towards the minorities. How the other provisions of these constitutions relate to these Articles? The notion of the nation and the source of sovereignty could also affect the position of the minorities as the principles are intertwined.

2. The Notion of Nation

The definition of a nation is a complex issue. Firstly, it must be distinguished from the concept of state, as *"(...) a nation can exist without a state, as a state will not need a nation as a foundation"*.[7]

4 László Heka: *Etnikai, vallási és politikai konfliktusok a Balkán térségében III. A konfliktus kialakulása*. [Ethnic, Religious and Political Conflicts in the Balkans III. The Beginnings of the Conflict]. Pólay Elemér Alapítvány Szeged, 2010. pp. 9-29. [Heka 2010a]

5 László Heka: *Etnikai, vallási és politikai konfliktusok a Balkán térségében I. A deli szlávok és a Balkán.* [Ethnic, Religious and Political Conflicts in the Balkans I. The South Slavs and the Balkans]. Pólay Elemér Alapítvány, Szeged, 2010, pp. 117-118.

6 László Heka: *Etnikai, vallási és politikai konfliktusok a Balkán térségében II. Társadalmi, etnikai, vallási és politikai viszonyok a Balkán térségében*. [Ethnic, Religious and Political Conflicts in the Balkans II. Social, Ethnic and Political Relations in the Balkans]. Pólay Elemér Alapítvány Szeged, 2010, pp. 91-95, 153-212.

7 Gergely Egedy: *Gondolatok a nemzetről. A politikai és a kulturális megközelítés*. [Thoughts about the Nation. The Political and the Cultural Approach]. In: László Szarka –Balázs Vízi –Balázs Majtényi –Zoltán Kántor (eds.): Nemzetfogalmak és etnopolitikai modellek Kelet-Közép-Európában. [Definitions of Nation and Ethnocpolitical Models in central-eastern Europe]. Gondolat Kiadó, Budapest, 2007, p. 70.

Another complication is the definition. As the Resolution on 'Preferential treatment of national minorities by the kin-state: the case of the Hungarian law of 19 June 2001 on Hungarians living in neighboring countries ("Magyars")' stated: *"The Assembly notes that up until now there is no common European legal definition of the concept of 'nation'."*[8] The nation is not strictly a legal issue, as Egedy wrote, *"The nation has closer connection to social psychology and culture, and if we see it as a starting point, then the nation can be defined as a community with common history and culture for the first glance. One important criterium is connected: the principle of territoriality, meaning that the examined community can define its place in a territory which is seen as the community's own country."*[9]

The different ideas and elements could create contradictory definitions in the constitutions of the states as well. The nation could be seen as a population living in a territory of a sovereign state.
A different concept comes from the classic statement of Ernest Renan: *"A nation is a soul, a spiritual principle. Two things which, properly speaking, are really one and the same constitute this soul, this spiritual principle. One is the past, the other is the present. (...) The nation, like the individual, is the outcome of a long past of efforts, sacrifices, and devotions. (...) These are the essential conditions of being a people: having common glories in the past and a will to continue them in the present; having made great things together and wishing to make them again".*[10]

Emmanuel-Joseph Sieyes introduced the new concept of nation in his famous essay "What is the Third Estate?".[11] Since then, the different ideas on nation and nationality created several disputes, as completely contradictory theories were born.[12]

The two typical models are the political and the cultural nation. The states decide which concept to apply while creating a constitution. The choice will determine the concept of the nation. The concept of the political nation has objective criteria, while the cultural nation has subjective criteria generally.

The concept of the cultural nation means that the people who live outside of the borders of the state but have the nationality of the state are part of the nation. The concept of the political nation means that every citizen living in the territory of the state is part of the nation. The choice between the concepts generally happens while drafting the constitution, albeit it is not always clear from the wording of the document. However, the decision

8 Preferential treatment of national minorities by the kin-state: the case of the Hungarian law of 19 June 2001 on Hungarians living in neighboring countries ("Magyars")'Resolution 1335 (2003) p. 10.
9 Egedy 2007. pp. 70-71.
10 Ernest Renan: *"What is a Nation?"*, text of a conference delivered at the Sorbonne on March 11th, 1882. In: Renan Ernest: Qu'est-ce qu'une nation?, Paris, Presses-Pocket, 1992. (translated by Ethan Rundell), Available online: http://ucparis.fr/files/9313/6549/9943/What_is_a_Nation.pdf
11 Emmanuel-Joseph Sieyès: *What is the Third Estate?* (1789) Available online: https://pages.uoregon.edu/dluebke/301ModernEurope/Sieyes3dEstate.pdf
12 Egedy 2007, pp. 71-77.

always has political consequences as it will define the relations with the minorities of the state and the members of the nation who are citizens of another state.[13]

The other side of the coin is the question of the members of the nation who are beyond the borders of the state. If one uses the notion of the cultural nation, they are members of the nation. The question is that which states of the Western Balkan use the definition of the cultural nation?

Albania "assures assistance" for these Albanians.[14] Bosnia and Hercegovina has no definition of the nation. It can be leaded back to the circumstances of the adoption of the constitution of Bosnia and Hercegovina, which was part of the Dayton Agreement.[15] As the typical constitution-makers were not present and the situation in the state was dire,[16] the sensitive topics, like the definition of the nation were avoided. Croatia *"guarantee particular care and protection"* to the members of the cultural nation.[17] Kosovo gives no constitutional mentions to the issue of the nation. Montenegro also avoids the question. The constitution of North Macedonia *"provides for the diaspora of the Macedonian people"* and *"protects the rights and interests of its nationals living or staying abroad"*, also using the notion of the cultural nation.[18] Serbia *"shall develop and promote relations of Serbs living abroad with the kin state."*[19] The Slovene constitution states that *"Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia."*[20] This principle is more suppressed considering the words of the other constitutions which decided on the usage of the cultural nation.

To conclude the different definitions, two groups can be distinguished from the texts of the constitutions: one is not mentioning the question – Bosnia and Hercegovina, Kosovo and Montenegro – and the other is to aid the members of the cultural nation, but on different levels: Albania, Croatia, North Macedonia, Serbia and Slovenia.

As an example, an election process from a state with a mixed nation definition: If one examines the possibility for participating in the elections for the voters who do not have residence in Croatia, they could elect 14 candidates.[21] The national minorities also have

13 Zoltán Kántor: *Egy hamis dichotómia: politikai/kulturális nemzet*. [A False Dichotomy: Political and Cultural Nation]. In: László Szarka –Balázs Vízi –Balázs Majtényi –Zoltán Kántor (eds.): Nemzetfogalmak és etnopolitikai modellek Kelet-Közép-Európában. [Definitions of Nation and Ethnocpolitical Models in central-eastern Europe]. Gondolat Kiadó, Budapest, 2007. p. 80.

14 Constitution of Albania Article 8.

15 The General Framework Agreement for Peace in Bosnia and Herzegovina Initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995

16 Heka 2010a, pp. 30-46.

17 Constitution of Croatia Article 10

18 Constitution of North Macedonia Article 49.

19 Constitution of Serbia Article 13.

20 Constitution of Slovenia Article 5.

21 The process in detail: "The total number of the valid votes in the ten constituencies in the Republic of Croatia shall be divided with 140, which is how many representatives have totally been elected in these constituencies. With the gained results, the number of valid votes in the special constituency shall be divided. The result achieved in that manner is the number of representatives elected in the special constituency. If the result is not a whole number, it shall be rounded to the whole number from 0.5 up and below 0.5 down." C.f.: Act on Election of Representatives to the Croatian Parliament (consolidated wording). Available online: http://aceproject.org/ero-en/regions/europe/HR/Croatia_Act_on_Election_of_Representatives.pdf

the opportunity to elect representatives.[22] Thus, the theory of cultural nation influenced the election methods to create the possibility of voting for the citizens abroad.

To support one of the theories – to choose between the cultural and political definition of the nation is always a choice of the constitution-maker. However, if the issue is absent from the constitutional text altogether, vague or contradictory, there is a possibility for the legislative or the executive power to create the legal background for the question freely.

3. Source of Sovereignty

One of the most important principles of a constitution is the chosen definition of the source of the state sovereignty.

As Jean-Jacques Rousseau wrote in the "Social Contract": *"Those who are associated in it take collectively the name of people, and severally are called citizens, as sharing in the sovereign power, and subjects, as being under the laws of the State. But these terms are often confused and taken one for another: it is enough to know how to distinguish them when they are being used with precision."*[23]

Defining the source of sovereignty has become essential and the legitimate source of supremacy is the people generally. The concept become essential in every democratic constitution as only the people could give legitimacy to the ruler. The functions of a modern state are divided between the different branches of power. Nonetheless, the source of every power must be linked to the people to gain legitimacy.

The importance of the words defining the sovereignty of a state cannot be emphasized enough. The source of the sovereignty generally is the 'people' of the state, albeit the exact choice of words can show the concept of the nation in a state. If we analyze the choice of the states of the Western Balkans in this issue, the following can be stated:

Albania and Kosovo use the term 'people' which is too wide to support the idea of the political or the cultural nation. Bosnia and Hercegovina uses *"Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina*".[24] This idea did not make a clear choice between the political and the cultural nation. The constitution of Croatia uses the phrase *"the people as a community of free and equal citizens"*,[25] so this definition has connection with the political nation. North Macedonia, Serbia and Montenegro use the term 'citizen', these definitions also refer to the concept of political nation. The constitution of Slovenia adopts several different terms: 'citizens, people, Slovene nation, all citizens', which can be confusing. If the constitution uses conflicting terms to define the same issue, the results can cause incomprehension.

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22 Act on Election of Representatives to the Croatian Parliament (consolidated wording), Available online: http://aceproject.org/ero-en/regions/europe/HR/Croatia_Act_on_Election_of_Representatives.pdf , Article 43

23 Jean-Jacques Rousseau: *Social Contract VI.* Available online: https://oll.libertyfund.org/titles/rousseau-the-social-contract-and-discourses

24 Constitution of Bosnia and Hercegovina Preamble

25 Constitution of Croatia Article 1.

Summarizing the types, what can be concluded is that the constitution of Croatia, North Macedonia, Serbia and Montenegro use terms which can be connected to the political nation, while the constitution of Bosnia and Hercegovina, Albania and Kosovo have not made a clear choice between the two concepts. The Slovene constitution uses several different terms to describe the issue which also would not give the answer of the choice between the political and the cultural nation.

It can be seen that the chosen concept of nation cannot be decided only by the text of the constitution of these states, as half of them did not choose between the two concepts at all, some of them use terms which can be described as both, and few of them declared some connection to the political nation, albeit it is not a clear choice, just an indication.

The problematic issue of defining the nation of a state based on a choice between the cultural and the political nation will determine the foreign policy of a state with the states which have citizens from the state as minority. While it could cause certain complication between the states, it can also help to strengthen the connection. As the nation of a state is related to the sovereignty, it will be guarded as a treasure as well, it could be a sensitive issue between the states. Especially in the Western Balkans, where the nationality-based conflicts and war crimes are not at least 100 years old, but from the close memory of several of the citizens of the states. The interactions between the different nationalities show a downturn after the Yugoslaw War, as e.g. the rate of marriages between two different nationalities in Bosnia and Hercegovina diminished largely.[26]

As the concept of popular sovereignty is still used in every democratic state, the decision of defining the source, the "we the people" is up to the constitutional makers, as the constitution determines the source of sovereignty.

4. Nationality

The United Nations created several documents and conventions on the question of different minorities.[27] The Council of Europe created a framework of minority rights protection.[28] The EU also has special provisions for the protection of minorities which will be examined in the subchapter dealing with the EU enlargement issues.

