# 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

**Elisabeth Sándor-Szalay**

*University Professor, University of Pécs Faculty of Law*

**Balázs Kiss**

*Doctoral Student, Doctoral School of Law, ELTE University*

*This case note analyses the judgment of the European Court of Human Rights in the case of Bakirdzi and E.C. v. Hungary. The judgment pertains to the effective participation of minorities in public affairs in the context of electoral rights. In its ruling, the ECtHR found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in conjunction with Article 14 of the Convention. The judgment underlines important principles as to preferential arrangements regarding the participation of national minorities in the electoral process.*

*Keywords: effective participation in public affairs; electoral threshold; equal suffrage; national minority list; parliamentary election; preferential parliamentary representation; prohibition of discrimination; right to free choice; right to free elections; secret suffrage; suffrage*

## 1. Introduction – the background of the judgement

Pursuant to Article 2 (2) of the Fundamental Law, the participation of the thirteen national minorities living in Hungary in the work of Parliament is regulated by a cardinal law. On the basis of this provision, Act CCIII of 2011 on the Election of Members of Parliament (hereinafter: Election Act) introduced a system of national minority representation from 2014, in which members of national minorities may apply for registration in the central register of voters as national minority voters with effect also extending to the election of Members of Parliament, on the basis of their self-identification, in accordance with section 85 (1) and section 86 (c) of Act XXXVI of 2013 on the Election Procedure (hereinafter: Election Procedure Act).

Pursuant to section 12 (2) of the Election Act, voters residing in Hungary who are registered in the electoral roll as national minority voters may vote (a) for a single mandate constituency candidate and (b) for the list of their national minority, or, in the absence of such list, for a party list. In contrast with that, other voters resident in Hungary may vote for one single mandate constituency

candidate and one party list.[1] In the election of Members of Parliament, each national minority may have only one closed national minority list drawn up by the national-level self-government of that national minority. Voters registered as national minority voters may only vote for their national minority's list and may not influence the order of candidates on the list.

According to section 16 (d) of the Election Act, national minority lists enjoy a preferential quota and may obtain a preferential mandate. The preferential quota shall be one quarter of the number of votes required to obtain a mandate from a party list in the given year. In accordance with section 18 (1) of the Election Act, a national minority that has set up a national minority list but has not obtained a seat on it shall be represented in Parliament by a national minority advocate.

The applicants living in Budapest, namely K. Bakirdzi belonging to the Greek national minority and E.C. of Armenian national minority[2] applied, on the basis of sections 85 (1) and 86 (c) of the Election Procedure Act, for registration in the national minority register as national minority voters prior to the election of the Members of Parliament on 4 April 2014, with effect also extending to the election of the Members of Parliament. In that year, all national minority self-governments established national minority lists. In 2014, no national minority list received enough votes to win a preferential mandate. The preferential quota necessary for obtaining a preferential mandate was 22,022 votes. In 2014, no national minority list received enough votes to win a preferential mandate.

Without recourse to domestic legal remedies, the applicants individually applied to the ECtHR,[3] which examined the applications in a single procedure, given the similarity of the subject matter.

## 2. Procedure before the ECtHR

### 2.1. Admissibility of the applications

In its submission, the Hungarian government pointed out that the applicants had not appealed to the regional election commissions against the decisions of the local election commissions to register them as national minority voters with effect for the election of Members of Parliament. If the appeal had been rejected, the Hungarian government argues that the applicants would have had the possibility of a judicial remedy. They could have lodged a constitutional complaint against the courts' decisions under section 26 (1) of Act CLI of 2011 on the Constitutional Court (Constitutional Court Act). However, the applicants failed to exhaust domestic remedies. The applicants argued that their removal from the national minority registers could not have remedied their injuries.[4]

The Hungarian Government also argued that the applicants could have appealed against the decision of the polling station commission to the competent election commission and then to the National Election Commission (NEC). The NEC's decision could have been challenged before the Curia and the Curia's decision could have been the subject of a constitutional complaint. However, the applicants also failed to pursue these remedies. In the context of an objection to the decision of the polling station commission, they pointed out that it can be necessarily lodged in the context of

[1] Section 12 (1) of the Election Act.

[2] See the list of applicants in the annex to the *Bakardzi and E.C. v. Hungary* (App. no. 49636/14 and 65678/14) ECtHR (2022) (hereinafter: Judgment).

[3] See the annex to the Judgment for the deadline for submitting applications.

[4] Judgment, para. 28, 30.

the counting of the votes and not in relation to the application of a provision of law allegedly being contrary to the Fundamental Law.[5]

The ECtHR rejected the Hungarian Government's objections concerning the failure to exhaust domestic remedies and declared the applications admissible.[6]

### 2.2. Decision in the merits of the case

The applicants complained under Article 3 of the First Additional Protocol to the European Convention on Human Rights (ECHR) and Article 14 of the ECHR that, although the Hungarian authorities intended to promote the participation of national minorities in the legislature, the measure had the opposite effect and led to the disenfranchisement of the groups concerned, since under the relevant legislation national minorities have no real possibility to reach the preferential quota and thus obtain a preferential mandate.[7]

It was further argued that a fundamental element of free elections is genuine choice. National minority voters, however, had no real opportunity to vote. On the one hand, because national minority voters were excluded from voting to the party list, and on the other, they could only vote for a closed list of their own national minority.[8]

The applicants also complained of the fact that limiting the national minority voters' choice to a closed national minority list also violated the secrecy of the vote. Once they had identified themselves as national minority voters at the polling station, it was immediately known to everyone how they were voting.[9]

According to the applicants, the measures were discriminatory, as they were treated differently from other voters because of their national minority.[10]

In its submission, the Hungarian government argued that the preferential mandate constituted positive discrimination, the legitimate aim of which is to increase the political participation of national minorities in Hungary.[11]

According to the Hungarian government, the principle of equal suffrage would be violated if a national minority voter could vote for both a national minority list and a party list. With this in mind, the restriction introduced in the national legislation to avoid multiple national minority votes can also be considered a legitimate aim justifying the restriction of the national minority voters' right to vote to the national minority list.[12]

Finally, the Hungarian Government has also stressed that it is up to the free choice of voters whether they apply to be registered in the list of voters as a national minority voter with effect also for the election of Members of Parliament. As pointed out, they could subsequently change their reg-

[5] Judgment, paras. 29-30.

[6] Judgment, paras. 31-34.

[7] Judgment, para. 35.

[8] Judgment, para. 36.

[9] Judgment, para. 37.

[10] Judgment, para. 38.

[11] Judgment, para. 39.

