An Attempt to Achieve a Noble Aim through Inadequate Means

Analysis of the ECtHR Judgment in Bakirdzi and E.C. versus Hungary

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Abstract

The present study deals with the judgment of the ECtHR concerning the rule of national minorities' representation in Hungarian parliamentary elections and the conclusions that may be drawn from it. It tries to answer the question whether Hungarian legislation is compatible with the requirements of the ECHR, and whether the ECtHR's reasoning in the present case adds up to a logical and coherent system. The judgment of the ECtHR raises a number of questions regarding the specific part of the Hungarian parliamentary electoral system that affects national minorities. The critical analysis of the judgment shall be divided into two main parts: first, the reasoning of the judgment dealing with discrimination, and second, the part of the judgment that finds a violation of Article 3 of Protocol No. 1. to the ECHR. The signatory state was condemned for three reasons: (i) because of the impossibility to obtain a mandate (the low number of seats), (ii) due to the prohibition to also vote on party lists in the same election, and (iii) because of the breach of the secrecy of the vote. Based on the analysis of the above aspects, this study concludes that the ECtHR – despite minor or major errors of reasoning in its judgment – correctly highlighted the problems inherent in the relevant part of the Hungarian legislation, namely, the difficulties and anomalies surrounding national minorities in obtaining seats in parliament. Thus, while an amendment of these rules is undoubtedly necessary, it remains a question which direction this change will take.

Keywords: preferential mandate, list of national minorities, secrecy of the vote, right to vote, Bakirdzi and E.C.

1. Introductory Thoughts

In a multi-ethnic country (such as Hungary), a central question is how national minorities other than the majority national minority can participate in the exercise of power and represent their interests at the national level. According to Petra

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Roter, representation of national minorities' voters can take two forms: on the one hand, through bodies specifically established for this purpose (*e.g.* national minority self-governments), and on the other hand, through the participation of persons belonging to national minorities in the election of various representative bodies.[1] To solve this conundrum in Hungary, the legislator has made it possible to set up a national minority list to 'compete' with the party lists and to ensure the parliamentary representation of national minorities recognized in Hungary. These candidates may be nominated by the national self-government of the given national minority, on the basis of the recommendation of at least one per cent, but not more than 1500, of the voters registered in the register as national minority voters. Only voters who declare themselves to be a member of a national minority may vote for these lists, however, they are barred from voting for party lists.

As far as the facts of the case are concerned, it is important to note that Kalliopé Bakirdzi, member of the Greek national minority, and E.C., member of the Armenian national minority, filed an application to the ECtHR following the 2014 parliamentary elections, because, in their view, the specific part of the Hungarian parliamentary electoral system that ensures the representation of national minorities in the parliament violates several provisions of the ECHR.

Pursuant to the provisions concerning national minority voters of Act CCIII of 2011 on the Election of Members of Parliament (Election Act), national minority lists drawn up by the national minority self-governments of national minorities recognized in Hungary are closed lists at parliamentary elections, which must include at least three candidates. In case the national minority in question has succeeded in drawing up a national minority list, the national minority voter has only two options: either to vote for the list put up by his or her national minority or to not cast a list vote. Meanwhile, such voters do not have the option to vote for party lists instead of, or in addition to the national minority list. The national minority list is entitled to a preferential mandate, in case it obtains a quarter of the votes necessary for the mandate allocated from the party lists. This reduces the number of 93 seats available for the parliamentary elections. Should a national minority list fail to achieve the necessary number of votes, the minority may send a national minority spokesperson to the Hungarian parliament, who merely has the right to speak, but not to vote.

According to the facts of the case, the applicants registered as national minority voters for the 2014 parliamentary elections. According to statistical data, a total of 35,289 members of the 13 national minorities recognized in Hungary applied to be entered in the national minority register in the 2014 parliamentary elections. Of the 13 national minorities[2] only the Roma (14,271) and German (15,209) national

1 It analyses the electoral situation of national and ethnic minorities in the former Yugoslav states (Bosnia and Herzegovina, Croatia and Slovenia): Petra Roter, 'Voting rights of minorities and the role of ethnicity in elections in the post-Yugoslav space' *in* Helen Hardman & Brice Dickson (eds), *Electoral Rights in Europe – Advances and Challenges*, Routledge Taylor & Francis Group, London – New York, 2017, pp. 69-91., 71.

2 The 13 national minorities recognized in Hungary are: the Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovak, Slovene and Ukrainian national minorities.

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minorities exceeded 10 thousand in the register. As far as the applicants' national minority registrations are concerned, however, this number was less than 200 (140 in the case of persons belonging to the Greek national minority, and 184 in the case of those belonging to the Armenian national minority). In the parliamentary elections, 20,022 votes were needed to obtain a preferential mandate, but none of the national minority lists reached this threshold.

