

# LESS IS MORE? THE ECtHR'S JUDGMENT ON THE VOTING RIGHTS OF NATIONAL MINORITY VOTERS IN HUNGARY



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## Abstract

In 2011, Hungarian Parliament passed a new electoral law that – unlike the previous legislation – contained elements of positive discrimination in favour of the national minorities to promote their representation in Parliament and to enhance their political participation. After the 2014 parliamentary elections, the system of national minority voting was challenged before the European Court of Human Rights by two minority voters, claiming that the voting system constituted discriminatory interference with their voting rights (*Bakirdzi and E.C. v. Hungary*). The applicants relied on Article 3 of Protocol No. 1 (right to free elections) to the European Convention on Human Rights taken alone and in conjunction with Article 14 of the Convention (prohibition of discrimination). The Court found that the combination of the restrictions on the applicants' voting rights, considering their total effect, constituted a violation of both of the articles of the Convention.

The current study outlines the background of the case, paying special attention to the challenged legal framework and the outcome of the last three parliamentary elections, and then analyses the procedure before the Court. As the relevant statutory scheme has not yet been amended, the summary outlines some possible ways in which the Government could bring the domestic legal framework into line with the principles set out in the judgement.

The judgement may be of interest for at least two reasons. On the one hand, the decision sheds light on the problems that lawmakers must face when elaborating the voting system of national minority voters. On the other hand, the judgement analysed here helps us to explore the meaning of 'equal suffrage', 'free elections' or

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‘secrecy of vote’. According to some views, the Court has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life. Therefore, the judgment may also have an international impact.

**Keywords:** national minorities, right to vote, equal suffrage, free expression of opinion of people, discrimination, Hungary

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## 1. Background of the Judgement

As the ECtHR’s judgement would be difficult to interpret without knowledge of the legal context, the first section of this study aims to outline the background of the case of *Bakirdzi and E.C. v. Hungary*.<sup>1</sup> In doing so, firstly some overall features of the national minorities in Hungary are sketched out. Then the long and bumpy road that led to the parliamentary representation of ethnic minorities is outlined. This is followed by the analysis of the current legal framework that was thoroughly reviewed by the ECtHR as well. Finally, the results of the 2014–2022 parliamentary elections are briefly presented from the perspective of minority lists.

### 1.1. National Minorities in Hungary

Although for many centuries Hungary was a rather mixed country in terms of the ethnic composition of its population, after the 1920 Treaty of Trianon following World War I (by which Hungarian territory was reduced to less than one-third of its former extent, and the country lost almost 60% of its population), and the deportations and forced population exchanges after World War II, the country became nearly ethnically homogeneous. As Kukorelli notes, the minority policy in the decades of communism was part of the communist party’s alliance policy, and was ideological and with little regard for fundamental rights.<sup>2</sup>

Three years after the democratic transition, Parliament<sup>3</sup> passed the Act on the Right of National and Ethnic Minorities<sup>4</sup> by an overwhelming majority vote. It is noteworthy, that the Council of Europe formed a positive opinion about it, highlighting

1 *Bakirdzi and E.C. v. Hungary*, Judgement of 10 November 2022 (Applications nos. 49636/14 and 65678/14)

2 Kukorelli, 2018, p. 5.

3 We use the terms ‘Parliament’ and ‘National Assembly’ (*Országgyűlés*, the official name of the Hungarian legislative body) interchangeably.

4 Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereby 1993 Minority Act)

its merits and highly progressive achievements.<sup>5</sup> The phrase “keeping up with the most noble traditions and values of Hungarian history” in the explanatory notes of the law refers primarily to the Nationalities Act of 1849, which was the first official act of the legislature in Hungary (and one of the first even in Europe) that regulated the rights of minorities and languages,<sup>6</sup> and to the Nationalities Act of 1868, the earliest modern, liberal language law on the continent.<sup>7</sup>

Based on the 1993 Minority Act, the following ethnic groups qualified as ethnic groups native to Hungary: Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.<sup>8</sup> The law underwent a number of amendments over the next two decades and was subsequently replaced by a new act.<sup>9</sup> The 2011 Minority Act recognised the same 13 minorities as its predecessor (however, the term ‘Gypsy’ was changed to ‘Roma’). It is worth mentioning that both of the minority laws left open the possibility for other ethnic groups to qualify for a recognised minority status. On this basis, in the past decades, several ethnic groups (e.g. Italians, Russians, Huns, Székelys [Szeklers], and, most recently, Scythians) have tried to get themselves recognised as national minorities.<sup>10</sup> However, they were either unable to collect 1,000 signatures from Hungarian citizens (which is a prerequisite for the initiative), or their initiatives were rejected by the Parliament.

5 Réti, 1995, p. 273.

6 Katus, 2003.

7 Berecz, 2022.

8 1993 Minority Act, Section 61 (1).

9 Act CLXXIX of 2011 on the Rights of National Minorities (hereby 2011 Minority Act).

10 For attempts before 2007, see Pap, 2007, pp. 81–95.

As regards the number of minorities, the results of the censuses are summarised in Table 1.

		2001		2011		2022	
		Persons	%	Persons	%	Persons	%
1.	Armenian	1,164	0.01%	3,571	0.04%	4,198	0.04%
2.	Bulgarian	2,316	0.02%	6,272	0.06%	6,109	0.06%
3.	Croatian	25,728	0.25%	26,774	0.27%	21,823	0.23%
4.	German	120,339	1.18%	185,696	1.87%	142,550	1.48%
5.	Greek	6,618	0.06%	4,642	0.05%	6,178	0.06%
6.	Polish	5,144	0.05%	7,001	0.07%	7,398	0.08%
7.	Gypsy/Roma	205,715	2.02%	315,583	3.18%	209,909	2.19%
8.	Romanian	14,780	0.14%	35,641	0.36%	27,554	0.29%
9.	Ruthenian	2,075	0.02%	3,882	0.04%	7,109	0.07%
10.	Serbian	7,344	0.07%	10,038	0.10%	11,621	0.12%
11.	Slovak	39,266	0.39%	35,208	0.35%	29,880	0.31%
12.	Slovene	4,831	0.05%	2,820	0.03%	3,965	0.04%
13.	Ukrainian	7,393	0.07%	7,396	0.07%	24,609	0.26%
14.	Total Minority Population	414,165	4.06%	555,507	5.59%	313,810	3.27%
15.	Total Population	10,198,079	100.00%	9,937,515	100.00%	9,603,518	100.00%

*Table 1. Number of minorities and their share of the total population in Hungary based on the question: “Which ethnic group do you belong to?”<sup>11</sup>*

Notes:

- 1) As the respondents were allowed to declare two identities (in 2011 and 2022), the sum of rows 1–13 is higher than the ‘Total Minority Population’.
- 2) The ‘Total Minority Population’ does not include the number of other minorities that are not recognised by law (e.g. Arabs, Chinese, Russians).