[12] Judgment, para. 40.

istration at any time.[13]

In the context of the preferential quota system, the ECtHR referred to a previous case and pointed out that the ECHR does not oblige contracting parties to provide for positive discrimination in favour of national minorities.[14] In a similar earlier case, the Court has already noted that Article 15 of the Council of Europe Framework Convention on National Minorities, while recognising the freedom of discretion granted to the State in electoral matters, emphasises the participation of national minorities in public affairs. The ECtHR, taking into account the opinions of the Advisory Committee on the Framework Convention on National Minorities and the Venice Commission, has taken the view, however, that the parties to the Framework Convention on National Minorities have a wide margin of discretion as to how to approach the objective set out in Article 15 of the Framework Convention on National Minorities, i.e. the promoting the effective participation of persons belonging to national minorities in public affairs, and stressed that the ECHR, interpreting the issue even in the light of the Framework Convention on National Minorities, does not require different treatment in favour of the political parties belonging to national minorities in the context of participation in public affairs.[15]

The ECtHR noted that in the system under examination, national minority lists could only obtain the requisite number of votes to obtain a preferential mandate from the ballot of voters belonging to the given national minority community who were registered as national minority voters, including for the election of Members of Parliament. This rule, however, placed them in a significantly different position from other party lists, which could obtain votes from the total eligible electorate. According to the ECtHR, the legislation also infringed the right of applicants to associate for political purposes through their votes, since national minority lists could only be endorsed by voters belonging to the national minority community concerned.[16]

The ECtHR considered it essential to stress that the disadvantage in the electoral process was not based on the national minority voters' own choice to associate themselves with a narrow political interest group of the population, but on the legislator's decision to restrict who could cast a ballot on national minority lists.[17]

The ECtHR accepted the applicants' argument that in Hungary the number of voters belonging to specific national minorities was not high enough to reach the preferential electoral threshold even if all voters belonging to that national minority were to cast their vote for the respective minority list.[18]

The ECtHR has stressed that States may condition access to parliamentary representation upon the showing of a modicum of support, and the ECHR does not require States to adopt preferential thresholds in respect of national minorities. However, in the event that States do set a quorum for national minorities, 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 and whether – in turn – that electoral threshold has a negative impact on the opportunity of national minority voters

[13] Judgment, para. 41.

[14] *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996.

[15] *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 43; Judgment, para. 54.

[16] Judgment, para. 55.

[17] Judgment, para. 56.

[18] Judgment, para. 57.

to participate in the electoral process on an equal footing with other members of the electorate . The legislature must assess whether the statutory scheme creates a disparity in the voting power of members of national minorities.[19]

As regards the freedom of national minority voters to choose, the Court pointed out that, as a condition of their registration as national minority voters, applicants had only two options: (a) to vote for their national minority list as a whole or (b) to abstain from voting. National minority voters could not choose between the different party lists, nor did they have any influence on the order in which the candidates were elected from the national minority list.[20]

In the context of closed party lists, the Court has held, referring to a previous case, that they cannot in themselves be considered to unduly restrict the political choices of voters.[21] However, in the case of closed national minority lists, the ECtHR considered it essential to examine the extent and nature of the effect on the applicants' electoral rights (Judgement, 62 to 63).

In the ECtHR's view, the fact that national minority voters, irrespective of their political views, could only cast their vote for their closed national minority list made the system under examination different from electoral systems with closed list. (Judgement, 64)

The system for national minority voters did not, in the ECtHR's view, allow the applicants to genuinely reflect their will as electors, or to cast their ballot in the promotion of political ideas, to associate with others for political purposes. National minority voters could not express their political views; they could only indicate at the ballot box the fact that they sought representation in political decision-making as members of a particular national minority community.[22]

The ECtHR expressed doubts 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 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.[23]

In the context of the secrecy of the ballot, the ECtHR reiterated that if a voter chooses to request to be included in the national minority register with effect for the election of Members of Parliament, he or she has only one choice and in practice receives a ballot paper containing the national minority list instead of a choice of party lists on the ballot paper.

In the ECtHR's view, this means that those present at the polling station at the relevant time, in particular the 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. Furthermore, national minority voters could be linked to their votes during the counting of the ballot, especially in polling districts where the number of national minority voters was limited.

According to the ECtHR, the system allowed the details of who a national minority voter had voted for to be known to everybody, i.e. the right to full secrecy was not available for the applicants as national minority voters, and they could not exercise their right to vote without prejudice to the

[19] Judgment, paras. 58-59.

[20] Judgment, para. 61.

[21] *Saccomanno and Others v. Italy* (App. no. 11583/08) ECtHR (2012), para. 63.

[22] Judgment, para. 65.

[23] Judgment, para. 66.

right to secrecy.[24]

The ECtHR also stressed that national minority voters should be granted the same protection as other voters, and that secrecy should be maintained for both groups.[25]

In conclusion, the ECtHR found that the above features of the Hungarian legislation had the effect of significantly limiting the applicants' 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.[26]

Finally, the ECtHR emphasised that if the legislator decides, in the absence of an international obligation to do so, to establish a system aimed at eliminating or reducing *de facto* inequalities in political representation, it is only natural that 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. In the ECtHR's view, the system introduced in Hungary has 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 national minorities in political decision-making.[27]

The ECtHR unanimously held that the above restrictions on the applicants' voting rights, considering their total effect, constituted a violation of Article 3 of the ECHR First Additional Protocol read alone and taken in conjunction with Article 14 of the Convention.[28]

The ECtHR held, by six votes to one, that a finding of the infringement was in itself sufficient just satisfaction for the non-material damage suffered by the applicants. The ECtHR did not award the applicants any non-pecuniary compensation.

### 2.3. Concurring and dissenting opinions

Judges *Marko Bošnjak* and *Davor Derenčinović* attached a concurring opinion to the majority decision.

The judges who formed the concurring opinion, while agreeing with the substance of the judgement and the reasoning on freedom of choice and secrecy of the ballot, did not support the reasoning on the threshold requirement for national minorities in the context of Article 3 of the First Additional Protocol to the ECHR, as well as the almost complete absence of reasoning on the violation of Article 14 of the Convention.[29]

In the judges' view, the reasoning relating to the threshold requirement goes well beyond the guarantees laid down in the First Additional Protocol to the ECHR. They pointed out that the States' margin of appreciation in this regard is very broad and that a violation of the Convention can only be established in cases where the freedom of choice of the voters or the secrecy of the ballot were at stake. Although national legislation on the participation of national minorities in elections may

[24] Judgment, para. 70.

[25] Judgment, para. 71.

[26] Judgment, para. 72.

[27] Judgment, para. 73.

[28] Judgment, para. 74.