2. Arguments Put Forward by the Petitioners

The applicants were Hungarian citizens belonging to the Greek and Armenian national minorities, respectively, who had registered as national minority voters for the 2014 parliamentary elections. They were therefore barred from voting for party lists in the Hungarian parliamentary elections, and could solely vote for the national minority lists of their own national minorities.

The applicants' primary argument was that, although the legislator's aim in drafting the Election Act was to promote the representation of national minorities in parliament, the system established actually had the opposite effect and led to their disenfranchisement. This is owed to the fact that a significant proportion of the 13 recognized national minorities, given their low overall numbers, are precluded from reaching the number of votes required for the preferential mandate.[3] The applicants also argued that an essential element of free elections is to ensure the possibility of a real choice, yet they were not afforded this opportunity. On the one hand, because national minority voters were excluded from voting for party lists, and on the other hand, because their choice was effectively limited to either voting for their own national minority list or not voting for any list. In this respect, the applicants' main argument was that shared ethnic origin does not necessarily amount to the same political views.[4] According to the applicants, the system also violates the principle of secret ballot, because once they appear at the polling station as a national minority voter, everyone will know how they vote on the list.[5] In their view, the Election Act is also discriminatory, as they were treated differently from other voters on the basis of them belonging to a national minority.[6]

Responding to the applicants' arguments, the representative of the Hungarian Government explained that the electoral system in fact applies positive discrimination, since national minorities need fewer votes to win seats than members elected from the party list, therefore, Article 14 ECHR is not violated.[7] In the Hungarian Government's view, it would be a breach of the equality of the right to vote if national minority voters were entitled vote for party lists in addition to their national minority list.[8] In fact, it is up to each voter to decide whether to register as a national minority voter or not, and this decision can be freely changed

3 *Bakirdzi and E.C. v Hungary*, Nos. 49636/14 and 65678/14, 10 November 2022, para. 35.
4 Id. para. 36.
5 Id. para. 37.
6 Id. para. 38.
7 Id. para. 39.
8 Id. para. 40.

at a subsequent election.[9] In addition, the Hungarian Government also argued that the applicants had not exhausted their domestic remedies, therefore, their motion should be considered inadmissible.[10]

The applicants did not agree with the Hungarian Government's reasoning. They also disputed the argument that their removal from the national minority register could have remedied their grievances.[11]

3. The Judgment of the ECtHR

The ECtHR was primarily concerned with the admissibility of the application. In its judgment, the ECtHR first of all emphasized that the most important issue to be decided in the case was not whether the applicants were on the electoral roll as national minority voters or not, but whether the electoral system and rules applied restricted the right to vote of national minority voters. Hence, according to the ECtHR, no other legal remedy could have remedied the violation of fundamental rights alleged by the applicants.[12] According to the judgment, the Hungarian Government's argument that the applicants have not exhausted their domestic remedies is therefore unfounded.[13]

The ECtHR then turned to considering the merits of the application. In this context, it first briefly summarized the relevant elements of its previous practice with regard to Article 14 ECHR and Article 3 of Protocol No. 1. First of all, the ECtHR has reaffirmed (as it has done several times before, see *e.g. Mathieu-Mohin and Clerfayt*[14]) that the primary obligation of the state is to adopt positive measures to allow democratic elections to be held in which the people can freely express their views.[15] According to the ECtHR, 'the free expression of the opinion of the people' means that voters cannot be unduly persuaded to vote for one party or another during elections. The word 'election' means that the different political parties should be given a proper opportunity to present their candidates.[16] However, the ECHR affords each State a wide margin of appreciation to decide which electoral system to apply. The main concern is to ensure that the electoral system reflects the views of the electorate, which requires that all voters are treated equally. However, it does not follow that all votes must have equal weight in the outcome of the election or that all candidates must have an equal chance of winning.[17] When scrutinizing an electoral system, the ECtHR must therefore consider whether the rules governing parliamentary elections exclude individuals or groups of individuals from participating in the political life of the country (see *Aziz*[18]), and whether the

9 Id. para. 41.
10 Id. paras. 28-29.
11 Id. para. 30.
12 Id. para. 31.
13 Id. para. 33.
14 *Mathieu-Mohin and Clerfayt v Belgium*, No. 9267/81, 2 March 1987.
15 *Bakirdzi and E.C. v Hungary*, para. 42.
16 Id. para. 43.
17 Id. para. 44.
18 *Aziz v Cyprus*, No. 69949/01, 22 June 2004.