As can be seen, only the German and Roma minorities exceed 1%, meanwhile, six minorities do not even make up 0.1% of the population. As the numbers in Table 1 rely on the self-declaration of the citizens, the changes in the data are mainly due

11 Source: the author, based on the census data; Available at: <http://tinyurl.com/muzhm26s>.

to the willingness of the respondents to assume their minority identity during the censuses.<sup>12</sup>

Two further characteristics of domestic minorities deserve closer attention. Firstly, minorities are geographically relatively scattered throughout the country, and there are no ethnically homogenous blocks such as the Hungarian-inhabited Székely Land in Romania.<sup>13</sup> Secondly, the nationalities in Hungary are widely considered to be highly assimilated minorities.<sup>14</sup> According to the 2022 census, only 79,256 respondents (0.83% of the total population) declared that they did not belong to the Hungarian nationality.<sup>15</sup> However, among Hungarian citizens (i.e. excluding respondents with foreign citizenship), only 8,980 made this response. In summary, a vast majority of the 13 minorities also declared their belonging to the Hungarian nationality during the census. As Dobos notes, “With the exception of the Roma, ethnic minorities in Hungary are well integrated into Hungarian society in socio-economic terms, and ethnicity in general does not play such a role that it becomes a political mobilizing force for many, and a fundamental influence on voter behaviour.”<sup>16</sup>

## ***1.2. Parliamentary Representation of the Minorities – Struggles and Dead Ends***

As Nagy puts it, “Ensuring the representation of minorities living in Hungary has been subject to heated public debate since the democratic transition in 1989/90.”<sup>17</sup> Indeed, it was a long and bumpy road that led to the parliamentary representation of ethnic minorities. A detailed overview of this process would go far beyond the scope of this study, so only a few stages are touched upon.<sup>18</sup>

In March 1990, the following provision was added to the Constitution: “The representation of national and linguistic minorities living in the Republic of Hungary in Parliament and in the Councils shall be ensured. The Parliament shall elect Members of Parliament to represent minorities, irrespective of the election pursuant to paragraph (1) of Article 71, in the manner and in the number determined by a separate Act.”<sup>19</sup> At the same time, the Parliament adopted this above-mentioned act.<sup>20</sup>

12 Tóth and Vékás, 2013. As Morauszki and Papp claim, the ‘minority revival’ from 2001 to 2011 (meaning that the rate of people who identify themselves as a minority has increased by almost one and a half times) was due to the fact that the 2011 census used a different methodology to ask about minority affiliation (Morauszki and Papp, 2014). For the limited comparability of the two censuses, see also Tátrai, 2014; Kapitány, 2015.

13 See the minority map of Hungary based on the data of the 2011 census: <https://atlo.team/magyarorszagnemzetisegiterkepe/>. For further analyses, see Tóth and Vékás, 2014, pp. 53–56.

14 Kállai, 2012; Tátrai, 2014; Kapitány, 2015; Dobos, 2022.

15 However, 1,086,223 respondents refused to answer the question regarding their nationality.

16 Dobos, 2021, p. 56.

17 Nagy, 2021, p. 52.

18 For a detailed overview, see e. g. Várfalvi, 1995; Szajbély, 2003; Kukorelli, 2018; Móri, 2018.

19 Act XVI of 1990 on the Amendment of the Constitution of the Republic of Hungary, Section 6.

20 Act XVII of 1990 on the Parliamentary Representation of National and Linguistic Minorities Living in the Republic of Hungary.

The new law laid down that, “In the Republic of Hungary, the part of the Gypsy, Croatian, German, Romanian, Serbian, Slovak, Slovenian and Jewish communities [...] shall have one representative each in the Parliament”.<sup>21</sup> The representatives of minorities would not have been elected directly, but by the MPs themselves, based on the proposition of the nomination committee (the ‘co-optation procedure’). However, this regulation was rather short-lived, as the newly elected parliament decided in June 1990 to repeal the entire law. Meanwhile, the newly enacted provision of the Constitution was replaced by the following provision: “The laws of the Republic of Hungary ensure the representation of national and ethnic minorities living in the territory of the country.”<sup>22</sup> As can be seen, the new wording spoke about representation in general, without clear reference to *parliamentary* representation.

The next development was the above-mentioned 1993 Minority Act, which stipulated that, “Minorities have the right – as determined in a separate Act – to be represented in the National Assembly.”<sup>23</sup> Although several ideas had been put forward by the legislators<sup>24</sup> and scholars to solve the problem of parliamentary representation,<sup>25</sup> the aforementioned ‘separate Act’ was never adopted. The Constitutional Court already established an unconstitutional omission of legislative duty in 1992, as the Parliament had failed to adopt the act on the rights of minorities.<sup>26</sup> The Court ruled that, “the general representation of minorities has not been ensured to the extent and in the manner required by the provisions of the Constitution”.<sup>27</sup> Two years later the Court found in its rather ambiguous decision that the unconstitutional omission of legislative duty persisted.<sup>28</sup> By this time, the Minority Act of 1993 had already been passed, but parliamentary representation was still a long way off. However, in the academic literature, it was far from clear whether the Parliament indeed committed a constitutional omission for failing to ensure parliamentary representation of minorities.<sup>29</sup> It should be recalled here that the Constitution referred to representation *in general*, and it did not clearly imply the need for parliamentary representation. In December 1994, the first minority self-government elections were held, giving minorities representation at the municipal level. Meanwhile, a year later, minority self-governments were also established at national level.

In 2008, the ombudsman for minorities’ rights, alongside the chairs of the national minority self-governments, drafted a concept on the parliamentary representation

21 *Ibid* Section 1.

22 Act XL of 1990 on the Amendment of the Constitution of the Republic of Hungary, Section 45.

23 1993 Minority Act, Section 20 (1).

24 For an overview of the first years, see Várfalvi, 1995, pp. 61–64.; Kékkúti, 1998.

25 E. g. Somogyvári, 1998; Ágh, 2001. Both authors envisaged the representation of minorities in a newly created second chamber (upper house). For the most detailed review of possible solutions, see Szajbély, 2003, pp. 190–203.

26 Decision No. 35/1992 (VI.10).

27 *Ibid* Section III.

28 Decision No. 24/1994. (V.6).

29 E.g. Szajbély, 2003, pp. 183–186.; Kállai, 2012, pp. 47–49.

of minorities<sup>30</sup> and submitted it to the Government. Two years later, the outgoing Parliament passed a resolution in February 2010 setting a 2012 deadline for the Government to present a draft bill on the parliamentary representation of minorities.<sup>31</sup> Some three months later, following the 2010 parliamentary elections, the Parliament added the following provision to the Constitution: “The number of Members of Parliament shall not exceed two hundred. A maximum of thirteen additional Members of Parliament may be elected to represent national and ethnic minorities.”<sup>32</sup> However, this provision has never entered into force since Fidesz, which won a two-thirds majority in the 2010 elections, decided to adopt a new constitution.

### *1.3. The Current Legal Framework*

After a landslide victory in the 2010 parliamentary election, the Fidesz-led government embarked on a transformation of Hungary’s constitutional and political framework. As a part of this transformation process, Parliament soon passed a new constitution named the Fundamental Law (April 2011), a new minority law (2011 Minority Act) and a new electoral law<sup>33</sup> (December 2011). The Fundamental Law lays down that, “The participation of national minorities living in Hungary in the work of the National Assembly shall be regulated by a cardinal Act.”<sup>34</sup> The 2011 Minority Act in its original wording did not refer to the parliamentary representation of the national minorities.<sup>35</sup> Although the 2011 Electoral Act retained the mixed electoral system established in 1989, it has shifted the system towards the majoritarian principle, and several adjustments have been made to give the largest party (practically, Fidesz) a better position in the later elections.<sup>36</sup> One of the most significant (albeit politically less crucial) changes was the introduction of a new scheme for minority voting, i.e. for the first time in democratic Hungary, special provisions aimed at favouring the participation of national minorities in Parliament.

As is widely known, a number of methods, from reserved seats to exemption from the parliamentary threshold, exist to ensure, or at least foster, the parliamentary

30 Available at: <http://www.kisebbsegombudsman.hu/hir-161-kisebbsegek-parlamenti-kepviseletenek.html>

31 National Assembly Resolution No. 20/2010 (II.26) on the Legislative Process on the Representation of National and Ethnic minorities in the National Assembly.