[29] Judgment, Concurring opinion, para. 1.

be subject to scrutiny and criticism by the relevant international actors (Advisory Committee on the Framework Convention on National Minorities and the Venice Commission), to claim that such a national policy constitutes a violation of the ECHR First Additional Protocol is rather far-fetched and it is not really necessary in the context of the case.[30]

The judges who elaborated the concurring opinion also point out that the reasoning of the judgement on the preferential threshold is clearly different from the reasoning of the ECtHR applied in a similar case.[31]

In their concurring opinion, the judges stressed that the preferential access to the mandate for national minorities in Hungary exceeds the requirements currently provided for by the relevant international legal standards. While the system does not guarantee political representation of national minorities in the form of a seat in Parliament, effective participation in public affairs is ensured by the participation of national minority spokerspersons in the work of the Parliament.[32]

The judges attaching the concurring opinion to the judgement of the ECtHR supported the relevant finding in relation to Article 14 ECHR, because making a distinction between the situation of national minority voters (lack of choice, prejudice to the secrecy of the ballot) and that of the electorate as a whole was not justified. In their view, however, the judgement does not contain an application and analysis to the facts of the case of the general principles relating to Article 14 of the Convention, which makes it difficult to understand how the fundamental safeguards against discrimination in the election context have been applied in this case.[33]

Judge *Ioannis Ktistakis* attached a partial dissenting opinion to the judgement.

In the opinion of the judge who delivered the dissenting opinion, bearing in mind that the applicants were not politicians or members of political parties, but ordinary voters, it is difficult to accept that a finding of infringement by the ECtHR can in itself constitute sufficient just satisfaction. According to the judge, this decision of the ECtHR may deter applicants from pursuing their complaints before national and international courts, in order to fight for their rights recognised by the Convention.

## 3. Ratio decidendi

The ECtHR unanimously found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in conjunction with Article 14 of the Convention.

Three principles underlie the decision. The preferential threshold introduced by the State to promote the effective participation of national minorities in public life must not make the collection of votes for the election of a national minority more burdensome than for the election of a candidate from a party list and must not have a negative impact on the possibility for national minority voters to participate in the electoral process on equal terms with other voters. On the other hand, an electoral system in which national minority voters, irrespective of their political views, can only cast their vote for their closed national minority list does not allow them to genuinely express their electoral will, nor does it ensure the free expression of the people's opinion in the election of the legislature.

[30] Judgment, Concurring opinion, para. 3.

[31] *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016); Concurring opinion, para. 4.

[32] Judgment, Concurring opinion, para. 6-7.

[33] Judgment, Concurring opinion, para. 10.

Lastly, an electoral system whose specific features risk making the vote of a voter belonging to a national minority indirectly accessible to all does not guarantee the right to vote in secrecy.

## 4. Comments on critical parts of the judgement

### 4.1. Exhausting legal remedies – the question of constitutional complaint

In relation to the applications submitted without recourse to domestic remedies, the question arises as to why the ECtHR, by invoking Article 35 (1) ECHR – according to which a case may be referred to the ECtHR only after all domestic remedies have been exhausted in accordance with generally recognised rules of international law – rejected the Hungarian Government's objections and declared the applications admissible and did not reject them on the basis of Article 35 (4) ECHR.

The provision on the exhaustion of domestic remedies is an indispensable and fundamental rule for the functioning of the system of protection established by the ECHR.[34] The rationale of the restrictive rule is that the ECHR should first of all provide national authorities, mainly courts, with the possibility to remedy an alleged violation of a right guaranteed by the ECHR or to establish the absence of a violation,[35] which is one of the fundamental elements of the subsidiary nature of the system established by the ECHR.[36]

The exhaustion rule is not, however, absolute in nature,[37] but applies with a degree of flexibility and without excessive formalism.[38] In monitoring compliance with this rule, it is essential for the ECtHR to take account of the circumstances of each individual case.[39]

As far as Hungary is concerned, it is worth mentioning that according to the recent case-law of the ECtHR, all constitutional complaints under the Constitutional Court Act are effective remedies and therefore they are to be exhausted.[40] By derogation from the previous case-law[41], the ECtHR ruled

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[34] *Demopoulos and Others v. Turkey* [GC] (App. nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04) ECtHR (2010), para. 69; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 23.

[35] *Selmouni v. France* [GC] (App. no. 25803/94) ECtHR (1999), para. 74; *Micallef v. Malta* [GC] (App. no. 17056/06) ECtHR (2009), para. 55; *Ananyev ot Others v. Russia* (App. nos. 42525/07, 60800/08) ECtHR (2012), para. 93.

[36] *Selmouni v. France* [GC] (App. no. 25803/94) ECtHR (1999), para. 74; *Kudła v. Poland* [GC] (App. no. 30210/96) ECtHR (2000), para. 152; *Burden v. the United Kingdom* [GC] (App. no. 13378/05) ECtHR (2008), para. 42; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 24.

[37] *Kozacıoğlu v. Turkey* [GC] (App. no. 2334/03) ECtHR (2009), para. 40.

[38] *Fressoz and Roire v. France* [GC] (App. no. 29183/95) ECtHR (1999), para. 37; *Azinas v. Cyprus* [GC] (App. no. 56679/00) ECtHR (2004), para. 38; *Scoppola v. Italy (No. 2.)* [GC] (App. no. 10249/03) ECtHR (2009), para. 69; *Eberhard and M. v. Slovenia* (App. nos. 8673/05, 9733/05) ECtHR (2009), para. 104; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 25.

[39] *Kozacıoğlu v. Turkey* [GC] (App. no. 2334/03) ECtHR (2009), para. 40; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 25.

[40] P. Sonnevend & B. Bazánth, *35. cikk - Az elfogadhatóság feltételei* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, p. 456.

[41] *Vén v. Hungary,* no. 21495/93, the decision of the European Commission of Human Rights of 30 June 1993. In its decision, the European Commission of Human Rights did not consider the constitutional complaint, which was available until the end of 2011, to be an effective domestic remedy, because it considered that under the rules in force at the time, the Constitutional Court did not have the power to annul or amend specific disciplinary measures taken against an individual by public officials.

in the *Mendrei case* that a direct constitutional complaint under section 26 (2) of the Constitutional Court Act is to be considered an effective domestic remedy. According to the ECtHR, where the harm suffered by the applicant can be remedied by the annulment of the relevant legislation by the Hungarian Constitutional Court, the direct constitutional complaint must be considered an effective domestic remedy within the meaning of Article 35 (1) ECHR and the application, which is made without exhausting domestic remedies, must be rejected pursuant to Article 35 (4) ECHR. [42]

According to the ECtHR's decision in the *Szalontay case*, a constitutional complaint under section 26 (1) and section 27 of the Constitutional Court Act is also considered an effective domestic remedy in terms of the admissibility criteria.[43] *"[I]t can be said that the use of an appropriate constitutional complaint is a necessary precondition for the submission of an application and for the ECtHR to proceed on the merits."*[44]

In proceedings before the ECtHR, the burden of proving that the applicant has not availed themselves of an effective and available domestic remedy lies with the respondent State government.[45] The burden of proof is on the applicant to show that the remedy was in fact exhausted, that the failure to exhaust was due to the remedy being inadequate or ineffective in light of the circumstances of the case, and that there were special circumstances that relieved the applicant from complying with the requirement.[46] A crucial consideration is that doubts about the effectiveness of a particular remedy do not excuse the applicant from seeking to pursue it,[47] as it is in their interest to seek redress before an appropriate tribunal.