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rules applied by the electoral system are not arbitrary or abusive.[19] For example, although electoral thresholds deprive some voters of the possibility of representation, these may be considered necessary and proportionate, *e.g.* to avoid excessive fragmentation of a parliament.[20] As regards the closed lists, the ECtHR also recalled that, although this constitutes a restriction on voters' choice of candidates, the restriction may be justified in the electoral system, given the constitutive role of political parties in democratic countries.[21]

More generally, the ECtHR also emphasized that a rule may be considered discriminatory if there is no objective and reasonable justification for the discrimination, and. if there is no reasonable proportionality between the means used and the aim pursued. Moreover, States have some margin of appreciation to assess whether and to what extent differences between otherwise comparable situations justify different treatment. The ECtHR also emphasized, however, that the ECHR does not bar Member States from treating certain groups differently in order to correct 'factual inequalities' between them.[22]

In its reasoning on the merits of the case, the ECtHR focused on three issues: *(i)* the electoral system established (including the issue of preferential mandates), *(ii)* the lack of free choice for national minority voters, and *(iii)* the violation of secret ballot.[23]

(i) One of the applicants' main arguments was that they had no real chance of obtaining a preferential mandate, as the total number of the persons belonging to their national minority did not reach the required threshold. In this respect, the ECtHR noted that the preferential mandate applied by the Election Act to national minorities is completely different from the general electoral threshold, as it was introduced precisely to ensure representation. The ECtHR emphasized that the ECHR does not oblige Member States to apply positive discrimination in their electoral systems in favor of national minorities, but expects Member States to promote the participation of minorities in public affairs. The introduction of a preferential mandate (*i.e.* an exemption from the electoral thresholds) could be one of the appropriate means to achieve this. At the same time, Member States have a wide margin of appreciation on how they wish to promote the participation of minorities in public affairs.[24] In relation to the system applied by the Election Act, however, the ECtHR also pointed out that national minority candidates can only obtain the votes necessary for a preferential mandate from members of their own national minority. This puts them in a very different position as compared to other political parties and independent candidates, who can expect votes from the electorate as a whole. According to the ECtHR, this voting scheme violates the right of 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

19 *Bakirdzi and E.C. v Hungary*, para. 45.
20 Id. para. 46.
21 Id. paras. 47-48.
22 Id. paras. 49-50.
23 Id. para. 51.
24 Id. para. 54.

associate with any other like-minded electors for the advancement of political beliefs.[25] In this context, the ECtHR also pointed out that this situation is different from a situation where a voter 'joins' a political grouping of his own choice, even if though the party in question has little social support (and the voter therefore cannot expect real representation by them). The difference lies in the fact that in the present case, it is the legislator's decision that brought about this situation, by determining who can vote for the national minority lists.[26] In its decision, the ECtHR emphasized that while individual Member States could (of course) link representation to a minimum level of support, they are not obliged to adopt preferential thresholds. When they do, however, they should consider whether the rule applied would not make it more difficult for national minorities to obtain seats and whether the preferential electoral threshold might negatively affect the ability of national minority voters to participate in the electoral process on equal terms with other voters.[27] And although, in the ECtHR's view, not all votes have to necessarily have equal weight in the outcome of an election, the legislator must assess whether the system established creates inequality and leads to a devaluation of votes cast on national minority lists.[28]

(ii) The second main argument of the applicants was that they had no real freedom of choice in the system established by the Election Act.[29] National minority voters are not allowed to vote for party lists, nor can they have a say in the order of the candidates placed on their national minority list. They can merely decide whether or not to vote for their respective national minority list.[30] In this context, the ECtHR pointed out that closed lists do not in themselves violate the ECHR, because even if closed lists limit the range of candidates from which voters can choose, they still allow them to allocate their votes between the different party lists according to their political preferences.[31] However, in the present case, the ECtHR was bound to scrutinize the question of the closed nature of national minority lists. In this regard, it emphasized that the right to vote includes the possibility for voters to choose candidates or party lists that best reflect their political views, and that electoral legislation cannot require voters to adopt political positions that they do not support.[32] According to the ECtHR, what distinguishes the current situation from closed-list electoral systems in this respect is the fact that national minority voters, regardless of their political views, could only cast their votes on national minority lists. In this context, it should be noted that national minority voters cannot express their political views and choices at the ballot box, but only that they have asked to be represented in political decision-making as a member of a national minority group.[33] Therefore, in this respect, the ECtHR concluded that a

25 Id. para. 55.
26 Id. para. 56.
27 Id. paras. 57-58.
28 Id. para. 59.
29 Id. para. 60.
30 Id. para. 61.
31 Id. para. 62.
32 Id. para. 63.
33 Id. paras. 64-65.