32 The 25 May 2010 Amendment of the Constitution of the Republic of Hungary, Section 1.

33 Act CCIII of 2011 on the Election of the Members of the National Assembly (hereby 2011 Electoral Act).

34 Fundamental Law of Hungary, Art. 2 (2).

35 However, the following provision was added to the 2011 Minority Act in 2017: “Every national minority community and every individual belonging to a national minority shall have the right to take part, through its representative in the National Assembly’s legislative work affecting the interests and rights of national minorities.” [Section 4 (1) c)].

36 Tóth, 2015.

representation of national minorities.<sup>37</sup> The Hungarian legislator decided to introduce a preferential threshold for the national minorities' electoral lists. According to the 2011 Electoral Act, the national list may be drawn up as a party list or national minority list,<sup>38</sup> which means the minority lists compete with the political parties' lists. The relevant provisions affecting minority voting are:

*Section 9 (1) National self-governments of national minorities may draw up national minority lists.*

*(2) Drawing up a national minority list shall be subject to recommendations by at least one percent of the voters recorded in the electoral register as national minority voters or to 1,500 recommendations, whichever is fewer.*

*(3) Candidates on a national minority list may be only voters recorded in the electoral register as voters of that particular national minority.*

*(4) A national minority list shall include at least three candidates.*

*(5) The national self-governments of two or more national minorities may not draw up a joint national minority list.*

As noted above, the 2011 Electoral Act retained the mixed electoral system,<sup>39</sup> consequently voters with domicile in Hungary may cast two votes. As a crucial provision, the law lays down that the 'ordinary' voters (i. e. not recorded in the electoral register as national minority voters) may cast a vote for one single-member constituency candidate and one party list.<sup>40</sup> In contrast, a voter recorded in the electoral register as a national minority voter may cast a vote for one single-member constituency candidate and the list of their national minority (or in the absence thereof, one party list).<sup>41</sup> (It should be stressed – and this fact was also of great importance in the trial – that the national minority voters do not vote for the party list.)

At this point, one may pose the question: what is the 'preferential' aspect/element of this minority voting system? First of all, the 5% electoral threshold for party lists is waived for the national minority lists. In addition, the law introduced a so-called preferential quota for the national minority lists, that is the number of votes required for winning a preferential national minority mandate.<sup>42</sup> When allocating mandates from the national list, the total number of national list votes is divided by 93 (virtually, this is the 'price' of a single mandate), and the result is then divided by four; the integer of the resulting quotient constitutes the preferential

37 For a global overview, see Protsyk, 2010; for a brief summary of the European models, see Mór , 2016, 319–320. and Cserv k and Farkas, 2017, pp. 29–32.

38 2011 Electoral Act, Section 7.

39 Currently 106 members of the Parliament are elected from single-member constituencies and 93 from the national list [2011 Electoral Act, Section 3 (2)].

40 2011 Electoral Act, Section 12 (1).

41 2011 Electoral Act, Section 12 (2).

42 2011 Electoral Act, Section 14 (3).



quota.<sup>43</sup> To sum up, a national minority list needs to acquire a quarter of as many votes to win the first mandate as the parties. However, it should be noted that this preferential provision applies only to the *first* mandate of a given national minority list, that is if the number of votes cast for a minority list exceeds twice the preferential quota, that minority will not be entitled to two seats (i.e. a national minority list may not be assigned more than one preferential mandate).<sup>44</sup>

The legislator also had in mind those minorities which, despite the preferential quota, were unable to gain any seat. According to the law, “a national minority which drew up a national minority list from which, however, it has not won a mandate shall be represented by a national minority spokesperson<sup>45</sup> in the National Assembly.”<sup>46</sup>

An important point of the legal framework is the process of becoming a national minority voter. According to the Act on Election Procedure, voters with an address in Hungary may request that their belonging to a national minority be entered into the central electoral register, or such an entry be deleted.<sup>47</sup> This means that a citizen belonging to a national minority is free to decide whether they wish to participate in the parliamentary elections as a national minority voter. If so, then they may request to be registered as a national minority voter. A request for registration as a national minority voter must contain the reference to the national minority (i.e. the voter must indicate to which national minority they belong) and a statement by the voter in which the voter professes to belong to the national minority in question.<sup>48</sup> The Election Procedure Act also stipulates that, “Voters who are listed in the register as national minority voters also with regard to the election of Members of Parliament shall be issued a single-member constituency ballot paper and the list ballot paper of *their* national minority.”<sup>49</sup> (emphasis added). To give an example, a voter recorded as a Greek minority voter receives the Greek minority’s list, and so they may cast the vote only to this list. Consequently, the Greek minority’s list may receive votes only from the voters who are recorded as Greek minority voters. The law also stipulates that the national self-governments of two or more national minorities may not draw up a joint national minority list.<sup>50</sup>

The structure of the minority lists should also be briefly mentioned. As noted above, a national minority list must contain at least three candidates. However, the

43 2011 Electoral Act, Section 16 d). To put it in another way, a given minority list is entitled to one seat only if it secures at least one quarter of the electoral Hare quota (cf. Venice Commission – OSCE/ODIHR, 2012, Section 47).

44 2011 Electoral Act, Section 16 e). However, in the very unlikely event that a given national minority list’s share of the vote reaches 5%, the list could win additional seats. [Section 16 fb)].

45 Elsewhere also translated as ‘national minority advocate’.

46 2011 Electoral Act, Section 18 (1). The nationality spokesperson may speak at the sitting of the Parliament if the House Committee considers that the item on the orders of the day affects the interests or rights of nationalities. However, he or she has no right to vote at the sittings of the Parliament.

47 Act XXXVI of 2013 on Election procedure (hereby Election Procedure Act), Section 85 (1) a).

48 Election Procedure Act, Section 86 a)–b).

49 Election Procedure Act, Section 257 (1a).

50 2011 Electoral Act, Section 17 (1).

voter cannot vote for a specific candidate, but only for the list itself. In other words, the minority lists are closed, and so the voters have no influence on the order in which candidates are elected. (As an illustration, see the German minority's list in the 2022 election [Picture 1].) If a minority list gains a seat, the mandate is allocated to the candidate ranked first.<sup>51</sup>



*Picture 1. German minority's list in the 2022 election*<sup>52</sup>

Therefore, it can be concluded that the Hungarian model of the parliamentary representation of minorities does not resemble any of the existing Eastern and Central European models.<sup>53</sup>

#### ***1.4. Minority Voting in Practice – Lessons from the Elections of 2014–2022***

Three parliamentary elections (2014, 2018, 2022) have taken place in Hungary since the 2011 Electoral Law came into force. Although the applications were lodged

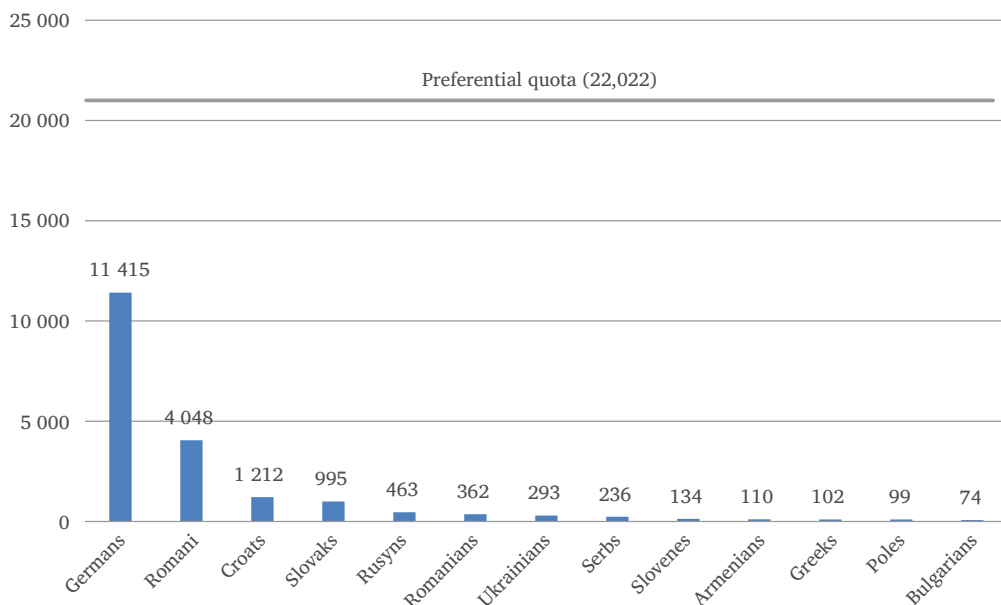
51 2011 Electoral Act, Section 9 (5).