The Hungarian government – in all likelihood also relying on the above-mentioned ECtHR case-law – ultimately held against the applicants with failure to exhaust constitutional remedies as an effective domestic remedy.[48] In opposition to the Hungarian Government's objections, the applicants correctly argued that their removal from the national minority register could not have remedied their prejudice and pointed out that a challenge to the decision of the election commission could necessarily be brought in relation to the counting of ballots and not to the application of a provision of law allegedly being in conflict with the Fundamental Law.

The ECtHR, accepting the applicants' arguments, correctly held that the decisive issue in the case was the alleged restriction on the right to vote of applicants registered as national minority voters arising from the legislation itself regulating national minority voting, not the fact that the applicants were registered as national minority voters or whether the electoral bodies had engaged in unlawful conduct or taken an unlawful decision. Accordingly, the ECtHR held that the remedies proposed by the Hungarian Government could not be regarded as a legal avenue which would have provided the applicants with the possibility of having the issue of the alleged violation of their voting rights examined.

The ECtHR also rightly accepted the applicants' evidence that the available domestic remedies were not adequate or effective in the circumstances of the case, and thus rejected the Hungarian

[42] *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), paras. 42-43.

[43] *Szalontay v. Hungary* (App. no. 71327/13) ECtHR (2019), para. 39.

[44] Sonnevend & Bazánth 2021, p. 456.

[45] *Mifsud v. France* [GC] (App. no. 57220/00) ECtHR (2002), para. 15; *McFarlane v. Ireland* [GC] (App. no. 31333/06) ECtHR (2010), para. 107.

[46] Sonnevend & Bazánth 2021, p. 457.

[47] *Domján v. Hungary* (App. no. 5433/17) ECtHR (2017), para. 33; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 26.

[48] Judgment, para. 28-29.

government's objections to the failure to exhaust domestic remedies.

In our view a direct constitutional complaint under section 26 (2) of the Constitutional Court Act is the only effective domestic remedy to address the issue of the alleged violation of the right to vote of applicants registered as national minority voters arising from the national minority voting legislation itself. According to the case-law of the ECtHR, the harm suffered by the applicants can presumably be remedied by reviewing and annulling the relevant law(s) by the Constitutional Court,[49] bearing also in mind that doubts about the effectiveness of the specific remedy do not exempt the applicant from attempting to seek legal redress.[50]

In the context of a direct constitutional complaint, however, it is worth pointing out the following.

Pursuant to section 26 (2) of the Constitutional Court Act, the procedure of the Hungarian Constitutional Court may be initiated exceptionally, on the one hand, if the violation of rights has occurred directly, without a judicial decision, due to the application or the effectuation of the provision of a law, which is contrary to the Fundamental Law and, on the other hand, if there is no legal remedy procedure to redress the injury, or the petitioner has already exhausted their options for legal remedies. It is essential to note that pursuant to paragraph (1) of section 30 of the Constitutional Court Act, a constitutional complaint under paragraph (2) of section 26 of the Constitutional Court Act may be submitted in writing within one hundred and eighty days of the entry into force of the law violating the Fundamental Law.

In accordance with the established case-law of the Hungarian Constitutional Court, the time limit begins to run on the day following the entry into force of the challenged legislation,[51] even if the petitioner becomes actually affected by the challenged legislation after that date. In accordance with the case-law of the Hungarian Constitutional Court, the time-limit is clearly to be calculated from the date of entry into force of the legislation, even if the application or effectuation of the legislation occurs after the time-limit.[52]

According to the consistent case-law of the Hungarian Constitutional Court, the time limit for filing a constitutional complaint under section 26 (2) of the Constitutional Court Act is an objective time limit,[53] which is a formal limitation of the Hungarian Constitutional Court's procedure.

The Election Act applicable in the examined case entered into force on 1 January 2012, and was first applied during the 2014 elections of Members of Parliament. It was the first time for the applicants as national minority voters to be confronted with the provisions of law causing their violation of their rights, but at that time they were obviously not in a position to submit a direct constitutional complaint – classified by the ECtHR as an effective domestic remedy – under section 26 (2) of the Constitutional Court Act.

The applicants' failure to exhaust domestic remedies cannot, however, be imputed to them with account to circumstances of the case because of the inadequacy of the remedy.

[49] Cf. *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 42.

[50] Cf. *Domján v. Hungary* (App. no. 5433/17) ECtHR (2017), para. 33; *Mendrei v. Hungary* (App. no. 54927/15) ECtHR (2018), para. 26.

[51] Ruling No. 3264/2012. (X. 4.) of the Constitutional Court, Reasoning [2].

[52] B. Bitskey, J. Fröhlich & F. Gárdos-Orosz, *Az egyes alkotmányjogi panaszeljárások különös szabályai,* in B. Bitskey & B. Török (Eds.), Az alkotmányjogi panasz kézikönyve, HVG-ORAC, Budapest, 2015, pp. 178-180.

[53] Decision No. 3003/2018. (I. 10.) of the Constitutional Court, Reasoning [14].

### 4.2. Odd solutions of national minority suffrage – a "limping legal transaction"

The ECtHR found a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in taken conjunction with Article 14 of the Convention, in relation to the preferential quota system, the lack of free choice for national minority voters and the violation of the secrecy of the ballot. The issues we consider problematic in these three areas are set out below.

The preferential quota system was treated by the ECtHR as part of a system whereby national minority lists could only obtain the number of votes required to obtain a preferential mandate by the ballots of voters belonging to the national minority community concerned. This feature of the system, however, placed national minority lists in a position significantly different from party lists, which could obtain votes from the electorate as a whole. The ECtHR considered it essential to stress that the disadvantage on the side of the national minority lists in the electoral process was not based on the national minority communities' own decision to associate themselves with a numerically small interest group of the population, but on the legislator's decision to define the scope of the electorate voting for national minority lists and the conditions for voting for national minority lists. The ECtHR further accepted the applicants' argument that the number of national minority voters in Hungary was not high enough to reach the preferential quota even if all voters belonging to the national minority concerned had cast their ballots for the national minority list concerned. In the preferential quota system established by Hungary, the ECtHR considered that it had become more burdensome to collect the votes needed to obtain a preferential mandate than to obtain a mandate from a party list, and that this had a negative impact on the opportunities for voters of national minorities to participate in the elections on equal terms with other voters.[54]

In view of the population number of national minority communities living in Hungary, their activity at elections[55] as well as the rules for obtaining preferential seats, it is undisputed that only the Roma and the German national minorities had and have a real chance of obtaining preferential mandates.