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system where voters can only vote for a specific closed list of candidates and requires voters to give up their party affiliation in order to be represented as a member of a national minority, does not necessarily guarantee the free expression of voters' opinions at the time of elections.[34]

(iii) Thirdly, the ECtHR examined the issue of the secret ballot. First of all, the ECtHR confirmed that the secrecy of voting means that an electoral system must ensure that the election is conducted by secret ballot, allowing voters to exercise their right to vote freely and effectively, in according to their conscience, without undue influence, intimidation or disapproval of others.[35] The applicants did not claim that their right to secret suffrage was violated during the election process, however, they complained that, because of the system introduced by the Election Act (namely, that they had only one choice), their vote was made public for all to see.[36] Because of the system in the Election Act, those present at the polling station at the given time, especially the members of the competent electoral committees, were aware that the voter had voted for the candidates on the national minority list. In addition, national minority voters could be linked to their votes during the counting of ballots, especially in polling stations where the number of registered national minority voters was limited.[37] For these reasons, according to the ECtHR, the Election Act made it possible for everyone to know the details of the votes of voters belonging to national minority and to collect information on the voting intentions of national minority voters. Thus, the principle of secret suffrage did not prevail for national minority voters.[38]

Three judges attached dissenting opinions to the judgment.[39] According to judges *Marko Bošnjak* and *Davor Derenčinović*, the reasoning of the judgment is partially incomplete (mainly because of the total lack of reasoning for discrimination). In their view, the reasoning of the majority decision is contradictory as regards the eligibility of the preferential threshold and goes beyond the requirements that may be derived from the ECHR. The States have a wide margin of appreciation in this respect, and a breach of the Protocol can only be established in cases where the freedom of the electorate or the secrecy of the vote is at stake. It is therefore not reasonably justifiable to suggest that an electoral rule which does not in itself relate to a human right is prejudicial in the context of electoral freedom. Such a measure may be subject to political criticism, but this cannot be the basis for finding of a violation of the ECHR. The system of the Election Act does not guarantee the representation of national minorities in parliament, but this is not an expectation. In fact, the participation of national minorities in public affairs is also ensured by the institution of the national minority advocate.

In its judgment, the ECtHR therefore found a violation of Article 3 of Protocol No. 1 and, in this context, of Article 14 ECHR. The ECtHR ruled that Article 3 of

34 Id. para. 66.
35 Id. para. 68.
36 Id. para. 69.
37 Id. para. 70.
38 Id. paras. 71-73.
39 Judge *Ioannis Ktistakis* criticized merely the fact that the ECtHR did not order the Hungarian state to pay compensation in addition to finding a violation of the ECHR.

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Protocol No. 1 and in conjunction with it, Article 14 ECHR is violated by the Hungarian electoral legislation which prevents candidates of a given national minority from obtaining a parliamentary seat if the total number of voters of that national minority is below the preferential threshold. It also found a violation of the relevant articles of the ECHR if national minority voters can only vote for their own national minority list, but not for party lists. It is also a violation of Article 3 of Protocol No. 1 to make the votes of voters belonging to national minorities (where the number of national minority voters is limited) indirectly available to all.

4. Assessment

The judgment of the ECtHR examined in the present study raises a number of questions regarding the provisions of the Hungarian parliamentary electoral law that affect national minorities.[40] The critical analysis of the judgment should be divided into two main parts: on the one hand the discriminatory reasoning of the judgment, and on the other hand, the part of the judgment that finds a violation of Article 3 of Protocol No. 1. The latter for three reasons: *(i)* because of the impossibility to obtain a mandate (the low number of seats), *(ii)* due to the prohibition to also vote on party lists in the same election, and *(iii)* because of the breach of the secrecy of the vote.[41]

In its judgment, the ECtHR based its finding primarily on a violation of Article 3 of Protocol No. 1, but in this context it also found a violation of Article 14 ECHR, *i.e.* it ruled that the Hungarian legislation could be considered discriminatory. With regard to the latter, two ECtHR judges also criticized in their dissenting opinions that the majority judgment did not sufficiently justify the existence of discrimination. In this respect, I partly agree with the dissenting opinion of Judges Marko Bošnjak and Davor Derenčinović, because, in my opinion, the judgment does not explicitly state the reasons for this, although between the lines of the judgment the reasons for discrimination can be found. In any case, discrimination can only be established within a homogeneous group whose members are in a comparable situation.[42] This raises the question of whether national minority voters form a homogeneous group with other voters with regard to the provisions under examination (*i.e.* in respect of the seats that can be obtained from lists). It is important to answer this question, because only then can the argument that national minority voters are discriminated against compared to other voters be upheld. The reasoning would be, that based on the provisions of the Election Act they have little or no chance to obtain a mandate for their national minority list, as

40 For the issues raised, *see also* Elisabeth Sándor-Szalay & Balázs Kiss, 'An odd solution – comments on the margins of a recent debate on national minority suffrage: ECtHR judgement in Case Bakirdzi and E.C. v. Hungary' *Pécs Journal of International and European Law*, 2022/II, pp. 55-79.

41 The ECtHR also addressed procedural preliminary questions in its judgment. In this context, it is important to note that the ECtHR correctly rejected the arguments put forward by the Hungarian Government on the issue of admissibility. In my view, the applicants' request was clearly admissible.