52 Source: <https://nemzetisegek.hu/wp-content/uploads/v%C3%A1laszt%C3%A1s-460x325.jpg>.

53 Halász, 2022, p. 82.

to the ECtHR after the 2014 election, the outcome of the latest two elections is worth a deeper look to get a more thorough picture of minority voting.

Diagram 1 illustrates the outcome of the 2014 parliamentary elections when minority voting debuted.



*Diagram 1. Votes cast for the national minority lists in the 2014 parliamentary elections<sup>54</sup>*

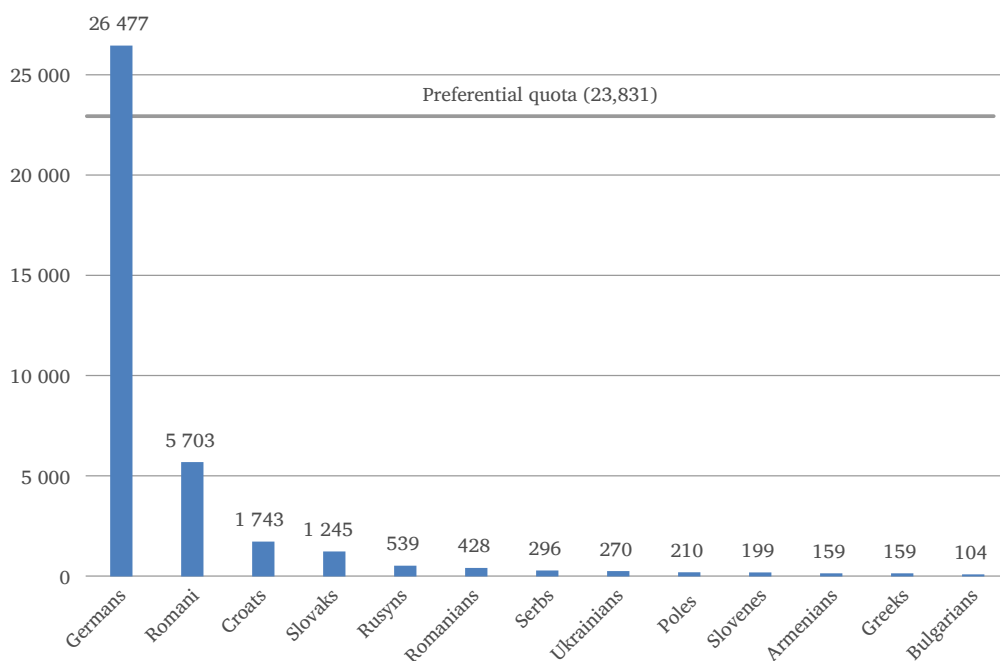
As the bar chart reveals, even the minority list with the highest support (the list of Germans) was far from gaining a seat. To win a parliamentary seat, 22,022 votes would have been needed, but the 13 minority lists together only received 19,543 votes. The fact that the minorities would be left without a parliamentary seat was practically certain even before the elections, as the two largest minorities (Roma and German) had only 14,271 and 15,209 voters in the electoral register, respectively, while the preferential quota was expected to be around 20,000. As no minority list votes reached the preferential quota, each of the 13 minorities was represented by a national minority spokesperson in the Parliament.

Although it was widely believed, based on the 2014 results, that under these circumstances no minority had a chance of winning a seat,<sup>55</sup> the 2018 election brought significant change (Diagram 2). In contrast to 2014, this time the German minority had a real chance to win a mandate as they had more than 33,000 voters in their

<sup>54</sup> Source: the author, based on the election data.

<sup>55</sup> E. g. Mór , 2015, pp. 591–592.

electoral register,<sup>56</sup> thanks to the intensive mobilisation of the self-government of the German minority.<sup>57</sup> In addition, the Roma minority (18,490 registered voters) still had a very slim chance of winning a seat, but they would have needed a low turnout along with committed and willing voters. While the German minority was able to reach the preferential quota, the vast majority of the Romani minority voters nevertheless decided not to vote for their minority list. (As the preferential quota was much higher than the number of registered Roma voters, they would in any case have had no chance of winning a seat.) The other eleven minorities had absolutely no chance of crossing the threshold.



*Diagram 2. Votes cast for the national minority lists in the 2018 parliamentary elections<sup>58</sup>*

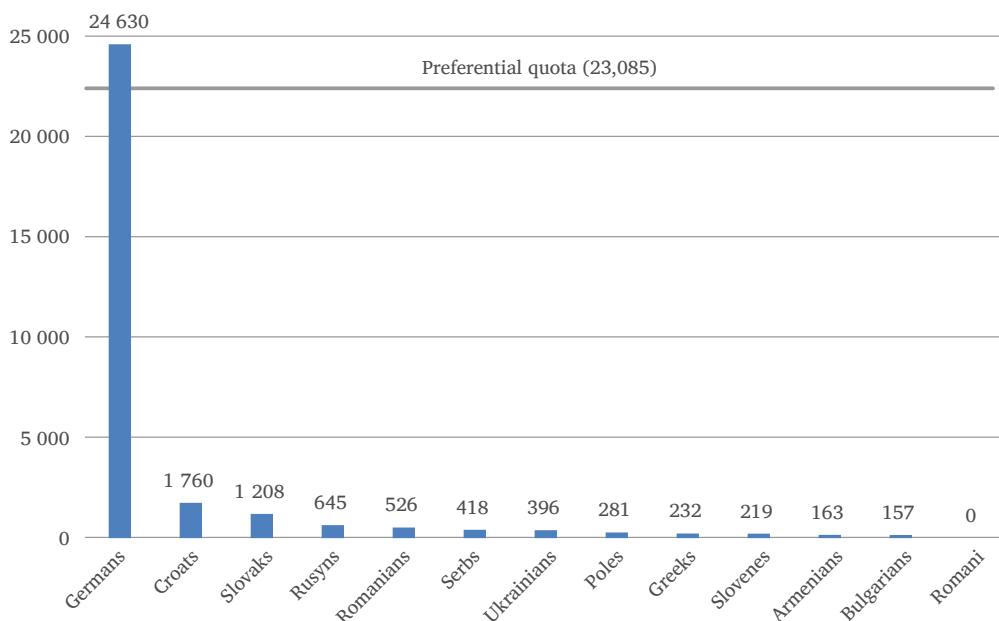
The outcomes of the 2022 elections (Diagram 3) are not significantly different from those of 2018. The German minority has once again won a parliamentary seat, albeit a narrow one, while the other minorities had absolutely no chance of winning

<sup>56</sup> For the data of the electoral register, see: <https://www.valasztas.hu/valasztopolgarok-szama> .