We share the opinion of *Gábor Kurunczi*, who argues that *"the case where a national minority voter casts his or her vote in the knowledge that it is certain to be 'lost' is not subject to the same constitutional assessment as the case in which the vote is cast for a party list that subsequently does not reach the election threshold set in the Election Act"*. The difference lies in the fact that, even for parties setting a list, it is not impossible for them to gain support from an ever-widening scope of the electorate, whereas the number of voters belonging to national minority communities is fixed, it cannot be increased at will,[56] and their activity at the elections can only be increased during the election campaign, for a limited period of time.

In order to illustrate the chances of the national minority communities to obtain a preferential mandate in the preferential quota system existing at the time of the application, we consider it useful to provide the following information.

The number of votes necessary for reaching the varying preferential quota – depending on the number of votes cast for national minority lists and rate of participation at the elections in the country

[54] Judgment, paras. 55-58.

[55] See in details in G. Kurunczi, *Az egyre általánosabb választójog kihívásai. Az általános és egyenlő választójog elvének elemzése a magyar szabályozás tükrében,* Pázmány Press, Budapest, 2020, pp. 124-127. S. Móré, *Nemzetiségek a mai Magyarországon. Politikai képviseletük, érdekképviseletük és jogvédelmük,* Gondolat, Budapest, 2020, pp. 170-171., B. Dobos, *A nemzetiségi részvétel jellemzői az országgyűlési választásokon (2014-2018)*, Parlamenti Szemle, No. 2, 2021, pp. 64-78., B. Kiss, *A nemzetiségek országgyűlési jelenlétének választójogi kérdései és részvételének jellemzői a 2022. évi országgyűlési választásokon I.*, Közjogi Szemle, 2022/2, pp. 60-74.

[56] Kurunczi 2021, p. 129.

– was 22,022 votes in 2014, 23,831 in 2018 and 23,074 in 2022. A look at the number of valid votes cast on national minority lists by voters belonging to national minority communities shows that the preferential quota was reached for the first time in 2018 and again in 2022, following successful voter mobilisation, only by the German national minority list set by the National-level Self-government of the Germans in Hungary, with 26,477 and 24,630 votes respectively.

In 2014, the total number of votes for national minority lists (19,543 votes) would not have resulted in a preferential mandate. In 2018, apart from the number of votes cast for the German national list, the number of votes for all other national minority lists (11,055 votes) was only less than 50% of the preferential quota, and in 2022, in the absence of a Roma national minority list, the number of votes cast for national minority lists was just over 25% of the number of votes needed to obtain a preferential mandate (6,005 votes) (Table 1).

| National minority | 2014 | 2018 | 2022 |
|---|---|---|---|
| **Bulgarian** | 74 | 104 | 157 |
| **Greek** | 102 | 159 | 232 |
| **Croatian** | 1,212 | 1,743 | 1,760 |
| **Polish** | 99 | 210 | 281 |
| **German** | 11,415 | 26,477 | 24,630 |
| **Armenian** | 110 | 159 | 163 |
| **Roma** | 4,048 | 5,703 | – |
| **Romanian** | 362 | 428 | 526 |
| **Ruthenian** | 463 | 539 | 645 |
| **Serbian** | 236 | 296 | 418 |
| **Slovakian** | 995 | 1,245 | 1,208 |
| **Slovenian** | 134 | 199 | 219 |
| **Ukrainian** | 293 | 270 | 396 |

Table 1: Number of valid national minority list votes cast in the parliamentary elections, 2014-2022[57]

Against this background, we consider the ECtHR's reasoning on the preferential quota system to be correct.

The question arises as to whether a stronger preference than the current one can be granted in Hungary in order to obtain preferential mandates by way of national minority lists.

In examining this question, it should be emphasised that the principle of equality of suffrage implies the requirement that votes should preferably be of equal weight in the election of each representative (effective equality, substantive requirement).[58]

The principle of equal suffrage is not included in the ECHR text, but has been derived from the

[57] www.valasztas.hu (22 February 2023).

[58] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 784.

ECtHR practice. However, the ECtHR, in its practice under Article 3 of the First Additional Protocol to the ECHR, does not require effective equality of the right to vote in relation to equality of the right to vote.

The principle of equal suffrage is not included in the ECHR's text, but has been derived by the ECtHR in its case-law. However, in its case-law elaborated on the basis of Article 3 of the First Additional Protocol to the ECHR, the ECtHR does not require effective equality of suffrage in relation to the equality of suffrage.[59]

The Hungarian Constitutional Court has stated in connection with the preferable equal weighting of votes: "*The equality of suffrage does not and cannot mean the completely equal exercise of the political will expressed at the time of the election. Although the Constitution proclaims the equality of suffrage, the indirect expression of the political will of the citizens through their representatives naturally results in disproportionality*".[60] It is apparent from the case-law cited that the Hungarian Constitutional Court has excluded effective equality of suffrage from the scope of the equality of suffrage,[61] holding that no absolute effect can be attributed to the equal weight of votes.[62] In the view of the Hungarian Constitutional Court, "*representation is a necessary condition for the [national minorities] to fulfil their role as state-constituent factors*".[63] As the Constitutional Court had already emphasised in its Decision No. 1040/B/1999, the Parliament may adopt rules more favourable than the general ones in order to provide for the representation of national minorities in Parliament.[64] In addition, in a decision on preferences related to suffrage, it also pointed out that "*there is a wide range of legislative measures aimed at eliminating inequality of opportunities, and the legislator has the discretion to choose between the various regulatory methods, while respecting the provisions of the Constitution*".[65]

The European Commission of Human Rights, however, considered a derogation from the equality of suffrage to be acceptable in order to protect national minorities.[66] In the context of suffrage preferences, the Venice Commission also stated that special rules offering to national minorities preferential access to seats in Parliament are not contrary to the principle of equality of suffrage.[67]

The Hungarian Constitutional Court – also in the light of the Venice Commission's recommendation referred to above – stressed that "*the legislator may derogate from maximum compliance with the constitutional requirements deriving from the equality of suffrage in respect of the weighting of votes only if there are sufficient constitutional grounds for doing so. The more significant the deviation (...) the stronger the constitutional justification is required to justify the deviation (...) A*

[59] E. Bodnár, *A választójog alapjogi tartalma és korlátai,* HVG-ORAC, Budapest, 2014, p. 111., E. Bodnár, *3. cikk Szabad választáshoz való jog,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, pp. 632-633.

[60] Decision No. 3/1991. (II. 7.) of the Constitutional Court, ABH 1991, 15, 17-18. and Decision 26/2014. (VII. 23.) of the Constitutional Court, Reasoning [36].