42 For details of the Constitutional Court's practice on discrimination, *see e.g.* Beáta Kováts, 'Egyenlőségi klauzula', *in* Lóránt Csink (ed.), *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*, Novissima, Budapest, 2021, pp. 185-199.

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opposed to other voters who, by voting for party lists, can in principle vote in the same direction in order to obtain a mandate for the party list in question. In this context, it is important to underline that the Election Act introduced a positive discrimination rule in line with international requirements,[43] allowing national minority lists to obtain a mandate even if they receive far fewer votes than party lists (conforming to the institution of preferential mandate). Therefore, to create equal opportunities, the Election Act introduced a different regulation for national minority voters with regard to the list mandate, differentiating between voters as a whole with regard to the list mandate. While the ECtHR judgment does not contain any reasoning to this end, was thus based on the assumption that the electorate as a whole constitutes a homogeneous group. In my view, this statement also correct in this respect, as both national minority and other voters can vote for national lists in addition to individual candidates. However, national minority voters can bring a representative into parliament with fewer votes – at least in principle. In practice, however, as I will describe later, this is not a realistic alternative. This begs the question: does positive discrimination really have a positive effect or, on the contrary, does it have a negative effect? It is also possible for voters who do not belong to a national minority to vote for a party list that does not meet the threshold for entry, so their vote does not result in a mandate. However, in the case of national minority voters, according to 2011 census data,[44] 8 of the 13 national minorities (including the national minorities the two applicants belong to) do not reach the total number of voters required to be registered[45] (and in most cases, their number is less than 10,000). Of the remaining 5 national minorities, only the German and Roma national minorities' numbers exceed the threshold to have a real chance of obtaining a preferential mandate.[46] It is therefore clear that the provisions of the Election Act actually make it impossible for 8 national minorities to obtain a preferential mandate. Indeed, this shows that a preferential mandate is almost unattainable for 11 of the 13 national minorities. On this basis, Article 3 of Protocol No. 1 does indeed give rise to a breach of Article 14 ECHR. In my opinion, however, the real discrimination is not between national minority and other voters, but in relation to the 13 recognized national minorities. This is because in the case of persons belonging to the German and the Roma minorities, for example, there is a real chance of obtaining a list mandate due to their numbers, and therefore, in their case positive discrimination can indeed

43 In this context, it is worth highlighting the Lund Recommendations (*see* at www.osce.org/hu/hcnm/30333) which, *inter alia*, encourage states to ensure the participation of minorities in the overall governance of the state. The Lund Recommendations also stipulate that states must ensure that minorities have an effective voice at the level of central government – *e.g.* by reserving a certain number of seats for minorities in one or both chambers of parliament and in parliamentary committees –, and also that the electoral system in states should facilitate minority representation and influence. In this context, the recommendation also envisages that lower thresholds for obtaining seats could introduced as positive discrimination, and that purely ethnic parties and mixed parties cannot be rejected as a general principle.

44 *See* at www.ksh.hu/nepszamlalas/tablak_demografia.

45 The limit was 20 022 votes in the 2014 parliamentary elections, 23 831 votes in the 2018 elections and 23 085 votes in 2022.

46 Only the German national minority actually achieved this in 2018 and 2022.

have a positive effect and does not turn into discrimination. The 13 national minorities recognized in Hungary form a homogeneous group among themselves in terms of the list seats that can be allocated in parliamentary elections, especially in terms of the preferential seats they can obtain. In addition, they are subject to the same preferential rule. Therefore, if we conclude that two national minorities have a realistic chance of obtaining the preferential mandate (the German and the Roma national minority), while the others are excluded from it, then the discriminatory nature of the regulation can be established. And in fact, in relation to the German and Roma national minorities and the other 11 national minorities, this statement is factually verifiable. On this basis, the existence of discrimination could have been assessed among voters of the 13 recognized national minorities. However, this issue was not addressed in the ECtHR judgment.

The majority ECtHR judgment therefore based its finding of a violation primarily on a breach of Article 3 of Protocol No. 1. In this context, it is worth analyzing the ECtHR judgment in the light of the above three aspects.

(i) With regard to the first point, it is important to underline that the majority reasoning of the ECtHR found a violation primarily due to the infringement of the 'right to free elections'. The main argument of the judgment was that the number of national minority voters cannot (in principle, with the exception of possible fictitious identities) be expanded in any way, so that for many national minorities it is impossible for their lists to gain the support of a higher number of voters so as to obtain a preferential mandate. The national minorities concerned have thus been put in a position by the legislator itself where it is more difficult or almost impossible for them to obtain a preferential mandate. In my opinion, the ECtHR's reasoning is also correct in this respect, as the current provisions of the Election Act (with the exception of the German and Roma national minorities) practically exclude the possibility of national minorities actually obtaining a mandate. At the same time, I would not consider it possible for national minority lists to gain seats in parliament without reaching a minimum threshold, as this would create significant inequality among voters (in terms of seats based on list votes). The creation of a preferential mandate can clearly be considered a form of positive discrimination, *i.e.* the Election Act puts national minority voters in a more favorable position. This is also confirmed by international practice. However, further reducing the number of votes required for a preferential mandate would not, in my opinion, be the right direction.[47] Not least because the system established by the Election Act already results in a paradoxical situation: it is difficult to maintain a national minority-based representation in a single-chamber parliament. A Member of Parliament elected on the basis of national minority has the same rights as a politically elected Member of Parliament, and therefore, by its very nature will not solely speak and vote on national minority matters, which makes national minority representation political (but this is the opposite to the aim of obtaining a preferential mandate).