26 Heka 2010a, pp. 39-40.

27 Anikó Szalai: *Anti-discrimination, Protection of Minorities and the Rights of Indigenous Peoples in the UN – Is this a Patchwork or a Fine Embroidery?* Paper prepared for the 2014 Annual Meeting of the Academic Council on the United Nations System, June 19-21, 2014, Kadir Has University, Istanbul, Panel 21: Human Rights Perspectives and Challenges. Available online: https://acuns.org/wp-content/uploads/2013/01/Anik%C3%B3-Szalai-Anti-discrimination-Protection-of-Minorities-and-the-Rights-of-Indigenous-Peoples-in-the-UN-%E2%80%93-Is-this-a-Patchwork-or-a-Fine-Embroidery.pdf , pp. 10-25.

28 Noémi Nagy: *A nemzeti kisebbségek nyelvi jogainak aktuális helyzete az Európa Tanács intézményei tevékenységének tükrében.* [The Current Situation of the National Minorities in the light of the Actions of the European Council]. In: Pro Minoritate, pp. 48-49.

The definition of nationality itself raises a series of questions. The complexity and uncertainty of the possible understandings themselves should have a full scale of examination.[29] Nonetheless, some common characteristics can be agreed on*: "(...) a group of persons in a State who: resides in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity."*[30]

If the constitutional definitions of the nation and the minorities are analyzed in the constitutions of the Western Balkans, the results will show differences. The different terms which are used in the constitutional texts can shed light on the differences of the ideas behind the documents. The constitutions of the Western Balkans use the following terms in question:

Albania, Croatia and Serbia use the term 'national minority'. North Macedonia uses the expression 'nationality', while Kosovo chosen the phrase 'community'. Slovenia has chosen the 'national community' and Montenegro uses two terms: 'minority nations' and 'other minority national communities'.

The expressions nationality, national minority and minority in themselves can cause concern when defining the groups of citizens who are from a different nation then the majority of the population in a state. The phrases used by the examined constitutions vary.

A striking difference could be seen in the language of the Bosnian constitution. The term 'constituent peoples' did not give opportunity to define majority and minority of ethnic groups. Three nationalities have the same position, they are all part of the constitution-making nation: *"Bosniacs, Croats and Serbs, as constituent peoples (along with Others)".*[31] This definition caused some difficulty in the elections in relations with expression 'Others'.

The Sejdic-Finci case revealed the problematic side of this phrasing for the first time: the other nationalities are left out. In the case, a Roma and a Jew citizen of Bosnia and Hercegovina appealed to the European Court of Human Rights as they could not stand for election to the House of Peoples and state presidency, because they were not members of the constituent peoples of Bosnia and Hercegovina. To shed light on the issue, one must understand the legal background of the case. The Bosnian constitution is extraordinary as it was adopted as part of international negotiations, annex to the Dayton Peace Agreement.[32] The Government of Bosnia and Herzegovina was not above to use this as an argument in processes before the ECHR: *"The Government submitted that Bosnia and*

29 Melinda Császár: *Nemzet – jog – identitás A státustörvény végrehajtásának szociológiai vonatkozásai.* [Nation-Law-Identity The Sociological Aspects of the Enforcement of the Status Law]. PhD dolgozat, [Corvinus University of Budapest, Institute of Communication and Sociology.], 2009, pp. 25-35.

30 CDL-INF (1996) 4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3 a.

31 Constitution of Bosnia and Hercegovina Preamble

32 The General Framework Agreement for Peace in Bosnia and Herzegovina Initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995

Herzegovina could not be held responsible for the contested constitutional provisions because its Constitution was part of an international treaty, the Dayton Agreement".[33] The language of the constitution is English. Bosnia and Hercegovina consists of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The head of state position is divided between three members: *"one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska."*[34] The federal parliament of Bosnia and Hercegovina is called Parliamentary Assembly. It consists of two houses, the House of Peoples and the House of Representatives.[35]

Special rules were made to define the sensitive relationship between the 'constituent peoples' to create a balance. Nonetheless, it created ambiguous results, as the other nationalities were banned from the possibility to become a member of the House of Peoples or the state president on the grounds of their ethnicity. Both men had political carrier which could be a foundation for becoming a candidate to the position of a member of the House of Peoples or the state president. The applicants said that these provisions which made them ineligible to stand for election are discriminative. As the ECHR examined the case, they said: *"When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing"."*[36]

There were concerns that changing the system of the elections in Bosnia and Hercegovina may result in chaos. However, *"the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere".*[37]

The ECHR decided that "*the applicants" continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1."*[38]

10 years after the decision of the ECHR, there were still no amendment of the constitution to provide the possibility of standing for election to the House of Peoples of Bosnia or state president.[39] Other cases were also decided by the ECHR with the same results.[40]

33 Case of Zornic v. Bosnia and Hercegovina (Application no. 3681/06)
34 Constitution of Bosnia and Hercegovina Article V.
35 Constitution of Bosnia and Hercegovina Article IV.
36 Case of Sejdic and Finci v. Bosnia and Hercegovina (Applications nos. 27996/06 and 34836/06) 45.
37 Case of Sejdic and Finci v. Bosnia and Hercegovina (Applications nos. 27996/06 and 34836/06) 48.
38 Case of Sejdic and Finci v. Bosnia and Hercegovina (Applications nos. 27996/06 and 34836/06) 50.
39 Cf.: https://www.coe.int/en/web/execution/-/sejdic-and-finci-after10-years-of-absence-of-progress-new-hopes-for-a-solution-for-the-2022-elections
40 Case of Zornic v. Bosnia and Hercegovina (Application no. 3681/06), Case of Pilav Bosnia and Hercegovina (Application no. 41939/07)

In the case of Zornic v. Bosnia and Hercegovina, a former judge of the Constitutional Court applied to the ECHR as she did not declare affiliation with any of the constituent people, she declares her nationality as a "citizen of Bosnia and Hercegovina". As she was not a member of the constitution people, she did not have the possibility of standing for election to the House of Peoples of Bosnia or state presidency.

The ECHR stated the following: *"there are no objective criteria for one's ethnic affiliation (see paragraph 8 above). It depends solely on one's own self-classification. There may be different reasons for not declaring affiliation with any particular group, such as for example intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of Bosnia and Herzegovina."*[41]

The nationality is a sensitive issue, as the self-classification cannot be an obligation, especially in case of losing a right in relation. As the Framework Convention for the Protection of National Minorities defined: "*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 from this choice or from the exercise of the rights which are connected to that choice."*[42] Connected with the self-classification, the ECHR stated: *"The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification".*[43]

Another controversy was revealed when a Bosniac national wanted to be elected for the Presidency from the territory of the Republika Srpska. The existing legal rules excluded this possibility: *"The applicant was faced with two options: to move to the Federation of Bosnia and Herzegovina thereby giving up the possibility to serve his community in the Republika Srpska, or to accept a status of second-class citizen in the Republika Srpska."*[44]

The ECHR examined the legal situation and stated that this part of the law is against the ECHR as well, as *"the applicant could not be elected to the Presidency from the territory of the Republika Srpska considering that he declared affiliation with Bosniacs",*[45] which is discriminative.[46]

The elections of 2022 will be held according to the discriminative rules if there will not be a political will strong enough to change the rules of the elections,[47] and the results of the last elections show the obstacles with the system.[48]

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41 Case of Zornic v. Bosnia and Hercegovina (Application no. 3681/06) 31.

42 Framework Convention for the Protection of National Minorities Strasbourg, 1.II.1995 Article 3 1.

43 Case of Zornic v. Bosnia and Hercegovina (Application no. 3681/06) 31.

44 Case of Pilav Bosnia and Hercegovina (Application no. 41939/07) 28.

45 Case of Pilav Bosnia and Hercegovina (Application no. 41939/07) 11.

46 *"Notwithstanding the differences with Sejdić and Finci, the Court considers that this exclusion is based on a combination of ethnic origin and place of residence, both serving grounds of distinction falling within the scope of Article 1 of Protocol No. 12 (see, mutatis mutandis, Carson and Others v. the United Kingdom [GC], no. 42184/05, §§ 70 and 71, ECHR 2010), and as such amounts to a discriminatory treatment in breach of Article 1 of Protocol No. 12."* Case of Pilav Bosnia and Hercegovina (Application no. 41939/07) 48.

47 Cf.: https://balkaninsight.com/2018/06/04/discrimination-in-bosnian-election-law-continues-06-01-2018/

48 László Horváth: *Választások Bosznia-Hercegovinában – újabb elvesztegetett négy év előtt állunk?* [Elections in Bosnia and Herzegovina – Facing Four Lost Years Again?]. In: Parlamenti Szemle, 2019/1. pp. 80-86, 88-91, 94-97, 101-103.

The notion of nation and nationality could cause great debates and injustices if not used properly and justly. This is still a sensitive issue and the dealing requires kid's gloves. However, a certain degree of cautiousness cannot and should not downgrade the principles of rule of law and democracy. As the Venice Commission stated: *"In both Sejdić and Finci as well as in Zornić, the European Court of Human Rights was quite prepared to accept that there is a relatively wide degree of latitude in relation to the election of the second chamber; the problem was that the total disenfranchisement of certain persons was not required to effect a politically acceptable settlement."*[49]

5. Identity

The concept of nation has a strong connection with the identity. The identity can determine the roots and the picture of the nation as the constitution-makers saw it at the moment of creating the constitution.

As Majtényi wrote: *"(...) if we accept that there is a need for creating a sense of belonging in a political community, then the attempts for the creation inevitably must be connected to the nation."*[50] According to Gary J. Jacobsohn, several constitutions point to the identity, albeit it will be gained through experience.[51] The text itself has the possibility, albeit the parallel practice will be needed. The constitutional text can be a starting point.[52]

The understanding and types of identity has become a favored topic of interest in the last few years, especially in connection with relationship between the EU and the Member States. The definition of the identity itself can become a center of dispute. If one adds the question of which type of identity to analyze, several new questions will emerge. The first what can be examined is the types of identity. One can mention the constitutional identity, the national identity, the constitutional national identity and the identity of the Member States. The definitions are not crystal clear,[53] as the relevant American and European ideas diverge, although the differences converge to each other due to the migration of the constitutional ideas. In Tribl's opinion: *"while the national identity's subject is the political nation, the subject of the constitutional identity is the constitutional system itself."*[54] The constitutional identity can be seen as a sword and as a shield as well.[55] What could be the scope of national identity and constitutional identity?

49 CDL-AD(2016)024 59.

50 Balázs Majtényi: *Hol húzódnak a kisebbségvédelem határai (Nemzetértelmezések és a kisebbségek védelme)* [Where are the Limits of Minority Protection? (Understandings of Nation and the Protection of Nationalities)] In: Regio Kisebbség, Politika, Társadalom. 2004/4, p. 4.

51 Gary J., Jacobsohn: *The Formation of Constitutional Identites* In: Tom Ginsburg – Rosalind Dixon (eds.): Comparative Constituional Law. Edward Elgar Publishing, 2011, p. 129.

52 Jacobsohn 2011. pp. 130-131.

53 Márton Sulyok: *Értelem és érzelem vagy büszkeség és balítélet? Alkotmánybíráskodás és alkotmányos identitás*. [Sense and Sensibility of Pride and Prejudice? Constitutional Jurisprudence and Constitutional Identity]. In: Fontes Juris, 2015/1, pp. 27–39.

54 Norbert Tribl: *Az alkotmányos identitás fogalomrendszere jogelméleti megközelítésben.* [The Conceptual System of Constitutional Identity in a Legal Theory Approach.]. In. Jogelméleti Szemle, 2018/1, p163.

55 Pietro Faraguna: *Constitutional Identity in the EU—A Shield or a Sword?* In: German Law Journal, 2017/7, pp. 1627-1633.