[61] Cs. Erdős, *3/1991. (II. 7.) AB határozat – parlamenti küszöb,* in F. Gárdos-Orosz & K. Zakariás (Eds.), Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990-2020. I. Társadalomtudományi Kutatóközpont – HVG-ORAC, Budapest, 2021, pp. 89., 97., 102.

[62] Decision No. 3141/2014. (V. 9.) of the Constitutional Court, Reasoning [29].

[63] Decision No. 35/1992. (VI.10.) of the Constitutional Court, ABH 1992, 204, 205.

[64] Cf. Decision No. 1040/B/1999. of the Constitutional Court, ABH 2001, 1098, 1101.

[65] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 785.

[66] *Lindsay and Others v. The United Kingdom,* no. 8364/78, the decision of the European Commission of Human Rights of 8 March 1979.

[67] CDL-AD (2002) 23 Code of Good Practice in Electoral Matter. Guidelines and Explanatory Report. Guidelines on Elections. I.2.4.b).

*sufficient justification may be the taking into account of the [national minorities'] proportion in the population.*" [68]

The views expressed in the Hungarian literature present a very varied picture on the preferential quota system in force and the granting of a stronger preference than the current one.[69] The ECtHR's finding is undoubtedly correct in that the quota system does not create a real opportunity for eleven national minority communities to obtain seats, as this would require even a greater distortion of the effective equality of votes than the existing rules – but no related obligation to this end is set forth in the ECtHR's judgement.

On the other substantive issue of suffrage, the ECtHR found a violation of the right to free choice in the context of the fact that, as a consequence of registering as a national minority voter, national minority voters could only vote for the whole of their national minority list or abstain from voting for the list. Minority voters could not choose between party lists, nor did they have any influence on the order in which the candidates on the national minority list were elected.[70] The ECtHR expressed doubts as to whether a system in which voters can only vote for a specific closed list and which requires voters to give up their party affiliation in order to be represented as a national minority adequately ensures the free expression of the people's views in the election of the legislature, as provided for in Article 3 of the First Additional Protocol to the ECHR.[71]

The ECtHR 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,[72] does not allow for the expression of political and ideological diversity within the national minority community and, in the absence of such diversity, for the national minority voters to cast their votes in order to promote political ideas and political action programmes or to associate themselves with others for political purposes through their votes.[73]

We agree with Péter Kállai, who argues that the current Hungarian legislation presupposes that "*a given [national minority] – and its national-level self-government – represents a single, common position, therefore there is no political competition within them, and they can be forced to agree on the issue of setting up a list*".[74] This solution is undoubtedly harmful because it eliminates the possibility of competition within a given national minority, which cannot be treated as a politically homogeneous entity.[75]

The question arises whether the ECtHR judgement under consideration includes an obligation to introduce plural voting in Hungary. Although the ECtHR undoubtedly warns that the legislation imposes an obligation to renounce party affiliation and refers to the opinion of the Venice Com-

[68] Decision No. 22/2005. (VII. 17.) of the Constitutional Court, ABH 2005, 246, 252. and Decision No. 26/2014. (VII. 23.) of the Constitutional Court, Reasoning [36].

[69] See in summary: Kiss 2022, p. 67.

[70] Judgment, para. 61.

[71] Judgment, para. 66.

[72] Section 9 (1) of the Election Act and section 117/A (1) of the National Minorities Act.

[73] Judgment, para. 65.

[74] P. Kállai, *Az alkotmányos patriotizmustól a nemzeti és etnikai kisebbségek parlamenti képviseletéig,* Fundamentum No. 4, 2012, p. 50.

[75] For details on the composition of the national-level minority self-governments, the characteristics of setting up the 2022 national minority lists and the competing positions in the assemblies of national-level minority self-governments, see B. Kiss, *A nemzetiségek országgyűlési jelenlétének választójogi kérdései és részvételének jellemzői a 2022. évi országgyűlési választásokon II.,* Közjogi Szemle, 2022/3, pp. 75-93.

mission among the relevant documents of the Council of Europe, which considers that a solution which would ensure a minimum representation of national minorities by giving persons belonging to national minorities the right to vote both for the general and on the national minority list is conceivable,[76] it does not lay down any clear obligation for Hungary in relation to plural voting.

Although the requirement of equality of suffrage is not explicitly provided for in Article 3 of the First Additional Protocol to the ECHR, in its case-law the ECtHR has identified the realisation of the "one man, one vote principle" as an appropriate guarantee of equality, in addition to effective equality of votes.[77]

In its consistent case-law, the Hungarian Constitutional Court considers the principle of equality of suffrage to be a special rule of equality compared to Article XV (2) of the Fundamental Law prohibiting discrimination.[78] The principle of equality of suffrage requires suffrage to be of equal value in respect of the voters (numerical equality, formal requirement).[79] "*Equal value of suffrage means that all voters have the same number of votes and that each vote is worth the same number when the ballot is counted. In this respect, [equality of suffrage] excludes plural suffrage, which would give beneficiary groups of voters more or differently valued votes in elections. In the Constitutional Court's view, this requirement is absolute: the "one man, one vote" principle stemming from the Constitution cannot be restricted for any reason whatsoever in this respect*".[80]

When drafting the regulation excluding the possibility of voting for party lists along with voting for the national minority lists, the legislator, as the Hungarian government also referred to in the proceedings before the ECtHR, certainly had in mind the Hungarian Constitutional Court's case-law, which could probably lead to the conclusion that "*a legislative solution according to which voters may vote for more than one list at the same time would violate the principle of equality of suffrage in Hungary*".[81] We agree with the views expressed in the literature that the exclusion of double-list voting is clearly based on the principle of equality of suffrage[82] and was introduced in the regulation order to enforce the numerical equality of votes.[83]

From a purely formal point of view, we also have to agree with the argument that, in the election of Members of Parliament, equality of suffrage should also apply to voters of national minorities, during the casting of their votes and the counting of ballots.[84]

In our view, the only way to create the possibility of plural voting in Hungary – in order to ensure acquiring preferential mandates – would be to amend the Fundamental Law. It should also be borne in mind that the equality of suffrage can only be interpreted and must be complied with when voters participate in the election of the same body or person,[85] consequently, if only national minority spokespersons could participate in the work of the Parliament and there was no possibility of obtaining preferential seats, in our opinion there would be no constitutional obstacle to the statutory institutionalisation of plural voting.

[76] CDL-AD (2002) 23 Code of Good Pratctice in Electoral Matter. Guidelines and Explanatory Report. 23.

[77] Bodnár 2014, p. 111., Bodnár 2021, pp. 632-633.

[78] Decision No. 22/2005. (VII. 17.) of the Constitutional Court, ABH 2005, 246, 248.