<sup>57</sup> Kállai, 2020, p. 15.

<sup>58</sup> Source: the author, based on the election data.

seats. (Due to internal conflicts, the Romani minority self-government failed even to draw up a list.)



*Diagram 3. Votes cast for the national minority lists in the 2022 parliamentary elections<sup>59</sup>*

The results of the three elections suggest that minorities, with a certain simplification, can be divided into three categories based on their chances of winning a seat:<sup>60</sup>

- I) Based on their population numbers, the Germans and the Romani have a real chance to gain a parliamentary seat. As seen, while the German minority exceeded the preferential quota twice, the Roma minority was unable to mobilise their members to a sufficient extent.
- II) The Croatian, Romanian, Slovak, and Ukrainian minorities have a very marginal, rather theoretical chance of winning a mandate. Each of these minorities exceeds 20,000, but these figures also include minors, so the number of persons with a right to vote is even lower. Crossing the preferential quota would require, on the one hand, a low turnout in the parliamentary elections (which would result in a lower quota), and, on the other hand, virtually all members of the given minority would have to register and then to vote for

<sup>59</sup> Source: the author, based on the election data.

<sup>60</sup> Cf. Kurunczi, 2020, pp. 126–127.

their own minority list.<sup>61</sup> All in all, they only have a theoretical chance of winning a mandate.

- III) The remaining seven minorities do not even have a theoretical chance of entering parliament, as their population numbers are far below the preferential quota of the last elections.

## 2. Procedure Before the Court

After outlining the background of the case of Bakirdzi and E.C. v. Hungary, we now turn to the Court's judgement. Firstly, the applicants' objections are summarised, then the Government's point of view is outlined, followed by the Court's assessment, the final decision, and the joint concurring and a partly dissenting opinion.<sup>62</sup>

### 2.1. The Applications

The applications were lodged after the 2014 parliamentary elections by two Hungarian citizens, Ms Kalliopé Bakirdzi and E.C., belonging to the Greek and Armenian national minorities, respectively.<sup>63</sup> (Concerning the similar subject matter of the applications, the Court examined them jointly in a single judgement.<sup>64</sup>)

The applicants complained that the system of national minority voting constituted a discriminatory interference with their voting rights. They relied on Article 3 of Protocol No. 1 to the European Convention on Human Rights<sup>65</sup> (hereby Convention) taken alone and in conjunction with Article 14 of the Convention.<sup>66</sup> The applicants had three objections to the Hungarian legal regulation. Firstly, they claimed that although the intention of the Hungarian authorities had been to promote the participation of national minorities in the legislature by introducing national minority voting, the effects of the measure were to the contrary, leading to the disenfranchisement of that group, since they had no prospect of attaining the preferential quota prescribed by the relevant legislation. The applicants referred to the actual

61 In contrast, the 2014–2022 experience shows that only a fraction of minority citizens register as minority voters (Dobos, 2023).

62 However, we do not touch upon the admissibility of the applications.

63 Judgement, paras. 2 and 4.

64 Judgement, para. 26.

65 “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

66 Judgement, para. 27: “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

population statistics, arguing that it was impossible for national minorities to gain a seat in Parliament.<sup>67</sup> (Reminder: during the 2011 census 3,571 and 4,642 respondents identified themselves as belonging to the Armenian and Greek minorities, respectively.)

Secondly, the applicants further submitted that the fundamental element of free elections is a real choice between the competitors of the political racecourse. They, however, did not have a genuine choice. National minority voters, on the one hand, were excluded from voting for party lists. On the other hand, they could not cast a ballot for anyone other than the candidates of their (closed) minority list. They argued in this respect that having an identical ethnic origin did not lead to having identical political views.<sup>68</sup>

Thirdly, the applicants alleged that the secrecy of the vote had also been violated since once they were identified as national minority voters, it was immediately known to everyone how they had voted.<sup>69</sup> (As noted above, a request for registration as a national minority voter contains a reference to the national minority the voters belong to. When the polling station commission hands over the ballot paper to the minority voter, the members of the commission are aware of who the voter will cast their vote for.)

To sum up, in the applicants' view, the legal regulation was discriminatory since – because of their status of belonging to a national minority – they had been treated differently from other voters.<sup>70</sup>

## ***2.2. The Government's Stance***

The Hungarian Government maintained that the regulation of the national minority seats constituted positive discrimination since a national minority list needs to acquire a quarter of as many votes to win the first mandate as that of the parties. This preferential rule had the legitimate aim of enhancing the political participation of minorities.<sup>71</sup>

When it comes to the fact that minority voters cannot vote for the party list, the Government referred to the principle of equal suffrage. If the minority voters could also vote for the party list (in addition to the minority list), this principle would be violated as they would have three votes (single-member constituency candidate, party list, and minority list), whereas other voters had only two (single-member constituency candidate and party list).<sup>72</sup>

67 Judgement, para. 35.

68 Judgement, para. 36. It is worthwhile to mention that this problem was also indicated in the OSCE/ODIHR Election Observation Mission Reports published after the parliamentary elections of 2014, 2018, and 2022.

69 Judgement, para. 37.

70 Judgement, para. 38.

71 Judgement, para. 39.

72 Judgement, para. 40.

Finally, the Government emphasised that it was the voters' free choice to register as minority voters, which in any event could always be subsequently changed.<sup>73</sup> If doing so, they would regain the possibility to vote for the party list.

### ***2.3. The Court's Assessment***

The Court first interpreted Article 3 of Protocol No. 1 and Article 14 of the Convention, summarizing its case law to date.

As for the first (right to free elections), the Court reiterated that this provision enshrines a characteristic principle of democracy and is accordingly of prime importance in the Convention system.<sup>74</sup> According to the case law of the Court, the words "free expression of the opinion of the people" means that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another. The word 'choice' means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections.<sup>75</sup> The Court reminded that Article 3 of Protocol No. 1 does not create any obligation to introduce a specific system such as proportional representation or majority voting with one or two ballots. The Contracting States have a wide margin of appreciation in that sphere. However, the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election does not entail that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus, no electoral system can eliminate 'wasted votes'.<sup>76</sup>

With regard to electoral systems, the Court ruled that its task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country and whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others.<sup>77</sup> In this context, the court explained that under certain conditions both electoral thresholds and closed party lists could be justified.<sup>78</sup>

Concerning Article 14 (prohibition of discrimination), the Court claimed that a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to

<sup>73</sup> Judgement, para. 41.

<sup>74</sup> Judgement, para. 42.

<sup>75</sup> Judgement, para. 43.

<sup>76</sup> Judgement, para. 44.

<sup>77</sup> Judgement, para. 45.

<sup>78</sup> Judgement, paras. 46–47.



be realised".<sup>79</sup> However, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. Nevertheless, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them.<sup>80</sup>

After assessing the general principles, the Court applied them to the current case. In the reasoning of the judgement, the Court reviewed the three objections of the applicants' one by one.