There is no generally acknowledged opinion in this issue, the matrix is confusing, and the different peculiarities of the Member States also must be taken into consideration. The concept of identity in the EU has great significance for the Western Balkans, as in the process of joining the EU they must deal with the questions of sharing the sovereignty and how to protect it. Issues related to the sovereignty are sensitive and can easily cause conflicts. The constitutions of the Member States defined the shared sovereignty in quite colorful ways to protect as much as possible.

The identity became a central issue between the EU and the Member States in the question of sovereignty. The EU started to define the European identity: *"they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity."*.[56] However, the concept has not developed, as *"The argument that the EU is too diverse for a common constitutional identity has resurfaced at various stages of the European integration.",*[57] and it evolved to a dialogue between the Member States and the EU.

The TEU mentions the national identity,[58] and the common values of the Member States.[59] The common values of the Members States could cover the areas of the identity, as the protected values of the national level could be safeguarded on the international and regional level as well. The Treaty of Lisbon created a wave of decisions from the Constitutional Courts in this question, with the leading role of the Federal Constitutional Court of Germany.[60]

The Constitutional Courts of the Member States have a significant role in defining the identity of a state, as the generally vague mentions in the constitutional texts leave a wide range for interpretation. Some Constitutional Courts are active in this role of starting to find the principles of the identity of the state.[61] Other Constitutional Courts decided to choose another path. As an example, the French practice treats the issue as a technical one.[62]

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56 Declaration on European Identity (Copenhagen, 14 December 1973)

57 Pola Cebulak: *European Constitutional Identity "Inside Out": Inherent Risks of the Pluralist Structure*. In: Croatian Yearbook of European Law and Policy, 2012, p. 6.

58 Consolidated version of the Treaty on European Union „Article 4. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

59 Consolidated version of the Treaty on European Union „Article 2 The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

60 Leonard F. M. Besselink: *Constitutional Identity Before and After Lisbon.* In: Utrecht Law Review, 2010/3

61 Constitutional Court of the Czech Republic, Federal Constitutional Court of Germany

62 Réka Sommsich: *Az alkotmányos identitás a francia és a belga alkotmánybírósági gyakorlatban.* [Constitutional Identity in the Jurisprudence of the French and Belgian Constituional Courts]. In: Alkotmánybírósági Szemle, 2018/1, p. 14.

The Constitutional Courts of the Visegrad 4 states – Czech Republic, Hungary, Poland and Slovakia – decided to use this concept to support their national values and system against the European values and system. Every Constitutional Court of the V4 countries interprets the concept with ethnocultural attributes.[63] Moreover, they use it as a limit to the EU powers by stating the supremacy of the constitution.[64] The example of the Federal Constitutional Court of Germany is applied by the V4 countries, albeit they deter from the German path: the aim is not to strengthen the level of protection of human rights and democratic values but to protect the national system against the EU level in some cases.[65]

The controversial question still remains, albeit the PSPP decision of the Federal Constitutional Court of Germany from May 2020 could be seen as a milestone.[66]

If one examines the use of the expression 'identity' in the constitution of the Western Balkans, the first element to recognize is that the constitution of Bosnia and Hercegovina does not contain the expression. This is the only constitution in the region without using it. As it was mentioned above, the constitution of Bosnia and Hercegovina adopted by special means and that left quite an imprint on the text. As the identity is scarce from the constitution, the identity-forming powers were not part of the creation, and the absence of the typical nation-defining and common identity-creating voices makes this constitution differ from others also in this question.

The constitution of Albania mentions the national identity of Albania in the preamble, in Article 3 as part of the basic principles, and the identity of the national minorities are also mentioned in Article 20. The Albanian constitution stated that *"(...) minorities are the bases of this state, which has the duty of respecting and protecting them"*[67], and gives individual and collective rights to them. The national minorities have constitutional rights, and the state has obligation to respect and protect them. The protection of national minorities is a basic principle of Albania.

The constitution of Croatia uses the expression of identity only once, when the *"The millennial national identity of the Croatian nation"*[68] is mentioned in the preamble. As the national identity itself, the concept of nation is also not clear enough in the text of the constitution. The preamble of the Croatian constitution has very extensive wording, with great detail to the events of the glorious past.

The preamble of a constitution could have different purposes. The solemn style of a preamble aims to show the significance of the entire document, and it could also have

63 Kriszta Kovács: *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*. In: German Law Journal, Vol. 18 No. 07 (2017), p. 1716.
64 Kovács 2017, p. 1718.
65 Kovács 2017, pp. 1719-1720.
66 Márton Sulyok –Norbert Tribl: *„A gazda bekeríti házát"? A Német Szövetségi Alkotmánybíróság PSPP döntésének jelentősége és az európai integrációért viselt alkotmányos felelősség realitása.* ['The master pulls a fence around his house'? The Significance of the PSPP Decision of the German Federal Constitutional Court and the Reality of Constitutional Responsibility for European Integration]. In: Európai Tükör, 2020/2, pp. 7-15.
67 Constitution of Albania, Article 3.
68 Constitution of Croatia, Preamble

normative meaning.[69] In the case of Croatia, the aim is to highlight the great events of the past. The preamble almost always has a more symbolic purpose then legal, however, the Hungarian Fundamental Law gave normative power to the National Avowal, the preamble.[70] This is a rare possibility for a preamble; generally their purpose is to create the proper environment for the constitutional text itself.

The Constitution of Kosovo protects the identity of the minorities[71] and the *"(...) national, ethnic, cultural, linguistic or religious identity"* of the people,[72] as they have a wide range of individual and collective rights guaranteed by the constitution itself.[73]

The Constitution of Montenegro provides for the identity of the minorities extensively as well.[74]

The Constitution of North Macedonia held the *"the free expression of national identity"*[75] as a fundamental value of the constitution, as well as the *"ethnic, cultural, linguistic and religious identity"* is also protected.[76] A special issue related to identity is the particular social security rights guarantee for the veterans who, among others, were *"expelled and imprisoned for the ideas of the separate identity of the Macedonian people and of Macedonian statehood".*[77]

The constitution of Serbia protects the identity of the minorities as well[78] and *"(...) undertake efficient measures for enhancement of mutual respect, understanding and cooperation among all people living on its territory, regardless of their ethnic, cultural, linguistic or religious identity."*[79] In my view, this sentence should provide for the protection of the national minorities as well.

The preamble of the Slovene Constitution states that the Slovenes established their national identity and the *"autochthonous Italian and Hungarian national communities and their members"*[80] can preserve their national identity.

Every constitution from the Western Balkans except the constitution of Bosnia and Hercegovina declares the national identity or the identity of the minorities as an important principle of the constitutional system. The national identity of a nation and the national identity of national minorities both have significance in the understanding of a state's

69 Márton Sulyok –László Trócsányi: *Preambulum.* In: András Jakab (ed.): Az Alkotmány kommentárja I. [Commentary of the Constitution I.]. Századvég Kiadó, Budapest, 2009, pp. 90-91.

70 The Fundamental Law of Hungary Article R) *„(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution."*

71 Constitution of Kosovo Article 57

72 Constitution of Kosovo Article 58

73 Constitution of Kosovo Article 59

74 Constitution of Montenegro Article 79

75 Constitution of North Macedonia Article 8

76 Constitution of North Macedonia Article 48

77 Constitution of North Macedonia Article 36

78 Constitution of Serbia Article 14

79 Constitution of Serbia Article 81

80 Constitution of Slovenia Article 64

operations. The states of the Western Balkans show the signs of caring about protecting the national minorities in the texts of their constitutions.

6. Minority Rights and EU Enlargement Negotiations

While one can find treaties of minority rights in both international and regional level,[81] the EU does not have an exemplary system of legal rules of minority protection despite the development of the area in the last decades.[82]

The EU law had an indirect base for a long time without a special directive on minority rights. However, there were supporting rules in the background: the principle of non-discrimination, the value of cultural diversity and the policies on integrating migrants.[83]

The Charter of Fundamental Rights of the EU and TEU mentions "national minorities", which was a progress in the process.[84] The Minority Safepack is a new and ambitious initiative on the protection of minority rights.[85]

The treatment of the minorities in the Member States can be seen on a long scale from ensuring a wide range of collective and individual rights to struggling with the recognition of the rights in the practice. The size of the minority groups can determine the actions of a state, and historical events can also affect the treatment.[86]

The first concrete binding conditions are related to the Copenhagen Criteria, which is the list of basic conditions for the aspiring states to join the EU, contains the protection of minorities. The candidate and potential candidate states must fulfil the conditions to join the EU. The Copenhagen Criteria are the following:

- *"stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;*
- *a functioning market economy and the capacity to cope with competition and market forces in the EU;*

81 As an example: The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992, the Framework Convention for Protection of National Minorities.

82 Varga Csilla: *Eu Minority Protection Policy: Talks about nothing or positive development trends?* In: Iustum Aequum Salutare, 2018/3, pp. 255-260.

83 Bruno de Witte – Enikő Horváth: *The many faces of minority policy in the European Union*. In: K. Henrard & R. Dunbar (eds.): Synergies in Minority Protection: European and International Law Perspectives Cambridge. Cambridge University Press. p. 367.

84 Charter of Fundamental Rights of the European Union „Article 21 Non-discrimination
1.Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2.Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

85 Cf.: http://www.minority-safepack.eu/

86 András Sajó: *Constitution without the constitutional moment: A view from the new member states*. In: International Journal of Constitutional Law, Volume 3, Issue 2-3, May 2005. pp. 256-258.

- *the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union."*[87]

The protection of minorities must reach a certain level before a state can join the EU. However, these criteria were introduced in 1993. The Member States which joined the EU before 1993 did not have to reach any level of protection to the minorities, which gave some concern about the equal treatment until the Charter and the Treaty of Lisbon were not entered into force.

The states in the Western Balkans learned that lesson during the Yugoslav Wars. The new constitutions guarantee rights to the minorities, but to what degree? Are they sufficient for the EU standards?

If one examines the current state of the negotiations of the EU membership of the states from the Western Balkans which are candidates or potential candidates, it can be concluded that the developments differ. Taking into consideration that Slovenia and Croatia are Member States of the EU, and the last Member State to join was Croatia, the other states of the Western Balkans should feel the benefits and the real-life possibilities of joining the EU.

The most advanced negotiations can be found with Montenegro, where 33 of the 35 chapters are opened.[88] The second 'in the race' is Serbia with 16 opened chapters.[89] Albania[90] and North Macedonia[91] got the negotiations opened in March 2020, thus the status of these show a different time frame for the joining than Montenegro and Serbia. Leaders of the EU said that Montenegro and Serbia possibly can join the EU in 2025.[92] Bosnia and Herzegovina[93] and Kosovo[94] show the third level with the negotiations: they are not even candidates, just potential candidates.

The other side of the coin is the question of the real speed of the enlargement negotiations. As the EU is imposing more conditions[95] on the Western Balkan states then on the candidates before, the resistance against the joining is stronger than in the other Member States.[96] The EU learned from the 'big bang' enlargement and the backsliding of the democratic conditions, and introduced the 'benchmarking' to the negotiations.[97] According to Economides, the main reasons behind the slow speed are fragmentation and disintegration

87 https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en
88 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/negotiations-status-montenegro.pdf
89 https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-state-of-play.pdf
90 https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/albania_en
91 https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/north-macedonia_en
92 https://www.theguardian.com/world/2018/feb/06/serbia-and-montenegro-could-join-eu-in-2025-says-brussels
93 https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en
94 https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/kosovo_en
95 About the Stabilisation and Association Agreements: https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en
96 Milada Anna Vachudova: *EU Enlargement and State Capture in the Western Balkans*. In: Jelena Džankić – Soeren Keil – Marko Kmezić (eds.): EU Enlargement and State Capture in the Western Balkans. A Failure of EU Conditionality? Springer, 2019, pp. 66.
97 Vachudova 2019. pp. 77-78.

on the side of the EU, and unwillingness from the candidate states to meet the EU's demands.[98]

While the *"(...) Eu's interest to secure and stabilize its backyard."*,[99] and the new commission's aim is to support the process,[100] the new enlargement is far away from being successful due to several different factors.[101]

As the Copenhagen Criteria contains the basic conditions for a Member State, the protection of minorities must be on a sufficient level for success. The texts of the constitutions provide a basis for this, albeit the practical implementation can become quite diverse.