[79] Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 784.

[80] Decision No. 22/2005. (VI. 17.) of the Constitutional Court, ABH 2005, 246, 249-250.

[81] Móré 2020, p. 172.

[82] Kurunczi 2020, p. 107.

[83] Kállai 2012, p. 51.

[84] Cf. Decision No. 809/B/1998. of the Constitutional Court, ABH 2000, 783, 785.

[85] Bodnár 2014, p. 107.

In connection with the third essential question of electoral law, the ECtHR saw a violation of the secrecy of the voting in the fact that those present at the polling station at the relevant time, in particular the members of the election commission, would become aware that the voter registered as a national minority voter was casting his/her vote for the national minority list. The voter could also be linked to his/her vote during the counting of the ballot, especially in polling districts where the number of registered national minority voters is low. As a consequence, national minority voters were not considered by the ECtHR to have the right to complete secrecy.[86]

The ECtHR's findings regarding the breach of the secrecy of the voting are beyond doubt correct. It can be argued, however, that the identification of national minority voters by the election commission is indispensable for the exercise of suffrage,[87] which necessarily infringes the secrecy of the vote cast by the national minority voter. However, this objection can easily be refuted.

It is not disputed that the active electoral registration system established by Hungary for participation in the election of Members of Parliament, which makes the exercise of the right to vote on a national minority list conditional on the initiative of the voter belonging to the national minority concerned and their registration on the electoral roll, is a suitable means of identifying national minority voters, with account to the fact that that registration on the roll is based on a declaration of the free will of the person concerned. In its case-law, the Hungarian Constitutional Court has also pointed out that the restriction of the right to self-determination in relation to declaring affiliation with a national minority may be constitutionally based on making the exercise of suffrage subject to prior registration.[88] A request for registration on the roll based on one's free will does not result in a restriction of the essential content of the fundamental right to freely assume one's self-identity.[89]

However, it is worth pointing out that the ECtHR judgement does not call into question the need to identify national minority voters. The ECtHR finds that the right to secrecy of the ballot is infringed if, in addition to the legitimate aim of identifying national minority voters, the content of the vote of a minority voter necessarily becomes known to the members of the election commission and potentially to other voters present at the polling station, as a result of the specific features of the preferential quota system.

In our view, a voter's request – based on their free discretion – to be entered on the national minority register cannot in any way be interpreted as an acceptance that the content of their vote will be disclosed in public.

The ECtHR's findings on the secrecy of the voting are also compatible with the case-law of the Hungarian Constitutional Court, according to which "*[the] requirement of secrecy of the voting means that the content of the votes cast by individual voters may not be disclosed under any circumstances. This constitutional principle imposes on the State the requirement that it must lay down rules for the voting process and the counting and aggregation of ballots and must ensure that the conditions for voting are such as to guarantee that others cannot have access to or find out the content of the votes cast by the voters.*"[90]

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[86] Judgment, para. 70.

[87] Section 175 (1) and section 176 (1), (3) of the Election Procedure Act.

[88] Cf. the position of the Constitutional Court on the establishment of national minority self-governments. Decision No. 45/2005. (XII. 14.) of the Constitutional Court, ABH 2005, 569, 576-577. and Decision No. 41/2012. (XII. 6.) of the Constitutional Court, Reasoning [52].

[89] J. Tóth, *41/2012. (XII. 6.) AB határozat – nemzetiségi önkormányzatok létrehozása,* in F. Gárdos-Orosz & K. Zakariás (Eds.), Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990-2020. II., Társadalomtudományi Kutatóközpont – HVG-ORAC, Budapest, 2021, p. 99.

[90] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 453.

"*In the [Hungarian Constitutional Court's] view, enforcing the secrecy of the voting is an absolute requirement for elections. The secrecy of voting must be guaranteed by the State in all circumstances. The secrecy of voting is infringed if, during the counting of ballots, the content of the votes cast by the voter can be reconstructed and the counting committee can ascertain what the voter has voted on.*"[91]

In agreement with the ECtHR's findings, it is essential to point out a further circumstance that seriously undermines the principle of secrecy of the vote.

In examining the voting procedure, it is clear from a combined reading of section 178 (1) and section 257 (1a) of the Election Procedure Act that the election commission, on the basis of the electoral roll of the relevant polling district, shall hand over to the voter – registered as a national minority voter with effect also for the election of Members of Parliament – a ballot paper for voting in the individual constituency and a ballot paper for the list of the voter's national minority, as well as an envelope for the ballot papers. Section 182 (1) of the Election Procedure Act provides that after filling in the ballot paper the voter may place the ballot paper in an envelope and shall throw it in the ballot box.

Due to the population number of national minority communities living in Hungary and 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, in some cases only one voter may cast his/her vote for a national minority list. In this context, it is important to highlight that in the 2022 general election of Members of Parliament, only one voter was listed as a national minority voter in the electoral rolls of slightly more than 15% of the polling districts in Hungary.[92] It is also worth pointing out that if a single national minority voter attends the polling district and places the ballot papers, after filling them out, in the envelope handed over to him or her by the election commission, this circumstance may give the election commission the opportunity to reconstruct the content of the vote cast on the individual constituency ballot paper by the voter who can be easily identified on the basis of his or her national minority list ballot paper.

In our opinion, while the envelope is one of the guarantees of the secrecy of the vote when voting for candidates for single-member constituencies and party lists,[93] the use of the envelope in relation to national minority voters may result in the identification of the content of their vote and the violation of the principle of secrecy of the voting.

According to the case-law of the Hungarian Constitutional Court, in special circumstances, such as, in our view, the voting of national minority voters, "*the secrecy of the voting requires enhanced guarantees*".[94] "*In the [Hungarian Constitutional Court's] view, the disclosure of the vote cast by the voter in such cases results in a breach of the secrecy of the vote.*"[95] A regulation in which the low number of votes makes the content of the votes known is contrary to the Fundamental Law. In the absence or infringement of these requirements, the panel found an unconstitutionality by omission due to the failure to adopt guarantee provisions to ensure the secrecy of the voting in foreign diplomatic representations.[96]

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[91] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[92] www.valasztas.hu (22 February 2023).

[93] Á. Cserny & A. Cserny, *Választójogi és népszavazási kommentárok*, Wolters Kluwer, Budapest, 2017, p. 317.

[94] Cf. Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[95] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[96] Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 456.

In the light of the foregoing, in our view, the secrecy of the voting is not guaranteed even in the case where a small number of voters or a single national minority voter cast their votes in the polling district and put the ballot papers in an envelope. In this case, the rules governing the voting procedure create the possibility for the election commission to reconstruct during the counting of the ballots the content of the vote cast by the voter on the ballot paper for the individual constituency.[97] Based on the above, in our opinion, the rules of the Election Procedure Act on the national minority list voting do not fully guarantee the secrecy of the vote, which may result in further violation of the suffrage of voters belonging to a national minority.