47 Neither would it be the case, for example, if the number of votes required for a preferential mandate were determined by the number of members of the given national minority on the national register (on this basis, the national minorities with fewer members would need fewer votes).

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(ii) In its judgment, the ECtHR also ruled that the Election Act is contrary to the provisions of the ECHR, because it excludes national minority voters from voting for party lists. So national minority voters can only vote for their own national minority list, in which case they cannot even have a say on the order of the candidates placed on it. In this respect, the main question is whether it amounts to a violation of the ECHR to exclude the right of national minority voters to vote for party lists in addition[48] to voting for national minority lists.[49] As a starting point for assessing the above question, it is important to note that the Hungarian Constitutional Court stated in its *Decision No. 22/2005. (VI. 17.) AB* that

> "the principle of *'one man – one vote'* is the basis for the self-government of the members of the political community, which implements the right of equal participation in the democratic process. […] The Constitutional Court considers this requirement to be absolute: the *'one man one vote'* principle of the Constitution cannot be restricted in this respect."

According to the practice of the Hungarian Constitutional Court, the state may only resort to the restriction of a fundamental right if the protection or enforcement of another fundamental right and freedom or the protection of other constitutional values cannot be achieved in any other way, *i.e.* the restriction is indispensable for the achievement of a legitimate aim. It is important to emphasize that the principle of 'one person-one vote' must also apply to the preferential mandates by national minorities. Ignoring it, *i.e.* if a national minority voter had two list votes, would, under the current provisions of the Fundamental Law, clearly violate the principle of equality of electoral rights.[50] For all these reasons, it can be concluded that the exclusion of plurality voting by a national minority voter is acceptable as a legitimate aim governing the restriction of fundamental rights. However, for a restriction of a fundamental right to be constitutional, it is not in itself sufficient that it is to protect another fundamental right or freedom, or to promote another constitutional purpose. The restriction must also comply with the requirements of

48 *See* in this context the report of the Parliamentary Commissioner for National and Ethnic Rights No. 3032/2006, at http://epa.oszk.hu/01200/01259/00028/pdf/belivek_46-49.pdf.

49 In this respect, it is worth noting (although one example alone does not justify any argument) that there is a European example (in Slovenia) where it is considered permissible for a national minority to vote for two different lists at the same time. Slovenia grants so-called dual voting rights to Italian and Hungarian national minority voters, which allows them to participate in ordinary elections in addition to electing their own MP (Miran Komac, 'The protection of ethnic minorities in the Republic of Slovenia' *in Slovenia & European standards for the protection of national minorities*, Institute for Ethnic Studies, Ljubljana, 2002, p. 21.). The Slovenian Constitutional Court (Uradni List RS. No. 20/1998, 1313.) did not find the possibility of dual voting for national minorities incompatible with the principle of equality of electoral rights, in view of the conventions with Italy and Hungary. It is also important to note that the two representatives elected by the national minorities also have veto power in issues directly affecting them. Noémi Kutassy-Nagy & Katalin Szajbély, 'A kisebbségi közösségek parlamenti képviseletéről', *in* Tamás Gyulavári & Ernő Kállai (eds.), *A jövevényektől az államalkotó tényezőkig*, Országgyűlési Biztos Hivatala, Budapest, 2010, pp. 283-284.

50 However, there would of course be no obstacle before the legislator to adopt an amendment to the Constitution that would allow for this derogation. This would also be in line with international requirements.

proportionality, *i.e*. the objective pursued must be in proportion to the violation of fundamental rights caused by the restriction. In this context, the legislator is obliged to use the least restrictive means available to achieve the objective in question. It is also important to note that voters are entered into the national minority electoral roll only at their own request. Under the current legislation, national minority voters must therefore decide whether they wish to express their national minority identity, which is protected under the Fundamental Law, or their political opinion, which is also constitutionally protected. This choice makes the restriction of fundamental rights proportionate.[51] On this basis, I therefore believe that the current legislation stands the test of constitutionality.