### *2.3.1. Objection #1 – "No prospect of attaining the preferential quota"*

The Court laid down that the Hungarian statutory scheme with a preferential threshold for minority representatives significantly differs from the 'general' electoral threshold (the latter has been addressed by the Court in several judgements).<sup>81</sup> Subsequently, the Court recalled that, according to a decision of the former European Commission of Human Rights, the Convention "does not compel the Contracting Parties to provide for positive discrimination in favour of minorities".<sup>82</sup> It has also been reiterated that "even interpreted in the light of the Framework Convention [for the Protection of National Minorities], the Convention did not call for different treatment in favour of minority parties".<sup>83</sup>

As the Court noted, the specificity of the Hungarian regulatory system was that national minority candidates could attain the requisite number of votes only from the ballot of national minority voters belonging to the same minority group as themselves (i.e. the Greek minority's list may receive votes only from the voters who are recorded as Greek minority voters). In the Court's view, this in fact placed them in a significantly different situation compared to other candidates – whether representing political parties or independents – who could obtain votes from the total eligible electorate. As indicated in the overview of the legal framework, national self-governments are prohibited from drawing up a joint national minority list. The Court found that this prohibition impinged upon the right of the applicants as national minority voters to associate for political purposes through the vote, in that their candidate could only be endorsed by members of the same national minority. In comparison, other members of the electorate were free to associate with any other like-minded electors for the advancement of political beliefs.<sup>84</sup>

The Court accepted the applicants' argument that the number of minority voters belonging to the same national minority in Hungary was not high enough to reach the preferential electoral threshold even if all voters belonging to that national minority

<sup>79</sup> Judgement, para. 49.

<sup>80</sup> Judgement, para. 50.

<sup>81</sup> Judgement, para. 53.

<sup>82</sup> *Magnago and Südtiroler Volkspartei v. Italy*, no. 25035/94, Commission Decision of 15 April 1996, DR 85-A, p. 112.

<sup>83</sup> *Partei Die Friesen v. Germany*, no. 65480/10, par. 43, 28 January 2016. Judgment, par. 54.

<sup>84</sup> Judgement, para. 55.

were to cast their vote for the respective minority list. As noted in the judgement, in 2014, 140 and 184 voters were registered as Greek and Armenian minority voters, respectively, whereas the requisite number of votes to gain a seat in Parliament for a national minority candidate was 22,022.<sup>85</sup>

Subsequently, the court again emphasised that the Convention does not require States to adopt preferential thresholds in respect of national minorities. However, when setting up a quorum for national minority groups, consideration needs to be given as to whether that threshold requirement makes it *more burdensome* (emphasis added) for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists and whether – in turn – that electoral threshold has a negative impact on the opportunity of national minority voters to participate in the electoral process on an equal footing with other members of the electorate.<sup>86</sup> The reasoning of the judgement again reiterated that not all votes must necessarily have equal weight as regards the outcome of the election; the national legislator needs to assess whether the statutory scheme creates a disparity in the voting power of members of national minorities, as the applicants, in order to avoid that the potential value of votes that might be cast for national minority lists becomes diluted.<sup>87</sup>

### 2.3.2. Objection #2 – “No genuine choice”

In its assessment of the 2011 Electoral Act, the Court stressed, that in practice, as a consequence of being registered as national minority voters, the applicants could only vote for their respective national minority lists as a whole, or abstain from voting for the national minority list altogether. Therefore, they had neither the choice between different party lists nor any influence on the order in which candidates were elected from the national minority lists.<sup>88</sup> Whereas closed lists are not in themselves incompatible with the free choice of voters (they still may distribute their vote between the different party lists corresponding to their political preferences),<sup>89</sup> in the present case the national minority voters could only cast their votes for candidates fixed on the national minority list, irrespective of their political viewpoint.<sup>90</sup> As the judgement puts it, the applicants, as national minority voters, could not express their political views or choice at the ballot box, but only the fact that they sought representation in political decision-making as members of a national minority group.<sup>91</sup>

Overall, the Court expressed doubt as to whether a system in which a vote may be cast *only for a specific closed list of candidates, and which requires voters to*

85 Judgement, para. 57.

86 Judgement, para. 58.

87 Judgement, para. 59.

88 Judgement, para. 61.

89 Judgement, para. 62.

90 Judgement, para. 64.

91 Judgement, para. 65.

*abandon their party affiliations in order to have representation as a member of a minority ensures “the free expression of the opinion of the people in the choice of the legislature”.*<sup>92</sup>

### *2.3.3. Objection #3 – “Secrecy of their vote had been violated”*

Interpreting the principle of secret ballot, the Court pointed out that a voting system must ensure that voting is conducted by secret ballot allowing the electorate to exercise their vote for a preferred candidate freely and effectively, in accordance with their conscience and without undue influence, intimidation or disapproval by others. The voting system must assure voters that they would not be compelled directly or indirectly to disclose for whom they have voted.<sup>93</sup>

The applicants did not allege that the secrecy of the vote was violated in the act of voting itself but rather that since they had only one choice as voters, their electoral choice was indirectly revealed to everyone.<sup>94</sup> As has been explained above, a request for registration as a national minority voter must contain a reference to the national minority (i.e. the voter must indicate to which national minority they belong). Consequently, as soon as a minority voter registers, it becomes apparent which list they intend to vote for. Furthermore, when entering the polling station, the voter is given the ballot paper corresponding to their minority. Hence, all present at the polling station at the relevant time, especially members of the relevant election commissions, would come to know that the elector had cast a vote for the candidates on the national minority list. Similarly, national minority voters could be linked to their votes during the counting procedure, especially at polling stations where the number of registered national minority voters was limited.<sup>95</sup> Based on the above, the Court found that the national minority list voting system was not available to the applicants without compromising the right to secrecy.<sup>96</sup>

## **2.4. The Court's Decision**

Considering the above, the Court ruled that domestic legislation resulted in the applicants' being substantially limited in their electoral choice, with the obvious likelihood that their electoral preferences would be revealed and that the system fell with unequal weight on them because of their status as national minority voters.<sup>97</sup>

The Court once more reiterated that there is no requirement under the Convention for different treatment in favour of minority parties. It nonetheless considers that once the legislature decides to set up a system intended to eliminate or reduce

<sup>92</sup> Judgement, para. 66.

<sup>93</sup> Judgement, para. 68.

<sup>94</sup> Judgement, para. 69.

<sup>95</sup> Judgement, para. 70.

<sup>96</sup> Judgement, para. 71.

<sup>97</sup> Judgement, para. 72.

actual instances of inequality in political representation, it is only natural that the measure should contribute to the participation of national minorities on an equal footing with others in the choice of the legislature, rather than perpetuating the exclusion of minority representatives from political decision-making at a national level. As regards the Hungarian statutory scheme as a whole, the Court found that the minority voting system limited the opportunity of national minority voters to enhance their political effectiveness as a group and threatened to reduce, rather than enhance, diversity and the participation of minorities in political decision-making.<sup>98</sup> The Court ruled that the combination of the above restrictions on the applicants' voting rights, considering their total effect, constituted a violation of Article 3 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.<sup>99</sup>

Although the applicants claimed 10,000 euros each in respect of non-pecuniary damage, the Court considered that its finding of a violation constituted sufficient just satisfaction and accordingly made no award under this head.<sup>100</sup>

## ***2.5. Separate Opinions***

A joint concurring and a partly dissenting opinion were annexed to the judgement. In the joint concurring opinion, Judges Bošnjak and Derenčinović agreed only with the second and third arguments, but had some concerns regarding the reasoning with respect to the threshold requirement for a national minority in the context of Article 3 of Protocol No. 1 and the almost complete lack of reasoning when it came to the violation of Article 14 of the Convention.<sup>101</sup> The two judges saw a contradiction between the statements “the Convention does not require States to adopt preferential thresholds in respect of national minorities” and “when setting up a quorum for national minority groups, consideration needs to be given whether that threshold requirement makes it more burdensome for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists”. In their views, when the judgement laid down that “the national legislator needs to assess whether the statutory scheme creates a disparity in the voting power of members of national minorities, as the applicants, in order to avoid that the potential value of votes that might be cast for national minority lists becomes diluted”, the Court went well beyond the guarantees established by the Protocol. Judges Bošnjak and Derenčinović acknowledged that the Hungarian statutory scheme may be subjected to scrutiny and criticism by the relevant international actors but to hold that such a policy amounts to a violation of the Protocol seemed to them to be quite far-fetched.<sup>102</sup> As the joint concurring opinion notes, by

98 Judgement, par. 73.

99 Judgement, par. 74.

100 Judgement, pars. 76 and 78.

101 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 1.