As an example, the constitution of Serbia guarantees a wide range of rights to the minorities.[102] However, the reality is quite different as the rules are interpreted by the Constitutional Court. The Constitutional Court of Serbia stated that the obligation to protect the minority rights would not mean guaranteeing a certain level of protection.[103] This decision created a slippery slope for the protection of minority rights as I see, since the concrete rules can be altered almost without constitutional limitations. The conclusions of the Constitutional Court of Serbia were not consistent with the arguments.[104] I hope that the pressure from the EU will help to develop the status of the minority rights in every state of the Western Balkan. As the states of Central and Eastern Europe tried to prove their worth to the EU after 1989 by following the principles of democracy and rule of law, now the states of the Western Balkan are in the situation to show that their legal system and social environment have reached the level which is needed to join the EU.

"Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity;"[105]

7. Conclusions

As it could be seen from the analysis, the states of the Western Balkans have diverse constitutional definitions of nation, nationality and identity. However, the strong protection of the national minorities is given in most of the constitutions as a result of the Yugoslav

98 Spyros Economides: *From fatigue to resistance: EU Enlargement and the Western Balkans*. Dahrendorf Forum IV Working Paper No. 17 20 March 2020 3-6, pp. 11-13. (Economides 2020)
99 Vachudova 2019, p. 80.
100 E.g.: https://europeanwesternbalkans.com/2020/09/16/von-der-leyen-western-balkans-are-part-of-europe-not-just-a-stopover-on-the-silk-road/ , https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1816
101 Economides 2020, pp. 15-17.
102 Tamás Korhecz: *A nemzeti kisebbségek alkotmányos jogai és azok bírósági védelme Szerbiában*. [The Constitutional Rights of the National Minorities and their Judicial Protection in Serbia]. In: Petar Teofilović 2020, pp. 177-187.
103 Korhecz 2020, pp. 206-213.
104 Korhecz 2020, pp. 200-201.
105 Framework Convention for the Protection of National Minorities Strasbourg, 1.II.1995, Preamble

Wars. The protection of the national minorities must be a priority in showing the intention of leaving the past choices behind and joining the pathway of the EU values.

The aim of the states of the Western Balkans is joining the EU. Nonetheless, the definitions and principles of the constitutional texts must become practice to reach the standards of the Copenhagen Criteria and other conditions of becoming a Member State of the EU.

In conclusion, the aim of this paper was to show how the states of the Western Balkans define nation, national minorities and identity in their constitutions, to see the starting point and the theory. The practice of the states should be a focus point of another paper to see how the principles work in real life. The frame for a good system is given in most of the states, albeit they are just written words without a strong supporting executive administrative system.

I hope that the constitutional framework provided will be supportive for the development of the status of the national minorities in the states of the Western Balkans. The possibility is in the texts; however, the practical application differs from the ideal. If the states of the Western Balkans have a real intent to join the EU, they must start to implement the principles and good practices to reach the sufficient level of minority protection.

Annexes

State	Term
Albania	national minority
Bosnia and Hercegovina	constituent peoples
Croatia	national minority
Kosovo	community
Montenegro	minority nations and other minority national communities
North Macedonia	nationality
Serbia	national minority
Slovenia	national community

Table 1. The expression for nationality in the Constitutions of the Western Balkan (from the constitutional texts of the states)

State	Term
Albania	Article 8 3. The Republic of Albania assures assistance for Albanians who live and work abroad in order to preserve and develop their ties with the national cultural inheritance.
Bosnia and Hercegovina	no definition

Croatia	Article 10 The Republic of Croatia shall safeguard the rights and interests of its citizens living or residing abroad, and shall promote their ties to their homeland. The Republic of Croatia shall guarantee particular care and protection to those parts of the Croatian nation in other countries.
Kosovo	no definition
Montenegro	no definition
North Macedonia	Article 49 The Republic shall protect, guarantee and foster the characteristics and the historical and cultural heritage of the Macedonian people. The Republic shall protect the rights and interests of its nationals living or staying abroad. The Republic shall provide for the diaspora of the Macedonian people and of part of the Albanian people, Turkish people, Vlach people, Serbian people, Roma people, Bosniak people and others and shall foster and promote the ties with the fatherland. In doing so, the Republic shall not interfere with the sovereign rights of other states and with their internal affairs.
Serbia	Protection of citizens and Serbs abroad Article 13 The Republic of Serbia shall protect the rights and interests of its citizens in abroad. The Republic of Serbia shall develop and promote relations of Serbsliving abroad with the kin state.
Slovenia	5. Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law.

Table 2. The legal status of citizens living abroad in the Constitutions of the Western Balkan (from the constitutional texts of the states)

State	**Term**
Albania	the people
Bosnia and Hercegovina	Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina (no typical definition of sovereignty)
Croatia	the people, the people as a community of free and equal citizens
Kosovo	the people
Montenegro	citizen with Montenegrin citizenship
North Macedonia	citizens
Serbia	citizens
Slovenia	citizens, people, Slovene nation, all citizens

Table 3. The expression for the source of sovereignty in the Constitutions of the Western Balkan (from the constitutional texts of the states)

State	Status
Albania	candidate
Montenegro	candidate
North Macedonia	candidate
Serbia	candidate
Bosnia and Herzegovina	potential candidate
Kosovo	potential candidate

Table 4. The current state of the enlargement process of the states of the Western Balkan

State	Term
Albania	Preamble (…) with the centuries-old aspiration of the Albanian people for national identity and unity, Article 3 The independence of the state and the integrity of its territory, dignity of the individual, human rights and freedoms, social justice, constitutional order, pluralism, national identity and inheritance, religious coexistence, as well as coexistence with, and understanding of Albanians for, minorities are the bases of this state, which has the duty of respecting and protecting them. Article 20 1. Persons who belong to national minorities exercise in full equality before the law the human rights and freedoms. 2. They have the right to freely express, without prohibition or compulsion, their ethnic, cultural, religious and linguistic belonging. They have the right to preserve and develop it, to study and to be taught in their mother tongue, as well as unite in organizations and associations for the protection of their interests and identity.
Bosnia and Hercegovina	–
Croatia	Preamble The millennial national identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience in various political forms and by the perpetuation and development of a state-building idea grounded on the historical right of the Croatian nation to full sovereignty.
Kosovo	Article 57 Members of Communities shall have the right to freely express, foster and develop their identity and community attributes. Article 58 3. The Republic of Kosovo shall take all necessary measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, cultural, linguistic or religious identity. Article 59 Members of communities shall have the right, individually or in community, to: 1) express, maintain and develop their culture and preserve the essential elements of their identity, namely their religion, language, traditions and culture; (12) enjoy unhindered contacts among themselves within the Republic of Kosovo and establish and maintain free and peaceful contacts with persons in any State, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage, in accordance with the law and international standards; 14) establish associations for culture, art, science and education as well as scholarly and other associations for the expression, fostering and development of their identity.

Montenegro	Protection of identity Article 79 Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they can exercise individually or collectively with others, as follows: 1) the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities; 2) the right to choose, use and publicly post national symbols and to celebrate national holidays; 3) the right to use their own language and alphabet in private, public and official use; 4) the right to education in their own language and alphabet in public institutions and the right to have included in the curricula the history and culture of the persons belonging to minority nations and other minority national communities; 5) the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings also in the language of minority nations and other minority national communities; 6) the right to establish educational, cultural and religious associations, with the material support of the state; 7) the right to write and use their own name and surname in their own language and alphabet in the official documents; 8) the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written also in the language of minority nations and other minority national communities; 9) the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action; 10) the right to proportionate representation in public services, state authorities and local self-government bodies; 11) the right to information in their own language; 12) the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs; 13) the right to establish councils for the protection and improvement of special rights.

North Macedonia	Article 8 The fundamental values of the constitutional order of the Republic of Macedonia are: (…) - the free expression of national identity; Article 36 The Republic guarantees particular social security rights to veterans of the Anti-Fascist War and of all Macedonian national liberation wars, to war invalids, to those expelled and imprisoned for the ideas of the separate identity of the Macedonian people and of Macedonian statehood, as well as to members of their families without means of material and social subsistence. The particular rights are regulated by law. Article 48 Members of nationalities have a right freely to express, foster and develop their identity and national attributes. The Republic guarantees the protection of the ethnic, cultural, linguistic and religious identity of the nationalities. Members of the nationalities have the right to establish institutions for culture and art, as well as scholarly and other associations for the expression, fostering and development of their identity. Members of the nationalities have the right to instruction in their language in primary and secondary education, as determined by law. In schools where education is carried out in the language of a nationality, the Macedonian language is also studied. Amendment VIII 1. Members of communities have a right freely to express, foster and develop their identity and community attributes, and to use their community symbols. The Republic guarantees the protection of the ethnic, cultural, linguistic and religious identity of all communities. Members of communities have the right to establish institutions for culture, art, science and education, as well as scholarly and other associations for the expression, fostering and development of their identity. Members of communities have the right to instruction in their language in primary and secondary education, as determined by law. In schools where education is carried out in another language, the Macedonian language is also studied. 2. This amendment replaces Article 48 of the Constitution of the Republic of Macedonia.
Serbia	Article 14 The Republic of Serbia shall protect the rights of national minorities. The State shall guarantee special protection to national minorities for the purpose of exercising full equality and preserving their identity. Article 81 In the field of education, culture and information, Serbia shall give impetus to the spirit of tolerance and intercultural dialogue and undertake efficient measures for enhancement of mutual respect, understanding and cooperation among all people living on its territory, regardless of their ethnic, cultural, linguistic or religious identity.
Slovenia	Preamble (…) centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood. Article 64 (Special Rights of the Autochthonous Italian and Hungarian National Communities in Slovenia) The autochthonous Italian and Hungarian national communities and their members shall be guaranteed the right to use their national symbols freely and, in order to preserve their national identity, the right to establish organisations and develop economic, cultural, scientific, and research activities, as well as activities in the field of public media and publishing.

Table 5. The expression of sovereignty in the Constitutions of the Western Balkan (from the constitutional texts of the states)

Norbert Tribl:[1]

Predestined future or persistent responsibility? Constitutional identity and the PSPP decision in the light of the Hungarian Constitutional Court's most recent practice[2]

1. Introduction

One of the most important areas in the discourse on the European dimension of constitutional law is the relationship between the Court of Justice of the European Union (CJEU) and national constitutional courts[3], as the former is the authentic interpreter of EU law, while the latter is an authentic, *erga omnes* interpreter of national constitutions.[4] However, the issue of the relationship between these organs is in itself a consequence of the relationship between EU law and national constitutions being only seemingly regulated[5], based on a fragile state of balance below the surface. [6] The principle of the primacy of EU law over the constitutions of the Member States is not an *expressis verbis* clause laid down in the Treaties: the CJEU developed them in the *van Gend en Loos* and then the *Costa v. E.N.E.L.* decisions as general principles of EU law in the 1970s. However, the practice of the CJEU did not (even then) receive unreserved support from the Member States. From the 1970s onwards, the German Federal Constitutional Court declared in the Solange decisions that it reserved the right not to apply EU law against to German constitution if certain conditions were met. [7] However, the findings of the principle of the Federal Constitutional Court have never become a reality: since the creation of the *reservation for the protection of fundamental rights* and the *ultra vires test*, the Federal Constitutional Court has never taken a position that would have applied the wording of Solange decisions to a concrete case or issue. [8]

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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.