The question then is simply whether it would be appropriate and justified to create a three-vote model, which could, of course, require an amendment of the Fundamental Law. In its Opinion No. 190/2022 (*Code of Good Practice in Electoral Matters*), the Venice Commission emphasized that it is theoretically possible to grant 'plurality' voting rights, but that this can only be applied taking into account the specificities of the country concerned. Such an extra vote can only be an exceptional measure. This means that it can only be constitutionally justified in case the objective cannot be achieved by measures less prejudicial to equal suffrage, it is merely temporary and concerns only a small minority. Taking these conditions into account, however, we may conclude that the introduction of 'plurality' voting in Hungary would not be justified, as it would significantly violate the equality of suffrage in both legal and political terms, taking all factors into account. The total number of persons belonging to recognized national minorities and living in Hungary exceeds 644,000 (based on data from the 2011 census). This represents almost 8% of all voters, which is already a significant number. Moreover, taking into account the preferential mandate rules, in the case of four national minorities, a 'double' vote would effectively mean that their vote is worth more than that of other voters. In addition, the possibility of a significant increase in the number of national minority voters through fictitious identities cannot be excluded. Indeed, this could render national minority lists a 'playground' for political parties, significantly eroding the essence and meaning of national minority representation. A long-standing problem is that although Article XXIX (1) of the Fundamental Law states that citizens belonging to national minorities have the right to freely choose their identity, in practice, the choice of national minority is still preferred. The law does not set objective criteria in the context of identifying as a person belonging to a national minority. Thus, it may be the case that a person not only identifies with their actual or one national minority, since there is no obstacle to choosing a national minority identity with which one has no real attachment. This can lead to

51 In my opinion, when applying this fundamental rights test, no importance should be attached to the question of whether the votes of national minority voters on the list are indeed of equal weight to the votes of non-national minority voters on party lists. If only because we can answer this question with a clear 'no', taking this into account would mislead the present assessment. In my view, an institution introduced to remedy a violation of equality will not in itself be legitimized by another violation of equality.

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a number of abuses, *e.g.* in the course of the formation of national minority self-governments, or in the process of awarding grants.[52]

It is worth pointing out that even if the Election Act were to allow voters voting on a national minority list to vote on the party list, problems inherent in the current rules ensuring the representation of national minorities would not be solved. That is, without the emergence of fictitious identities in the electoral roll, most national minority lists would still be unable to obtain a preferential mandate. Therefore, in my view, granting 'plurality' voting for national minorities is not a real alternative, it would just create another problem.[53]

Perhaps it is precisely in view of the above that the ECtHR judgment analyzed here was careful in its wording, as it only stated that the current Hungarian legislation does not necessarily ensure the free expression of voters' opinions during elections. However, the ECtHR has not taken the step to impose an obligation to allow multiple list voting. In fact, this would not have been possible under the practice of its own peer body, the Venice Commission.

(iii) The last point raised by the ECtHR with regard to the finding of a violation was that the provisions of the Election Act violate the principle of secrecy of the vote, since everyone in the polling station will know who the national minority voter cast their vote for. In this respect, it is important to underline that the principle of secrecy of the vote is in fact part of the state's obligation to protect its institutions. On this basis, the state must provide voters with the means to hide their vote (*e.g.* a polling booth or an envelope). However, secret suffrage should not be interpreted so broadly that it applies not only to voting but to all electoral procedures.[54] Voters can also choose at any time not to exercise their right to secrecy and to disclose their vote. The ECtHR's judgment was based on the premise that the requirement of secrecy was violated because if a voter is on the national minority register, everyone will know which list they are voting for as soon as they enter the polling station, since they cannot vote for any other list (neither for a party list, nor for the list of another national minority). In addition, their vote will be linked to them when the votes are counted (*e.g.* if they are the only voter pertaining to the given national minority who voted at the polling station).

In my view, this reasoning of the ECtHR judgment is flawed. The national minority voters decide on their own, exercising their right to free identity, whether they wish to be entered in the electoral roll as a national minority voter. Their decision therefore does not relate to their political vote and political identity

52 András László Pap, 'Észrevételek a nemzetiségek parlamenti képviseletének szabályozásához az Alaptörvényben, a választójogi törvényben és a nemzetiségek jogairól szóló törvényben', *in* Tímea Drinóczi & András Jakab (eds.), *Alkotmányozás Magyarországon 2010-2011. Vol. I.*, Pázmány Press, Budapest, 2010, p. 423.

53 It is also worth toying with the idea whether it would be possible for a national minority voter to cast a list vote not only for their own national minority list, but for any other national minority list. While this would increase the chances of a national minority list acquiring a mandate, in practice it would be completely contrary to the principle of national minority representation: it would be difficult to justify how and on what grounds members of a given national minority could be represented in parliament by another national minority. Thus, for my part, I would reject such a proposal.