102 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, paras. 2–3.

establishing this more favourable threshold for minorities, the Hungarian authorities went beyond the current requirements under the relevant international legal standards.<sup>103</sup> Therefore, the Hungarian legislator did not fall short of its obligations under the relevant international law, which provides a very broad margin of appreciation in election-related matters. The judges recalled that should the national minority fail to win a seat, the first candidate on the national minority list is appointed as a non-voting national minority spokesperson.<sup>104</sup> In their view, the effective political participation of minorities is ensured also by the spokespersons.

In the partly dissenting opinion, Judge Ktistakis contested the statement that “the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants”, as concluded by the majority. As the applicants were not politicians or members of a political party but simply voters, he cannot accept that the Court’s finding of a violation alone can constitute sufficient just satisfaction.<sup>105</sup>

## ***2.6 Comments on the Judgment***

Since the judgement was handed down, most of the domestic academic analyses on the subject have agreed with the Court’s ruling.

Regarding equal suffrage, Sándor-Szalay and Kiss reiterated<sup>106</sup> that neither the European Commission of Human Rights, nor the Venice Commission explicitly excluded plural suffrage (derogation from the equality of suffrage to be acceptable to protect national minorities), whereas the Hungarian Constitutional Court pinned down that the equality of suffrage excludes plural suffrage; the ‘one person – one vote’ principle stemming from the Constitution cannot be restricted for any reason whatsoever in this respect.<sup>107</sup>

When it comes to the violation of the secrecy of the voting, the authors pointed out a further circumstance that seriously undermines the principle. Given the diaspora nature of their geographical location, the number of voters registered in the national minority register in individual polling districts may be very low, and in a number of cases only one voter may cast their vote for a national minority list. In the latter case, if a single national minority voter attends the polling district and places the two ballot papers in the envelope handed over to them, even their single-member constituency candidate vote may be reconstructed (as the two ballot papers are in the same envelope).<sup>108</sup>

103 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 6.

104 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 7. It should be noted that the Joint Concurring Opinion refers here to Section 18 of the *Election Procedure Act*. However, this provision can be found in the *2011 Electoral Act*, Section 18 (1).

105 Partly Dissenting Opinion of Judge Ktistakis.

106 Sándor-Szalay and Kiss, 2022, pp. 67–69.

107 Decision No. 22/2005. (VII.17), Section II 2.

108 Sándor-Szalay and Kiss, 2022, p. 71.

Sándor-Szalay and Kiss reviewed also the joint concurring opinion of Judges Bošnjak and Derenčinović, and they agreed with the judges that the judgement does not contain an application and analysis of the general principles of Article 14 ECHR to the facts of the case, which makes it difficult to understand how the fundamental safeguards against discrimination were applied in the case in the context of the elections. In the author's view, the Court failed to further develop the Court's case law, as the Court did not undertake to provide a more detailed explanation of the reasoning behind Article 14.<sup>109</sup> In addition, Sándor-Szalay and Kiss claim that the judgement in *Bakirdzi and E.C. v. Hungary* even has international impact as the Court "has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life, and thus – in its own assessment as well – has deviated significantly from its previous case law".<sup>110</sup>

Kállai claims that some points of the reasoning should have been more elaborate and clearer in order to highlight the discriminative nature of the system. He argues that the whole electoral system is exclusionary towards minorities. Then he recalls that while the rights of the applicants were infringed in 2014, the same infringement happened systematically to thousands of minority voters also in 2018 and in 2022.<sup>111</sup>

In another recent analysis, Kurunczi challenged the Court's argument that the statutory scheme violated the secrecy of the voting. In his view, once a voter registers themselves as a minority voter, their decision does not relate to their political affiliation and political identity in the political sense, but to the minority to which the voter identifies themselves. Furthermore, if the state bodies (in this case, the electoral commission) could not be aware of the minority affiliation of the voter, the voter would not be able to take part in the election as a minority voter.<sup>112</sup>

Majtényi took a more critical view of the judgement. Although he does not think that the Court was mistaken about the conclusion that the Hungarian rules on the representation of minorities in Parliament are in breach of the Convention, he claims that "the quality of the court's argumentation is doctrinally weak and demonstrates an inadequate knowledge of Hungarian law". As he puts it, "The judgement does not address at all what has happened in the last eight years, e.g. that the German minority list gained enough votes to send an MP to the Parliament in both 2018 and 2022." This statement is confusing because the applications were lodged after the 2014 parliamentary elections, and, in the author's opinion, the Court could not be expected to extend its review to the 2018 and 2022 elections. He recalls the reasoning that, "As is apparent, the arrangement put in place for minority voters allowed for the details of how a national minority voter had cast their ballot to be known to everybody, and for information to be gathered about the electoral intention of minority voters

<sup>109</sup> Sándor-Szalay and Kiss, 2022, p. 72.

<sup>110</sup> Sándor-Szalay and Kiss, 2022, p. 77.

<sup>111</sup> Kállai, 2022.

<sup>112</sup> Kurunczi, 2023, p. 67.

as soon as they registered as such.”<sup>113</sup> Majtényi considers this statement to be false since data on minority affiliation is subject to special protection, so even minority self-governments do not have access to minority voters' data after the elections, and election documents, including ballots, are destroyed after the elections.<sup>114</sup>

### 3. Conclusions – the Future of Minority Voting in Hungary

As can be seen, it took the legislators more than 20 years to pass a law aimed at favouring the participation of national minorities in Parliament. However, a paradoxical situation has arisen that if no regulations in favour of minorities had been adopted, the Court's condemnation would not have been issued. In this sense, it is no exaggeration to say that less would have been more... It should be recalled here that, as the judgment also confirmed, neither the Convention, nor the First Additional Protocol to the Convention, nor the relevant international legal norms require different treatment and positive discrimination in the establishment of parliamentary representation of national minorities.<sup>115</sup> A key sentence in the reasoning of the judgement reads as follows: “However, when setting up a quorum for national minority groups, consideration needs to be given whether that threshold requirement makes it *more burdensome* for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists [...]” (emphasis added).<sup>116</sup> As discussed above, the statutory scheme enacted in 2011 made it completely impossible for seven out of the thirteen minorities to gain a parliamentary seat, while four other minorities have only a very slim, theoretical chance. (Based on their population numbers, only the Germans and the Romani have a real chance to gain a parliamentary seat.)