3 Cf.: Ernő Várnay: *Az Alkotmánybíróság és az Európai Bíróság. Együttműködő alkotmánybíráskodás?* [The Constitutional Court and the European Court of Justice. Cooperative Constitutional Justice?] In: Állam- és Jogtudomány, 2019/2, pp. 63-91.

4 Attila Vincze – Nóra, Chronowski: *Magyar alkotmányosság az európai integrációban* [Hungarian Constitutionalism in the European Integration.] (Third, revised edition). HVG Orac, 2018, pp. 493-515.

5 Martin Belov: *The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States.* In: Perspectives on Federalism, 2017/2, pp. 72-97.

6 László Trócsányi: *Alkotmányos identitás és európai integráció.* [Constitutional Identity and European Integration]. In Acta Universitatis Szegediensis: acta juridica et politica, 2014/76, pp. 473-476.

7 Cf: BVerfGE 37, 271 – Solange I., BVerfGE 73, 339 –Solange II.

8 Cf.: Vincze–Chronowski 2018, pp. 197-218.

However, over the decades, as the European Union has become a community of values and internal tensions have intensified. The potential conflict between EU law and national constitutions has become a seemingly political debate, becoming a more and more often used synonym for Euroscepticism. Meanwhile, the absolute primacy of EU law over national constitutions has become a doctrine. However, the risk of destabilization is coded into a system, which is based on an implicit integration of the absolute, no-exception primacy of EU law.[9]

However, in the midst of increasingly heated political debates, one of the most important legal problems of European integration remains, and we pay a serious price manifested in constitutional law for the lack of political consensus: certain parts of the relationship between the European Union and the Member States must be determined by the national constitutional courts and the CJEU. Thus, a force field is created where the originally neutral constitutional interpreters start to actively shape the integration process supplementing the original functions of the continental (Kelsenian, centralized) system of constitutional justice. Due to the unstable situation created by the Treaties, Member States' constitutional interpreters have been given a de facto new obligation: "to make heads or tails" of the relationship between the EU legal order and the Member States' constitutional systems, of which they are the gatekeepers. If we approach this issue dogmatically, we could even say that in the continental, centralized model of constitutional justice, the functions of constitutional courts are complemented by a kind of "integrational function".[10] The relationship between national constitutional courts and the CJEU, and the primacy of EU law over the constitutions of the Member States has been and still is sought to be maintained by the European Constitutional Dialogue, while the claim to define these relations simultaneously supports the need to protect constitutional identity.[11] Perhaps, however, the real question is whether EU law takes precedence over national constitutions.

In the scientific discourse of recent years, we have repeatedly encountered glimpses of a moment of "*open bread-breaking"*, when, due to the vagueness of the relationship between the two, these courts and these sources of law collided. On May 5, 2020, the German Federal Constitutional Court's decision[12] on the PSPP[13] scheme seems to have actually reached such a moment of "*open bread-breaking"*, although perhaps the subsequent processes are and will be less intense than we first might have thought. Despite all this, the decision provoked heated debates and stirred up national and European emotions as well, all providing different narratives for why it was born and what it actually means for the future.

9 C.f.: R. Daniel Kelemen – Piet Eeckhout – Federico Fabbrini – Laurent Pech – Renáta Uitz: *National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order.* On Verfassungsblog: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/

10 The phenomenon is somewhat similar to the form of responsibility for „*Integrationsverantwortung*" described later, which was developed by German constitutional law.

11 Cf.: Endre Orbán: *Quo vadis, „alkotmányos identitás"?* [*Quo vadis, „Constitutional Identity"?*] In: Közjogi Szemle, 2018/3

12 2 BvR 859/15 -, paras. (1-237),

13 Cf.: https://www.ecb.europa.eu/mopo/implement/omt/html/pspp.en.html

The present study has only a limited purpose in examining the decision of the German Federal Constitutional Court. However, its aim is to present the similarities that can be explored between the previous practice of the Hungarian Constitutional Court (HCC) and the PSPP decision of the Federal Constitutional Court. When we are examining PSPP in the light of the practice of the HCC, Decisions 22/2016. (XII. 5.) AB (on the meaning and elements of constitutional identity), and 2/2019. (III. 5.) AB (examining the relationship of EU legal order and the Fundamental Law of Hungary (HFL) in the light of Article E) of the HFL) will provide the baseline for comparison.

2. The PSPP Decision – 2 BvR 859/15

In the Decision 2 BvR 859/15 (PSPP decision), the Federal Constitutional Court made a number of findings defining European integration and the EU legal order, which, however, can only be classified as "anti-integration" provisions at a very sloppy and superficial first reading. (Surprisingly, the decision has been widely criticized for exactly the above.[14]) The genesis of the Federal Constitutional Court's decision is not rotted in an anti-integration sentiment, but in the legal doctrine of *Integrationsverantwortung*[15] developed in German constitutional law, which literally refers to a form of "integrational responsibility"[16] of the German constitutional organs – in the current case the Federal Government, the Bundestag and the Federal Constitutional Court –, in other words their constitutional responsibility for the integration process (*Integrationsprogramm*[17]).

The responsibility of the German constitutional organs for the integration process is based on Article 23 (1) of the Fundamental Law of Germany, i.e. the integration clause of the Fundamental Law. According to the settled case law of the Federal Constitutional Court and the PSPP decision, the German constitutional organs, within their responsibility for the integration process, are obliged to take appropriate steps to implement and protect it.[18] However, the Federal Constitutional Court emphasized that the *Integrationsverantwortung* is not a unilateral instrument that obliges constitutional organs of Germany to accept the decisions of EU institutions without restrictions. On the contrary, it can be interpreted as the implementation of the *Integrationsprogramm*, i.e. the idea of integration enshrined in the TFEU, and as such, its masters are the Member States.[19] Consequently, it is the responsibility of the German constitutional organs to comply with and enforce the acts of the EU institutions in so far as they are in line with the idea of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of these EU institutions run counter

14 Cf. R. Daniel Kelemen – Piet Eeckhout – Federico Fabbrini – Laurent Pech – Renáta Uitz: *National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order.* On Verfassungsblog: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ (2020. 11. 28.)

15 Michael Tischendorf: *Theorie und Wirklichkeit der Integrationsverantwortung deutscher Verfassungsorgane*. [Theory and Reality of the Responsibility for Integration of German Constitutional Organs.] In: Jus Internationale et Europaeum 129, Universitat Augsburg, 2016, pp. 7-9.

16 Cf.: Gero Kellermann: *Integrationsverantwortung und Verfassungsidentität – Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon.* [Responsibility for Integration and Constitutional Identity – The Judgment of the Federal Constitutional Court on the Treaty of Lisbon.]. In: Akademie für politische bildung tutzing, Akademie-Kurzanalyse, 2009/1, pp. 1-6.

17 Cf.: Christoph, Degenhart: Staatsrecht I., C.F. Müller GmbH, Heidelberg, 2019

18 2 BvR 859/15, 116.

19 2 BvR 859/15, 53, 89, 105-109.

to the *"idea of integration",* the responsibility of the German constitutional organs for process of European Integration requires them to take action against *ultra vires acts*, but at least to seek to mitigate their harmful effects.[20]

According to the Federal Constitutional Court, also argued in the preliminary ruling procedure, the ECB's bond purchase program goes beyond the ECB's and the ESCB's powers, given that, in addition to its monetary policy implications for the Eurozone, it has economic policy consequences and long-term implications[21], which fall exclusively within the non-delegated powers of the Member States.[22] In its PSPP decision of 5 May 2020 (merging several proceedings – 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15), the Federal Constitutional Court found, in its decision of 11 December 2018 in Preliminary ruling procedure C-493/17, that the CJEU stated that the ECB's decisions and the PSPP program complied with the requirements of EU law, in particular proportionality without examining the merits of the ECB's decisions in question or the long-term economic policy implications of the PSPP program.[23] According to the Federal Constitutional Court, the CJEU's review did not cover the real economic, long-term effects of the PSPP and thus did not examine the merits of whether the ECB exceeded its monetary powers under primary law.[24]

According to the Federal Constitutional Court, the CJEU did not properly apply the proportionality test,[25] so proportionality as laid down in the second sentence of Article 5 (1) and (4) TEU could not fulfill its function of protecting Member States' powers and preventing *ultra vires acts*, thus emptying the principle of delegation of power enshrined in the second sentence of Article 5 (1) and Article 5 (4) TEU.[26] According to the Federal Constitutional Court, the fact that the CJEU did not properly assess the economic policy implications of the PSPP (or marginalized it, quasi subordinated it to the monetary objectives of the Eurozone[27]) is an arbitrary interpretation of EU law[28] which allows the ECB to go beyond the powers conferred on it by the Treaties (monetary policy) and ultimately excludes its activities entirely from the possibility of judicial review.[29] This leads to a precedent-setting practice which would allow the EU institutions, in this case the ECB, to establish or extend their own powers (*Kompetenz-Kompetenz*[30]), which is contrary to integration efforts and the provisions of the Treaties.[31] Therefore, the Federal Constitutional Court does not consider itself bound by the interpretation of the law contained in the CJEU's decision.[32] According to the Court, since the CJEU's decision was due to an insufficient examination of the principle of proportionality, and in view of the above

20 2 BvR 859/15, 89, 105-106, 107, 109, 116, 231.
21 2 BvR 859/15, 133, 136, 139, 159, 161-162.
22 2 BvR 859/15, 109, 120, 127, 136.
23 2 BvR 859/15, 2, 6, 81, 116, 119-120, 161-162.
24 2 BvR 859/15, 116-120, 133.
25 2 BvR 859/15, 116, 126-128.
26 2 BvR 859/15, 6b, 6c, 116, 119, 123-126.
27 2 BvR 859/15, 120-122, 161-163.
28 2 BvR 859/15, 112-113.
29 2 BvR 859/15, 156.
30 2 BvR 859/15, 102, 156.
31 2 BvR 859/15, 102, 105-106, 116.
32 2 BvR 859/15, 154, 163, 178.

consequences, it does not ensure proper judicial review of the ECB's decisions[33] and thus extends the powers of the EU institutions.