54 Decision No. 2/1990. (II. 18.) AB, ABH 1990, 18, 20-21.

(which are sensitive data), but to the national minority to which they identify themselves. Their decision is public and accessible to the public bodies, which in this case include the electoral commission, since registration always has legal effects, including, for example, the right to vote. The person concerned can only exercise these rights if the public authorities are aware of their decision. So when a national minority voter enters the polling station, the members of the electoral commission sitting there will not know primarily for whom they will vote, but only that they belong to a national minority. *De facto* of course they will know, as under the system of the Election Act such voters can only vote for the list of their national minority, but it is important that this vote is not political in nature, but an expression of their national minority identity. However, such voters personally undertook to make this public when they applied for their entry into the national minority register. And other voters will not even know that they are on the national minority register unless the voter wants to make it public. In fact, when they sign the register or when they to the polling booth to vote, no one will disclose the national minority the freely identified with. During the counting of votes, their political vote (party affiliation) will only be linked to them and can only be traced back to them if their vote for the political candidates standing in the individual constituency are placed in an envelope together with their vote for the national minority list (and of course, only if they are the only member of that national minority in that constituency. However, as the use of an envelope is not compulsory, this concern can easily be overcome, with the national minority voter deciding not to use an envelope.

On the basis of the above, in my view, no breach of the secrecy of the vote should have been established.

5. Closing Remarks

In its judgment, the ECtHR ruled that the provisions of the Election Act guaranteeing the parliamentary mandate of national minorities violated the ECHR. On this basis, Hungary is (in principle) obliged to remedy the identified irregularities and breaches of the ECHR. This is possible by amending the relevant part of the Election Act. There is of course plenty of time for the Hungarian parliament to do this before the 2026 parliamentary elections (if we take into account that the Venice Commission's opinion No. 190/2002 states that it is not advisable to change an electoral system within a year of the next elections). But the question is in which direction the system should be changed. In my view, neither the abolition of national minority representation, nor the introduction of a double vote would be the right course. Here, I refer back to my earlier arguments on the issue of fictitious identity. Nor would I consider it justified to reduce the number of votes needed to obtain a preferential mandate, as this would undermine the seriousness of the election. This would also give rise to the problem of a national minority MP with little support being able to decide on the formation of a

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government.[55] And it is questionable whether it would be acceptable to the national minorities, for example, if only the national minority advocacy system could be implemented, instead of representatives with real voting rights. One solution could be to not excluding the party list vote (since this would be the only real list vote), and the national minorities could choose their advocate from among several individual candidates in the parliamentary elections. Another option could be that the advocate would be delegated by the directly elected (thus also implementing the principle of democratic legitimacy) national minority self-governments.[56] As far as the latter proposals are concerned, the effectiveness of the advocacy institution should naturally also be examined.[57] Indeed, if we are looking for alternative solutions to the regulation of the Election Act (and in this context, we are raising the issue of the exclusivity of the institution of non-voting advocates), we cannot ignore the question of whether these two solutions proposed above will ensure the effective representation of the interests of the national minorities concerned. In my view, these two alternatives would in no way worsen the current situation, as the other 11 national minorities besides the German and Roma national minorities, currently only have a real chance of putting a minority advocate into parliament. For different reasons, the Roma national minority has not even managed put a minority advocate in the parliament. This advocacy would still be given under the above two solutions, but it would also be possible for national minorities to 'regain' their party-list vote without any further problems, without fear of an increase in fictitious identity or concerns about multiple voting. In my view, the effective representation of interests does not depend on the voting rights of the national minority advocate. This is because the representation of interests (where appropriate) can also be ensured by giving a speech in Parliament.[58]

On the basis of the above, it can therefore be concluded that the ECtHR – despite the minor or major errors of reasoning in its judgment – correctly highlighted the problems of the relevant part of the Election Act: the difficulties and anomalies of national minorities in obtaining seats in parliament. The need for change is therefore indisputable, but its direction is still a matter for the future.[59]

55 *See e.g.* Gábor Kurunczi, *Az egyre általánosabb választójog kihívásai. Az általános és egyenlő választójog elvének elemzése a magyar szabályozás tükrében*, Pázmány Press, Budapest, 2020, pp. 107-144.

56 Since election is not a necessary form of representation, it can be by appointment, delegation or even *ex officio*. *See* Márta Dezső, *Képviselet és választás a parlamenti jogban*, Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézet, Budapest, 1998, p. 18.

57 Ágnes M. Balázs, 'A nemzetiségi szószólók és a nemzetiségi képviselő karrierútjai Magyarországon', *Regio: Kisebbség, Kultúra, Politika, Társadalom*, 2022/3, pp. 127-162.

58 In this respect, the question of extending the rights of national minority advocates – not including, of course, the right to vote – may also be raised.

59 On 13 February 2023, the Hungarian Government submitted an appeal to the Grand Chamber of the ECtHR against the judgment analyzed in this case note, However, the appeal was rejected by the Grand Chamber.