It must be stressed that the Court's previously established case law (e.g. *Partei Die Friesen v. Germany*) was not applicable in the *Bakirdzi and E.C. v. Hungary* case since the Hungarian legal framework has a unique feature, i.e. each minority list can only receive votes from voters of that minority. While, even a small niche party or a minority party has at least some theoretical chance to cross the electoral threshold (as it can attract voters from the whole of society, *at least theoretically*), the Hungarian statutory scheme *works in a different vein*. To put it bluntly, it was absolutely certain even *before* the elections that the Greek or the Armenian list would not win a mandate, as they had 140 and 184 voters recorded, respectively, in the electoral register in 2014. Consequently, the Greek list could under no circumstances have

113 Judgement, par. 70.

114 Majtényi, 2023.

115 For the details, see Sándor-Szalay and Kiss, 2022, pp. 73–76.

116 Judgement, para. 58.

received more than 140 votes. By all means, it could be argued that if more members of the Greek minority had registered as minority voters, there would have been a better chance of winning a seat. However, this statement overlooks the fact that even the population number of the Greeks (and also six other minorities) is far from the preferential quota. In light of this, the judgement was not excessive when it referred to “perpetuating the exclusion of minority representatives from political decision-making at a national level”.<sup>117</sup>

While the Hungarian Government requested that the case be referred to the Grand Chamber of the Court, the referral request was rejected, and consequently the judgement became final. This means that the Hungarian Government must take action to put an end to the infringements identified by the Court, since the implementation of the judgement is an obligation for Hungary under both international law and domestic law. As is clear from the judgement, the Court refrained from determining how Hungary should eliminate the infringement. Therefore, a number of solutions are possible, depending on the choice of the legislators. Some of the possible options are outlined below.<sup>118</sup>

- I) An obvious, but ‘cheap’ solution would be to abolish the minority voting system, i.e. to restore the pre-2012 situation. As noted above, there is no legally binding requirement at the international level to promote parliamentary representation of minorities through preferential provisions. Several countries, even in the European Union, do nothing to make it easier for minorities or minority parties to win parliamentary seats.<sup>119</sup> However, abolishing the current statutory scheme could also be seen as a step backwards, which may provoke criticism from domestic minorities, the neighbouring countries, and international organisations.
- II) Another option would be to maintain the current legal framework, with the amendment that minority voters would also have the right to vote for the party list, so they would not have to choose between expressing their minority identity or their party affiliation in the parliamentary elections. This scenario would be an obvious break with the principle of equal suffrage, as the minority voters would have three votes, whereas the others only two. According to the Venice Commission, “Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, e.g. by

<sup>117</sup> Judgement, para. 73.

<sup>118</sup> Based on the experience of 2014 and 2018, Kurunczi has formulated several other proposals (e.g. establishing an upper house in the Parliament) for the reform of the minority electoral system (well before the Court’s decision) (Kurunczi, 2020, pp. 135–143.).

<sup>119</sup> Slovakia serves as an example here. Hungarians are the largest ethnic minority (7.75%), even though the Hungarian (and other ethnic) parties do not receive any preferential treatment in the parliamentary elections.



waiving the quorum for the national minorities' parties do not infringe the principle of equality."<sup>120</sup>

The introduction of plural suffrage may be preceded by the amendment of the Fundamental Law,<sup>121</sup> as both the Fundamental Law and the case law of the Constitutional Court are committed to equality of suffrage. However, there is a notable exception from the latter as the Fundamental Law lays down that, "A cardinal Act may provide that only persons with domicile in Hungary may be granted the right or the *full right* to vote and to be voted for, and may specify further requirements for the eligibility to be voted for" (emphasis added). Based on this provision, the 2011 Electoral Act stipulates that, "A voter with no domicile in Hungary (*author's note: mainly Hungarians living in the neighbouring countries*) may cast a vote for the party list."<sup>122</sup> Consequently, they cannot vote for the single-member constituency candidates,<sup>123</sup> i.e. they have only one vote.<sup>124</sup> (It is noteworthy that the Court did not refer to this element of the Hungarian constitutional framework.)

Even if an amendment of the Fundamental Law would pave the way for plural suffrage, some problems still remain, while new challenges occur. As Kurunczi warns, plural suffrage may motivate citizens to take part in the elections as minority voters, without any real affiliation to the given minority, in order to gain an 'extra' vote. The minority lists may therefore become a 'playground' for political parties.<sup>125</sup> Additionally, it must be borne in mind that "the Court did not base the infringement of the right to free choice primarily on the absence of party list voting, but on the fact that the regulation chosen by the legislature, which entrusts national-level minority self-governments with the exclusive competence and responsibility for drawing up national minority lists, does not allow for the expression of political and ideological diversity within the national minority community [...]".<sup>126</sup> To put it another way, plural suffrage alone would not tackle the problems identified by the Court.

III) Within the framework of plural suffrage, the Government may decide to provide reserved seats for minorities. Croatia and Slovenia should serve as reference points, as the minorities in these countries have the right to

120 Code of Good Practice in Electoral Matter. Guidelines and Explanatory Report. Guidelines on Elections. I.2.4.b). [CDL-AD (2002) 23 – Opinion no. 190/2002].

121 Cf. Sándor-Szalay and Kiss, 2022, 69.; Kurunczi, 2023, p. 67.

122 2011 Electoral Act, Section 12 (3).

123 The reasons for that are quite obvious since a voter without residency in Hungary cannot be assigned to either one of the 106 single-member constituencies. However, Majtényi claims that "The half vote of non-resident citizens violates the 'one person, one vote' principle and that of the equal weight of all votes" (Majtényi, 2023).

124 For the details, see Bodnár, 2016.

125 Kurunczi, 2023, p. 67.

126 Sándor-Szalay and Kiss, 2022, p. 68.

guaranteed parliamentary seats.<sup>127</sup> First of all, the number of minority seats should be determined, which – if we look at the total proportion of minorities in the population – should be around eight. Subsequently, the lawmakers have to elaborate a scheme on how to distribute the reserved seats between the 13 minorities, taking into account the population numbers of the minorities. What seems certain, however, is that even in this case, not all 13 minorities would be guaranteed a seat, as it would result in a high degree of disproportionality if the minorities, numbering a few thousand, were to be able to elect a ‘full’ MP.

- IV) Theoretically, the calculation method of the preferential quota may be changed, entailing a lower threshold for the minority lists. However, even if the quota were halved, it would not improve the chances of minorities other than Germans winning a seat. In addition, Hungarian scholars are divided on the question of which is the highest preference that would not be unconstitutional.<sup>128</sup>
- V) Finally, it could be considered amending the current statutory scheme to allow minorities to elect only spokespersons in the future, but not full-fledged MPs, while certainly, they could also vote for the party list. At the same time, the minority lists should be transformed into open lists, enabling the voters to choose between the candidates. Although this option would eliminate the minority MPs with voting rights, it would offer at least three benefits. Firstly, the minority voters would not have to choose between expressing their minority identity or their party affiliation, i. e. they would not be excluded from voting for party lists. Secondly, they would have a genuine choice while voting for the minority list as they could vote directly for the preferred candidate. Thirdly, this arrangement would not undermine the principle of equal suffrage as overtly as option ii. would, since the spokespersons would be ‘only’ non-voting members of the Parliament.<sup>129</sup>

The scenarios sketched above serve as a point of departure for the forthcoming legislation. In the author’s view, it seems to be a somewhat difficult task to draft a law that takes into account each of the Court’s objections, while fitting into the Hungarian constitutional framework. However, one of the key statements of the judgement should be recalled: “The Court thus finds that the *combination* of the above restrictions on the applicants’ voting rights, considering their *total* effect, constituted a violation of [...] (emphasis added)”.<sup>130</sup> This wording clearly implies that the

<sup>127</sup> Roter, 2017; M. Balázs, 2022, pp. 181–189.

<sup>128</sup> Móri, 2018, pp. 138–139.

<sup>129</sup> Kállai suggests a similar reform and claims that the principle of equal suffrage would be infringed even if the minority voters would vote for the spokespersons (in addition to the single-member constituency candidates and party list) (Kállai, 2022). For a recent argument, see László, 2023, pp. 63–64.

<sup>130</sup> Judgement, para. 74.

shortcomings of the minority voting system were 'cumulative', which suggests that even if only some of the problematic elements of the current statutory scheme were resolved, then the system may be in line with the ECHR.

At the time of closing this manuscript, Hungary had not yet taken a step to amend the legal framework. However, as the next parliamentary election is scheduled only for 2026, the Government has plenty of time to find the proper solution.

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