According to the Federal Constitutional Court, the German constitutional organs, such as the Federal Government, the Bundesbank and the Court itself, have a constitutional obligation to protect the principle of democracy, which is protected by Articles 20 and 79 of the GG (*Grundgesetz*). The second one is the eternity clause, which is the main source of Germany's constitutional identity.[34] In the decision, the Federal Constitutional Court explains that the German people, due to their sovereignty, have the right to democratic self-determination, the principle of democracy, which is a fundamental constitutional factor that cannot be endangered by the integration process.[35] The system of division of competences is intended to ensure the preservation of the principle of democracy – and sovereignty of the people – and thus democratic legitimacy during the integration process. In order for the decisions of the EU institutions to have requisite democratic legitimacy, they must be traceable to the provisions of the Treaties and to the idea of the integration that creates them. The stability of the division of competences is intended to be ensured by the requirement of proportionality, and any failure to comply with it risks destabilizing the division of competences within the European Union.[36] According to the decision, the idea of integration does not infringe the principles of popular sovereignty or democracy as long as the decisions of the EU institutions and bodies are not ultra vires, i.e. they remain within the scope of the powers deriving from the Treaties, which are intended to be ensured by one of the main principles of the European Union, the delegation of powers and the requirements (and guarantees) imposed on it.[37]

The decision states that if the CJEU's interpretation of the law does not respect the powers set out in Article 19 (1) TEU and goes beyond them[38], it violates the minimum requirement of democratic legitimacy of EU acts and thus the decision – in the light of the above – is not applicable in relation to Germany.[39] The Federal Constitutional Court therefore does not consider the judgment of the CJEU in the preliminary ruling procedure to be binding on it, given that its consequences are contrary to the basic idea of integration[40] and lead to a misuse of powers. At the same time, the Federal Constitutional Court shares the view of the petitioners in the underlying constitutional complaint procedure that the PSPP deprives the Bundestag of its budgetary powers as enshrined in the GG, thereby violating Germany's constitutional identity.[41]

According to the Federal Constitutional Court, the CJEU has not carried out an in-depth review of the ECB's bond repurchase program[42], as a result of which the relevant ECB de-

33 2 BvR 859/15, 156, 111-113, 116-119.
34 2 BvR 859/15, 115, 230.
35 2 BvR 859/15, 100-101.
36 2 BvR 859/15, 101, 158.
37 2 BvR 859/15, 142, 158.
38 2 BvR 859/15, 154-156.
39 2 BvR 859/15, 2, 154, 157-158.
40 2 BvR 859/15, 113, 116.
41 2 BvR 859/15, 1, 33-42.
42 2 BvR 859/15, 119, 123, 126.

cisions, and thus the PSPP, are not subject to adequate judicial review.[43] According to the Federal Constitutional Court, the PSPP violates the GG because certain of its provisions, and in particular its long-term effects, goes beyond monetary policy and falls[44] within the scope of economic policy. Thus, in particular, the risk-sharing scheme of the PSPP constitutes a budgetary commitment which falls within the competence of the Bundestag.[45] According to the Federal Constitutional Court, the ECB exceeds its powers under the Treaties if its decisions have diversified economic or social policy implications which already fall within the competence of the economic policies of the Member States.[46] According to the Federal Constitutional Court, the bond purchase program could have an impact on public debt, private savings, pensions and the pension system, real estate prices and rescuing non-marketable companies as well.[47]

In addition to the ultra vires declaration of the ECB's bond purchase program (and the decisions on which it is based) and of the CJEU's preliminary ruling decision, the Federal Constitutional Court stated that it was contrary to the GG that the Federal Government did not challenge the decisions underlying the ECB's bond purchase program, in which the ECB did not substantially examine or assess whether the bond purchase program complied with the proportionality requirement. It did so, inter alia, with regard to the integration responsibilities of the German constitutional organs (*Integrationsverantwortung*), the principles of democracy and popular sovereignty.[48]

In its PSPP decision, the Federal Constitutional Court has called the Federal Government in the context of their integration responsibilities to prevent an EU institution, in this case the ECB, from taking a decision on the budget (and thus German constitutional identity) beyond its powers. In the decision, the Court called the Federal Government to demand a comprehensive proportionality test in the context of the PSPP and, given its integration responsibilities, to ensure that the PSPP does not violates the German constitutional identity and Member State competences while remaining within the competence of the Treaties.[49]

The PSPP decision of the Federal Constitutional Court states in several points that the *ultra vires acts* are not binding on German public organs in the light of the above and as a result of the provision in point 10 of the of the decision and in point 235 of the reasoning, the Federal Bank can only take continue to participate in the PSPP program if the ECB conducts an appropriate proportionality analysis of the economic policy implications of the PSPP. The Federal Constitutional Court also ordered the Federal Bank to place on the market assets already purchased under the PSPP.[50]

43 2 BvR 859/15, 156.
44 2 BvR 859/15, 6b, 122, 133, 135, 138-139, 163, 165.
45 2 BvR 859/15, 8, 116.
46 2 BvR 859/15, 6c, 139.
47 2 BvR 859/15, 6c, 139.
48 2 BvR 859/15, 6a – 10, 232.
49 2 BvR 859/15, 230-232, 234-235.
50 2 BvR 859/15, 235.

3. Decision 22/2016. (XII. 5.) AB on the interpretation of Article E) (2) of the Fundamental Law of Hungary

Decision 143/2010. (VII. 14.) AB of the Hungarian Constitutional Court (also known as the "Lisbon decision" of the HCC) was the first such ruling in Hungary that examined the constitutionality of the Act CLXVIII of 2007 on the promulgation of the Treaty of Lisbon. The decision has been subject of heavy criticisms for its approach and a limited, tangential discussion of the dogmatic problems of the conflict between Union and domestic (Member State) law. The decision also failed to address the issue of the protection of national sovereignty as part of EU integration, the issue was only brought up in one of the concurring opinions.[51] In 2010, the HCC did not essentially mark the constitutional direction to follow regarding the relationship of the Hungarian legal system and European integration. However, with their decision 22/2016. (XII. 5.) AB, the HCC took to consider the interpretation of Article 4 (2) TEU in light of the "integration clause" of the FL (primarily Article E) and to answer the questions it left open in the (first) Lisbon decision.

At the same time, the HCC also opened a Pandora's box: it thwarted the concept of constitutional identity into the center of Hungarian constitutional theory. In 2016, however, constitutional discourse did not revolve around any "integrational" responsibilities of the Member States constitutional courts, we have the PSSP decision to thank for this addition to the current debate. Regardless, the frequent demergence of notions such as constitutional identity and constitutional dialogue in national constitutional case-law have undoubtedly already pointed in this direction.

The second time around, after the first "botched" Lisbon decision, the Commissioner for Fundamental Rights petitioned the HCC regarding the interpretation of certain provisions of the Hungarian Fundamental Law, among others the "integration clause" [Article E) para (2)], which reads like this: *"In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union."* The clause continues with the following (third) paragraph: *"The law of the European Union may stipulate generally binding rules of conduct subject to the conditions set out in paragraph (2)."*[52] The Commissioner's petition was filed in relation to the provisions of Article XIV and Article E (2) of the FL in view of the prohibition of group expulsion, and asked for the interpretation of Article (E) (2) (i) regarding whether Hungary was obliged to implement measures that are in violation of the FL; (ii) whether an EU act could violate fundamental rights; and (iii) the Commissioner asked for further "guidance" in relation to ultra vires

51 László Trócsányi emphasized in his concurring opinion that when Member States have transferred some of their powers to the EU organs, did not give away their statehood, sovereignty and the essence of their independence. The Member States retained the right of disposal to the fundamental principles of their constitution that are indispensable for maintaining statehood and constitutional identity. The state, joining the integration, maintains the state sovereignty without a separate declaration, as it is the basis of the constitutions of the Member States (and the Community legal order). Cf. László Trócsányi's concurring opinion in the Decision 143/2010. (VII. 14.) AB.

52 Cf. Article E) (2) – (3) of the FL

actions of the EU.[53] The HCC separated the questions in the petition and considered the interpretation of Article XIV in a separate procedure, while the questions concerning Article E) have been discussed above.[54] Following the presentation of the petition and the determination of its competence, the HCC engaged in a broad-ranging comparative examination into the high court practices of the Member States.[55]

As a result,[56] the position of the HCC is that in exceptional cases and as a last resort ("ultima ratio") it is possible to examine *"whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self- identity of Hungary."* [57] Regarding the possibility of an exercise of competences under Article E) (2) infringing fundamental rights, it is determined by the HCC that any exercise of public authority in the territory of Hungary (including the joint exercise of competences with other Member States) is linked to fundamental rights.[58]

In this second "Lisbon decision" of the HCC (the so-called "Identity decision"), the HCC argued, using a very strange and untranslatable terminology, that the "self-identity" of Hungary is to be understood under the concept of constitutional identity, and the scope of this identity can only be considered on a case-by-case basis, based on the *"whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of the historical constitution – as required by Article R) (3)[59] of the Fundamental Law."* [60] At the same time, the HCC regards constitutional identity as a bridge between Member States and European integration when it states that the protection of constitutional identity should be granted in the framework of an informal cooperation with the Court of Justice of the European Union – namely constitutional dialogue – based on the principles of equality and collegiality.[61]

With reference to the German Solange decisions[62], the HCC declared that it must act with regard to the possible application of European law in protecting fundamental rights. However, the HCC also noted, as a last resort, that *"it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in violating human dignity or the essential content of fundamental rights."* [63] With regard to *ultra vires acts,* the HCC emphasized the fact that the "Integration clause" of the FL allows for the application of the EU legal acts in Hungary but also means the limitation of any

53 Decision 22/2016. (XII. 5.) CC [1] – [21]
54 Decision 22/2016. (XII. 5.) CC [29]
55 Decision 22/2016. (XII. 5.) CC [33] – [45]
56 Regarding the decision, the dominance of the comparative investigation, sometimes its exclusivity, is expressed as a criticism in Hungarian legal literature. See more: Drinóczi 2017, p. 6.
57 Decision 22/2016. (XII. 5.) CC [46]
58 Decision 22/2016. (XII. 5.) CC [47] – [49]
59 According to Article R (3) of the Fundamental Law: *"The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution."*
60 Decision 22/2016. (XII. 5.) CC [64]
61 Decision 22/2016. (XII. 5.) CC [63]
62 For more detail see: Decision Solange I. and II.
63 Decision 22/2016. (XII. 5.) AB [49]

joint exercise of competences.[64] In accordance with the above, based on Article E) (2) FL and Article 4 (2) TEU, as a constraint on the joint exercise of powers within European integration, the HCC established the "sovereignty control" and "identity control" tests based on an influence from the German Federal Constitutional Court's (GFCC) past cases (elaborated for the protection of Hungarian constitutional identity).[65] In this context, the Constitutional Court essentially declared and strengthened the consensus on constitutional identity in Hungarian academic literature, when it stated that the Constitutional Court is the supreme guardian of the protection of constitutional self-identity.[66] However, following this declaration of principle, the HCC noted that *"the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity, invalidity or the primacy of application of such Union acts."*[67]

Academic circles in Hungary and also internationally took note of the HCC decision in a controversial manner.[68] One of the biggest criticisms the decision received is that it may raise more questions about the relationship between national and EU law than it can answer.[69] Despite the fact that the HCC has laid out the results of a broad-ranging comparative overview of different constitutional jurisdictions in Europe in the justifications for its decision, its position was most significantly influenced by the judgments of the German Constitutional Court as noted above regarding the two tests. The HCC was criticized for too many references to the practice of European constitutional (and supreme) courts (in the name of the constitutional dialogue), at the same time, despite the declarations of theoretical significance in the decision, the relationship between Hungarian national law and the legal order of the European Union was not exactly determined in the decision.[70] As far as European judicial dialogue is concerned (not as a criticism, but rather as an opportunity for constitutional courts), the applicability of the preliminary reference procedure has been mentioned by scholars as a future possibility on the issue which was sat aside by the jurisprudence of the HCC.[71] (It should be noted that HCC is not precluded from initiating referrals to the CJEU – as the authentic interpreter of the EU law – on this issue[72] with reference to the identity-test. Especially since HCC has made an abstract interpretation of the Article E of FL[73] and did not decide on the concrete conflict between EU law and national law in the "Identity decision".)

64 Decision 22/2016. (XII. 5.) AB [53]
65 Decision 22/2016. (XII. 5.) AB [54]
66 Decision 22/2016. (XII. 5.) AB [55]
67 Decision 22/2016. (XII. 5.) AB [56].
68 Cf. Ágoston Mohay – Norbert Tóth: *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law.* In: American Journal of International Law, 2017/2, pp. 468 – 475.
69 Nóra Chronowski – Attila Vincze: *Alapjogvédelem, szuverenitás, alkotmányos önazonosság: az uniós jog érvényesülésének új határai?* [Protection of fundamental rights, sovereignty, constitutional identity: new frontiers for EU law?]. In: Szuverenitás és államiság az Európai Unióban. [Sovereignty and statehood in the European Union.]. ELTE Eötvös Kiadó, Budapest, 2017, p. 93., Tímea Drinóczi: *A 22/2016 (XII.5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle – Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben.* [Decision 22/2016 (XII.5.) AB: What (does not) It Contains and What Follows from It – Identity Testing and Ultra Vires Joint Exercise of Competences in a Comparative Analysis.]. In: MTA Law Working Papers, 2017/1, pp. 1-6., 10-11.
70 Chronowski – Vincze, p. 96.
71 Chronowski – Vincze, p. 122.
72 Chronowski – Vincze, p. 109.
73 Cf. Article 38 of the HCCA

Another fundamental concept in the decision, besides that of European constitutional dialogue, is the notion of (national) constitutional identity.[74] In the European view,[75] there is academic consensus on the fact that the exact meaning and content of constitutional identity (which shall contribute to the "self-definition" of the constitutional systems of the respective Member States; as the ensemble of fundamental constitutional provisions and institutions with historical origins defining the constitutional system) has not yet been defined, however, the ultimate interpretation and concept of constitutional identity must materialize in the practice of the constitutional courts of the Member States in charge of the interpretation of the constitution and be consistent with the case law of the CJEU and the provisions of Lisbon Treaty. The indefinite nature of the constitutional identity concept has amounted to academic views debating the incorporation of an undefined concept into the practice of the HCC, which resulted – according to some – in further uncertainties.[76] Hungarian authors posited that the HCC decision does not make it clear what exactly "protecting the constitutional identity of Hungary" means, i.e. what identity is based on Hungary's historical constitution".[77]

Taking everything into account (facts and opinions), the representatives of the Hungarian legal literature are in consensus that Decision 22/2016. (XII. 5.) AB is a landmark ruling –unavoidable in discussions on the topic of constitutional identity; a milestone, which obviously outlines the future direction of HCC jurisprudence on similar matters.[78] By this decision, the HCC joined those European constitutional courts who apply the concept of constitutional identity as an element of the relationship between EU law and national constitutions. On the other hand, the HCC has ruled in favor of the importance of constitutional dialogue, which forecasts an increase in the role of national constitutional courts in the European integration process. Not just as individual bodies, but as a conglomerate (cf. Verfassungsgerichtsverbund): looking at the challenges facing the European Union in the 21st century, we need to talk not about the role of a constitutional court, but about the role of constitutional judiciary in the integration process.

4. Decision 2/2019. (III. 5.) AB

Unlike the "Identity decision", in Decision 2/2019. (III. 5.) AB the HCC approached the relationship between the European legal order and the national constitution not through constitutional identity, but specifically through the integration clause of the FL. It was concluded that the HCC's authentic (*erga omnes*) interpretation of the FL should be

74 The concept of constitutional identity has extensive legal literature across European, for a well-rounded collection see e.g.: Alejandro Saiz Arnaiz – Carina Alcoberro Llivina (eds.): *National Constitutional Identity and European Integration*. Intersentia, Cambridge – Antwerp – Portland, 2013.

75 The concept of constitutional identity appears in a different approach in the Anglo-Saxon legal systems and in the European integration. In Anglo-Saxon approaches, constitutional identity is understood as the interpretation of legal institutions in conformity with the constitution.

76 Drinóczi, p. 13.

77 *Ibid*.

78 Cf.: László, Blutman: *Szürkületi zóna – Az Alaptörvény és az uniós jog viszonya*. [Twilight Zone – Relationship between the Fundamental Law and EU law]. In: Közjogi Szemle, 2017/1, pp. 1-14.

respected by all other organs (national and European).[79] The case was relevant to the awarding of refugee status, and the HCC held that the Hungarian State is not constitutionally obliged to award such status to all applicants.[80] Based on the petition submitted by the Government, the HCC had to answer three questions, for which it had to interpret Articles R) (1), E), 24 (1) and XIV (4) of the FL.[81]

Based on the petition, the particular constitutional problem addressed in the case was the relation between the FL and the legal order of the European Union, more specifically the HCC's monopoly of interpreting the FL. The background of the case was the formal notice sent by the European Commission regarding the compliance with EU law of the Act VI of 2018 on amending certain Acts relating to measures to combat illegal immigration and the Seventh Amendment[82] of the FL. According to the Commission's interpretation, the amended Article XIV of the FL on asylum violated certain Articles of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. According to the petitioner, in the context of this interpretation of the FL, a particular constitutional issue has been raised regarding the relationship between the interpretation of the FL by an organ of the EU and the authentic interpretation provided by the HCC.[83]

With regard to the above, the petitioner asked the following questions:[84]

(i) Can it be concluded from Article R (1) of the FL that, as the basis of Hungary's legal system, the FL is at the same time the source of legitimacy for all sources of law – including the law of the European Union under Article E) of the FL?[85] (First Question)
(ii) Does it follow from Article 24 (1) of the FL that the HCC's (authentic – erga omnes) interpretation of the constitution may not be derogated by any interpretation provided by other organs? (Second Question)
(iii) In case of an affirmative answer to the second question, how does the HCC provide a genuine interpretation of the second sentence of Article XIV (4) of the FL with regard to the right to asylum, by taking into account the Seventh Amendment? (Third Question)

79 The English version of the decision is available in the following link: https://hunconcourt.hu/uploads/sites/3/2019/03/2_2019_en_final.pdf
80 Justices Egon Dienes-Oehm, István Stumpf, Mária Szívós and András Zs. Varga attached a concurring reasoning, while Justices Ágnes Czine, Imre Juhász, Béla Pokol and László Salamon attached dissenting opinions to the Decision.
81 Cf. Decision 2/2019. (III. 5.) AB [7]
82 The Seventh Amendment of the FL was adopted on 20 June 2018. See in details: Márton, Sulyok – Norbert, Tribl: *Chronicle on Hungarian Constitutional Law 2018*. In: European Review of Public Law, 2018/4, pp. 1225-1257.
83 Cf. Decision 2/2019. (III. 5.) AB [2]
84 The arguments and detailed reasons given by the petitioner are set out in points [4] – [6] of the decision.
85 About the position of EU law in the case law of the HCC between 2012 and the current examined decision see: Márton, Sulyok – Lilla Nóra, Kiss: *In Unchartered Waters? The Place and Position of EU Law and the Charter of Fundamental Rights in the Jurisprudence of the Constitutional Court of Hungary*. In: Hungarian Yearbook of International Law and European Law. 2019/1, pp. 395-417, 397-402.

4.1. Answers to the First Question

In answering the first question, the HCC pointed out that according to Article R) (1) of the FL, the FL shall be the foundation of the legal system of Hungary and Article E) thereof contains the constitutional basis upon which Hungary participates, as a Member State, in the EU and which also serves as a constant basis for the enforcement of the Union's law as internal law, as well as for the direct applicability.[86] In its decision, the HCC recalled that Article E) (1) of the FL specifies the participation in the development of European unity as an aim of the State. The HCC noted with reference to the so called "Lisbon decision"[87] (cf. above), that this participation is not self-serving as it should serve the purpose of expanding human rights, prosperity and security.[88] The HCC pointed out that Hungary participates in the EU as a Member State in the interest of developing European unity, for the purpose of expanding the freedom, prosperity and security of European nations.[89] (The rules contained in Article E) and the interpretation of the HCC therefore are consistent with the terminology of '*Integrationsprogramm'* used in German constitutional law, as presented above.[90])

This decision of the HCC highlighted that EU law as internal law does not fit into the hierarchy of the domestic sources of law specified by the FL under Article T): it is a set of laws to be applied mandatorily on the basis of the constitutional order incorporated in the FL and the HCC has no competence to annul EU law.[91] (The HCC may only apply such legal consequence under Article 24 of the FL to the legal regulations listed in Article T) (2), while EU law provides for generally binding rules of conduct on the basis of Article E) (3).)[92] According to the HCC, therefore, the Court's lack of competence to annul EU law results from the fact that Union law is not part of the system of the sources of law according to Article T) and there is a separate constitutional provision that makes Union law, as a mandatorily applicable law, part of the legal system.[93]

The HCC pointed out that the transfer of competences on the basis of Article E) (2) of the FL is based on the Founding Treaties as international treaties signed by the Member States, ratification of which requires a majority required for the adoption of a constitution under Article E) (4).[94] In the opinion of the HCC, the requirement of a majority for the adoption of a constitution specified in Article E) (4) results in the obligation of a cooperative interpretation of the law and the Union law shall enjoy a primacy of application in contrast with the internal law created by the domestic legislator. The HCC cited the jurisprudence of the GFCC stating that *"the uniform enforcement of the European law in the Member States is of central importance concerning the success of the European*

86 Decision 2/2019. (III. 5.) AB [14]
87 Decision 143/2010. (VII. 14.) AB
88 Decision 2/2019. (III. 5.) AB [15]
89 Decision 2/2019. (III. 5.) AB [15]
90 Cf. Degenhart 2019, BVerfG, 2 BvR 859/15, 116.
91 Decision 2/2019. (III. 5.) AB [20]
92 Cf. Ondrej, Hamuľák – Márton, Sulyok – Lilla Nóra, Kiss: *Measuring the 'EU'-Clidean Distance Between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the EU Charter of Fundamental Rights.* In: Czech Yearbook of Public & Private International Law, 2019/10, pp. 130-150, 133-137.
93 Decision 2/2019. (III. 5.) AB [20]
94 Decision 2/2019. (III. 5.) AB [21]

Union"[95] and the legal community of the *28 members* could not survive without the uniform enforcement and effect of European law in the Member States.[96]

It should be noted that the HCC stated that restrictions can also be identified in Article E) of the FL: the joint exercise of competences *"shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure"*. The wording *"some of its"* competences originating from the FL as referred to in Article E) (2) may mean, in the view of the HCC, that concrete competences and the joint exercise of competences may take place *"to the extent necessary"*. The HCC recalled that the Founding Treaties at the time of the entry into force of the Treaty of Lisbon were already examined and it was stated that the procedures of the treaty guarantee that *"the Parliament shall play a proactive role in controlling the "extent necessary" for exercising the rights and performing the obligations originating from the founding treaties"*. [97] The subsidiarity check and the proportionality test – continued the HCC – offer preliminary control, while with regard to adopted acts of legislation there is the annulment procedure which may be initiated at the CJEU.[98]

The HCC stated, in accordance with the *"principle of maintained sovereignty"*[99], that EU membership shall mean the joint exercise of competences in an international community rather than a surrender of sovereignty.[100] Moreover, in the decision, the HCC explained that the joint exercise of competences is allowed by the FL through the constitutional self-restraint of Hungary's sovereignty. As a consequence, the limitations set by the FL shall also be respected in the case of the jointly exercised competences, in particular the protection of fundamental rights, which is "the primary obligation of the State" under Article I (1) of the FL as well as the inalienable elements of sovereignty in accordance with the last sentence of Article E) (2).[101] The reasoning of the HCC is essentially in line with the PSPP decision of 5 May 2020, in which the GFCC stated that the German people, by virtue of their sovereignty, have the right to democratic self-determination, to enforce the principle of democracy, which is a fundamental constitutional factor that cannot be jeopardized by even the integration process (cf. above).

It should be noted that the direct context of the PSPP decision is *ultra vires review* of the EU legal acts, which did not arise before the HCC, so the parallel presented between the two decisions should only be assessed in the light of the underlying facts. Both decisions interpreted Member States' obligations under EU law in the light of the basic idea of integration/integrational process. However, a specific act that did not arise from the Founding Treaties meant the genesis of the constitutional problem in the PSPP decision, while the HCC interpreted the exact articles of the FL in the context of the EU law in its decision.

95 Cf. BVerfGE 73, 339, 368
96 Cf. BVerfGE – 2 Bvr 2735/14, 37
97 Decision 143/2010 (VII. 14.) AB, 708-709.
98 Decision 2/2019. (III. 5.) AB [22]
99 Decision 22/2016. (XII. 5.) AB [60]. The English version of the decision is available online: here: https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf
100 Decision 2/2019. (III. 5.) AB [23]
101 Cf. Decision 22/2016. (XII. 5.) AB [97]

In essence, the HCC, similar to the PSPP decision, stated in Decision 2/2019. (III. 5.) AB that in the view of the CJEU the Union law is defined as an independent and autonomous legal order.[102] However – continues the HCC – the EU is a legal community with the power – in the scope and the framework specified in the Founding Treaties and by the Member States – of independent legislation, concluding international treaties in its own name, and the core basis of this community are the international treaties concluded by the Member States.[103]

Finally, answering the first question of the petitioner, the HCC stated that the Member States are the masters of treaties and their acts on the national enforcement of treaties and ultimately the frameworks set by the Member States' constitutions shall determine the extent of primacy enjoyed by Union law in the given Member State over the State's own law and, on the basis of Article R) (1) of the FL, the foundation of the applicability of Union law in Hungary is Article E).[104]

At this point, Decision 2/2019. (III. 5.) AB can once again be paralleled with the PSPP decision. One of the basic arguments of the PSPP decision is the concept of *Integrationsverantwortung* developed in German constitutional law, which can be interpreted as the form of a special constitutional responsibility of the German constitutional institutions for the integration process (*Integrationsprogramm*).[105] The responsibility of the constitutional organs for the integration process is based on Article 23 (1) of the GG, i.e. their integration clause. According to the settled case law of the GFCC, German constitutional institutions, within their responsibility for the integration process, are obliged to take appropriate steps to implement and protect it (i.e. the integration).[106] However, the GFCC emphasized that the *Integrationsverantwortung* is not a unilateral instrument which obliges constitutional institutions to adopt decisions of the EU institutions in an unlimited manner. On the contrary: it can be interpreted as an implementation of the idea of integration enshrined in the TFEU and as such its masters are the Member States[107]. Consequently, it is the responsibility of the German constitutional institutions to comply with and enforce the provisions of the EU organs in so far as they are in line with the spirit of the *Integrationsprogramm* in accordance with the Treaties. However, if the acts of the EU institutions run counter to the "idea of integration", the responsibility of the German constitutional institutions for EU integration requires them to take action against *ultra vires* acts, but at least to seek to mitigate their harmful effects.[108]

In essence, therefore, the starting point and conclusion of the two decisions is the same, but while the HCC made findings of principle, the GFCC had to take a position in a specific case with an important integrational dimension.

102 Decision 2/2019. (III. 5.) AB [24]
103 Decision 22/2016. (XII. 5.) AB [32]
104 Decision 2/2019. (III. 5.) AB [24]
105 Cf. Kellermann 2009/1, pp. 1-6.
106 2 BvR 859/15, 116.
107 2 BvR 859/15, 53., 89., 105-109.
108 2 BvR 859/15, 89, 105-106, 107, 109, 116., 231.

4.2. Answers to the Second Question

In answering the second question, the HCC had to look at whether it follows from Article 24 (1) of the FL that the HCC's interpretation of the FL shall not be derogated by any interpretation provided by another (international) organ.[109] (A similar issue was referred to the CJEU by the Romanian Supreme Court of Cassation in case C-357/19, in which the Supreme Court asked, inter alia, whether the primacy of EU law must be interpreted lowing the national court to disapply a decision of the constitutional court, handed down in a case concerning a constitutional dispute, binding under national law.[110])

Answering the question in the reasoning, the HCC recalled Hungary's obligations undertaken in international treaties, those arising from EU membership, and also the generally acknowledged rules of international law, and the basic principles and values reflected in them.[111] The HCC cited one of its former decisions on the European arrest warrant and the act on which the decision is based and according to which: *"the law of the European Union is not a set of rules enforced unconditionally and independently from the Member States" decision, as the basis of the validity of Union law is the decision based on free determination in line with the national constitution of the Member State on the intention to join the European Union and to ratify the amendment of the founding treaties. However, if a State has made a decision on accession or on ratification, it has also undertaken to adopt all general and individual measures in accordance with Article 10, currently in force, of the Treaty establishing the European Community for the performance of the obligations resulting from the founding treaties".*[112] However, the HCC's interpretation of the FL has an *erga omnes* character (similarly to all other constitutional courts of the Member States) and all organs or institutions shall respect it in their own procedures as the authentic meaning of the constitution.[113]

In addition to the above, the HCC recalled in the decision (with reference to its previous jurisprudence[114]) that the proceeding courts shall take into account each other's authentic interpretations.[115] The HCC considered Article E) of FL as a bridge between the FL and EU law and stated that "the creation of European unity", the integration, sets objectives not only for the political bodies but also for the courts and the HCC itself, defining the harmony and the coherence of legal systems as constitutional objectives that follow from "European unity".

Achieving the above – continues the HCC –, the laws and the FL should be interpreted in a manner to make the content of the norm comply with the law of the EU. The view of the HCC was based on the presumption that both the Union law and the national legal system

109 Decision 2/2019. (III. 5.) AB [25]
110 Request for a preliminary ruling from the Înalta Curte de Casație și Justiție (Romania) lodged on 6 May 2019. Available online: http://curia.europa.eu/juris/document/document.jsf?text=&docid=217084&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5642265
111 Decision 2/2019. (III. 5.) AB [26]
112 Decision 2/2019. (III. 5.) AB [30]
113 Decision 2/2019. (III. 5.) AB [35]
114 Decision 22/2016. (XII. 5.) AB [33], [63]
115 Decision 2/2019. (III. 5.) AB [36]

based on the FL aimed to carry out the objectives specified in Article E) (1) of FL.[116] In essence, the starting point of the HCC corresponds again to what was written in the subsequent PSPP decision, in which it is stated that failure to respect Article 19 (1) TEU violates the minimum requirement of democratic legitimacy for EU acts[117] and constitutional identity.[118] Consequently, if the CJEU is required to respect the constitutional identity of the Member States, which arise from the constitution, it must necessarily interpret the constitution of the Member State. Vice versa, when the GFCC found that the CJEU had decided *ultra vires*, it necessarily carried out an interpretation of the TEU. Based on the reasoning above, in its answer to the petitioner's second question the HCC stated that according to Article 24 (1) of the FL the HCC is the authentic interpreter of the FL, and its interpretation shall not be derogated by any interpretation provided by other organs and shall be respected by everyone. It was also stated that despite the above, in the course of interpreting the FL, the HCC shall take into account the obligations binding on Hungary on the basis of its membership in the EU and under international treaties.[119]

4.3. Answer to the Third Question

Finally, in the third question, the petitioner requested an interpretation of Article XIV (4) of the FL from the HCC. According to the petitioner, the exact meaning of this phrase *("shall not be entitled"*) of the Article XIV (4) could mean that a non-Hungarian national shall not be able to receive asylum if he or she arrived to the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution, but on the other hand it could also be interpreted in a way that although the affected applicant does not enjoy a fundamental right to get asylum and therefore the Hungarian State is not obliged to grant it, the National Assembly may provide for substantive and procedural rules on granting asylum to such persons as well.[120]

In answering the question, the HCC examined the context and content in which the phrases *"not entitled"* and *"have no right"* have been used by other provisions of the FL and interpreted the provision of the FL by way of analogy.[121] Based on these, the HCC found that the wording *"not entitled to"* used in the second sentence of Article XIV (4) means that the right to asylum shall not be regarded as a fundamental individual subjective right in the case of a non-Hungarian citizen who arrived to the territory of Hungary through a country where he or she was not subject to persecution or the imminent danger of persecution.[122] However, the HCC established that such persons do have a claim (protected as a fundamental right – right to petition) to have their application decided by the competent authority on the basis of Article XIV (5) of the FL. Due to this claim protected as a fundamental right, it is the duty of the National Assembly to lay down the fundamental rules on granting asylum in a cardinal Act.[123]

116 Decision 2/2019. (III. 5.) AB [36]
117 2 BvR 859/15, 2, 154., 157-158.
118 2 BvR 859/15, 1., 33-42.
119 Decision 2/2019. (III. 5.) AB [37]
120 Decision 2/2019. (III. 5.) AB [38]
121 Decision 2/2019. (III. 5.) AB [42]
122 Decision 2/2019. (III. 5.) AB [43]
123 Decision 2/2019. (III. 5.) AB [43]

The HCC pointed out, however, that based on the Universal Declaration of Human Rights, "*no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion",* which means that paying full respect to the principle of non-refoulement is one of the minimum obligations explicitly undertaken by Hungary.[124] Based on the above, the HCC stated in principle that *"with account to the international undertakings applicable to Hungary, the last sentence of Article XIV (4) of the Fundamental Law is actually setting out in the Fundamental Law the fact that in Article XIV (3) Hungary provides constitutional protection for the principle of non-refoulement, however, it refers to regulating in its national law at the level of an Act of Parliament, rather than in the Fundamental Law, to state what rules are applicable to those refugees who are not subject to the principle of non-refoulement."*[125]

To sum up, the HCC noted that during the decision-making process, the principle of constitutional dialogue was taken into account and the decision was made with respect to the accomplishment of European unity, which originates in Article E) (1) of the FL.[126] The HCC noted as well, that it interpreted the second sentence of Article XIV (4) on the one hand for the purpose of reaching a conclusion, which is in line with the overall spirit of the FL and on the other hand to take into account compatibility with the relevant provisions of the Directive interpreted in the light of the Charter of Fundamental Rights, in the spirit of contributing to the development of European unity.[127]

It can be seen based on the above, that the HCC was presented with a legal problem that challenged all the national constitutional courts within the European integration. The HCC ruled on this problem using the possibilities available to it, but within the limits of its powers and competences. On the one hand, the decision is anchored by the FL and – on the other hand, simultaneously – the consequences of the decision must not lead to a violation of an obligation arising international commitments under the FL. Concerning the third question, the HCC has identified the obligations arising from international treaties and the FL and concluded that the right to decide within this scope belongs to the National Assembly.

5. Summary

Although harsh criticism of both the PSPP decision and the relevant practice of the Hungarian Constitutional Court is trending, one thing needs to be stated: both bodies took their decisions in the context of their assumed constitutional responsibility for European integration, in the light of the founding treaties and the process of integration.

The importance of these decisions is significant one by one, but more important is another, emerging trend that seems positive: one can point to the existence of a form of

124 Decision 2/2019. (III. 5.) AB [45]
125 Decision 2/2019. (III. 5.) AB [47]
126 Decision 2/2019. (III. 5.) AB [48]
127 Decision 2/2019. (III. 5.) AB [48]

responsibility of the Member States' constitutional courts for the European integration process. The undefined nature of the relationship between EU law and national constitutions (resulting from the supranational nature of the integration) forced European Constitutional Courts into a role that could also be seen as a functional change in terms of the entirety of the European constitutional judiciary. The role of European constitutional justice seems to be complemented by a kind of 'integrational' function: the European Constitutional Courts must no longer only defend their own national constitutions but must do so while taking into account the proper advancement of the integration process. They must do so in a way that respects the right of the Court of Justice of the European Union to an authentic interpretation of the Treaties; however, taking into account that the CJEU, as an institution of the European Union, is not entitled to take decisions *ultra vires*, against the framework set by the Treaties.

Just as we distinguish between substantive law and constitutional law rules in national law, we can distinguish by analogy between the "ordinary provisions" of the European legal order and the fundamental provisions arising from supranationalism. The primacy of EU law is beyond dispute, which is also safeguarded by the CJEU. However, the CJEU and the EU institutions are not federal bodies above the Member States, but they are much more like the Member States themselves, subordinated to the consensual frames of the Founding Treaties in the integration process. European Constitutional Courts, collectively, can build a bridge that can establish a balance between national legal systems and the supranational structures of the European Union. Based on all this, the European system of constitutional justice seems to play a key role in this constitutional matrix of responsibility for the integration process.