### 4.3. The right to free elections and the prohibition of discrimination

The ECtHR unanimously found a violation of the right to free elections and the prohibition of discrimination in the Hungarian legislation, based on Article 3 of the First Additional Protocol to the ECHR and Article 14 of the ECHR.

Although, in their concurring opinions, judges *Marko Bošnjak* and *Davor Derenčinović* supported the relevant finding on Article 14 ECHR, on the grounds that making a distinction between the situation of national minority voters (lack of choice, violation of the secrecy of the ballot) and that of the electorate as a whole was not justified. However, in their view, 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.

We agree in part with the judges who have expressed the concurring opinion, and we consider that a detailed explanation of the reasoning behind Article 14 ECHR could indeed have contributed to the further development of the ECtHR's case-law. However, the absence of a detailed reasoning does not render the examined ECtHR judgement unfounded.

In view of this, we consider it important to draw attention to the case-law of the ECtHR in relation to Article 14 ECHR. Article 14 ECHR is applicable in the context of the rights and freedoms set out in the ECHR, namely Articles 2 to 13. The scope of application of Article 14 ECHR covers the provisions of the First, Fourth, Sixth, Seventh and Thirteenth Additional Protocols in relation to the contracting States which have ratified them. The prohibition of discrimination is an integral part of the human rights that the ECHR is designed to protect. A prerequisite for the applicability of Article 14 ECHR is that the life situation giving rise to the alleged discrimination complained of must fall within the regulatory scope of one of the rights set out in the ECHR. The non-discrimination provision is therefore not applicable on its own, but only in a subsidiary, complementary manner.[98]

It is also a consequence of the subsidiary nature of Article 14 ECHR that in most cases the ECtHR will not examine the discriminatory element in the facts of the case if it has already found a violation of another right or rights that the ECHR is supposed to protect, mainly on the grounds that the discriminatory element does not give rise to a new, appreciable violation of rights in the context of the situation at issue.[99]

Although the ECtHR judgement analysed in this paper does not indeed contain an explicit rea-

[97] Cf. Decision No. 32/2004. (IX. 14.) of the Constitutional Court, ABH 2004, 446, 455.

[98] E. Szalayné Sándor, *14. cikk Megkülönböztetés tilalma,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, pp. 337-338.

[99] Szalayné Sándor 2021, p. 338.

soning regarding the violation of Article 14 ECHR, it does, however, set out in detail the general principles relating to Article 14 ECHR and the specific principles relating to the assessment of discrimination on grounds of racial or ethnic origin, and repeatedly points to the different situation of national minority voters and the electorate as a whole.[100]

In our view, moreover, if the ECtHR had conducted an examination under Article 14 ECHR, it would certainly have strengthened the applicants' position.

In the case-law of the ECtHR, discrimination within the meaning of Article 14 ECHR means treating persons in a similar situation differently without objective and reasonable justification.[101] The ECtHR also includes within the scope of Article 14 ECHR the cases in which persons who are in fact in different situations are treated in the same way rather than differently.[102]

The absence of an objective and reasonable justification means that the discrimination in the case does not serve a legitimate aim or that there is no reasonable proportionality between the means used and the aim pursued.[103] The extent of the Member States' discretion in this respect depends on the circumstances, nature and context of the case.[104] According to ECtHR case-law, where the basis for differential treatment is affiliation with a national minority, the concept of objective and reasonable justification must be interpreted as narrowly as possible.[105]

There is no doubt that there is a clear and foreseeable difference between most members of the thirteen national minority communities living in Hungary as a group in a similar situation. Eleven out of the thirteen communities cannot reach the preferential threshold because of the verifiably low number of voting age members of the national minorities, and the discrimination in their respect is based on objective facts and it is inexcusable (Table 1).

### 4.4. The Framework Convention for the Protection of National Minorities as an aid of interpretation

We agree with the ECtHR's reasoning that the parties to the Framework Convention for the Protection of National Minorities have a wide margin of appreciation as to how to approach the objective set out in Article 15 of the Framework Convention, namely the promotion of the effective participation in public affairs of persons belonging to national minorities.

However, the ECtHR's argument that the ECHR and the First Additional Protocol to the ECHR, even interpreted in the light of the Framework Convention, do not oblige the contracting parties to grant national minority communities or their members preferential, national minority-based suffrage cannot be accepted. Although Article 15 of the Framework Convention does not speak ex-

[100] Judgment, 55, 58, 71 to 73.

[101] *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 41.

[102] *Thlimmenos v. Greece* [GC] (App. no. 34369/97) ECtHR (2000), para. 44; *Pretty v. The United Kingdom* (App. no. 2346/02) ECtHR (2002), para. 88; *Milanović v. Serbia* (App. no. 44614/07) ECtHR (2007), para. 97.

[103] *D.H. and Others v. the Czech Republic* [GC] (App. no. 57325/00) ECtHR (2007), para. 196; *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009) para. 41; *Cernea v. Romania* (App. no. 43609/10) ECtHR (2018), para. 33; Judgment, para. 49.

[104] *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 41; *Cernea v. Romania* (App. no. 43609/10) ECtHR (2018), para. 33.

[105] *D.H. and Others v. the Czech Republic* [GC] (App. no. 57325/00) ECtHR (2007), para. 196; *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009). para. 43; Judgment, para. 50.

pressly about the establishment of parliamentary representation, but it does expect the contracting parties to create the conditions necessary for participation in cultural, social, economic life and public affairs. Furthermore, Article 1 of the Framework Convention establishes the link between the rights enshrined in the Framework Convention and human rights, i.e. the ECHR. The Framework Convention, as a source of law increasingly invoked by the ECtHR, expects in the English text of Article 15 the possibility of *effective* participation, in contrast to the Hungarian text, which omits the adjective *effective*.

To explore the content of Article 15 of the Framework Convention for the Protection of National Minorities, the interpretation provided by the Advisory Committee of the Framework Convention for the Protection of National Minorities can be consulted in the first place.

According to Article 15 of the Framework Convention, effective participation means ensuring that the participation of national minorities has a meaningful influence on the decisions taken and that, as far as possible, the decisions are taken jointly. The participation of national minorities in matters directly affecting them can be considered as a minimum objective. It is therefore an essential requirement that persons belonging to national minorities should also have a voice in matters which do not affect them exclusively but which affect them as members of society as a whole.[106] Effective participation in decision-making can be achieved, among other things, through representation (of interests) in legislative bodies, typically by granting preferences under electoral law.[107] However, it is also clear that, in addition to direct representation of national minorities in Parliament, there are many other means of achieving effective participation in public affairs.[108] With this in mind, parliamentary representation should not be seen as the exclusive means of implementing Article 15 of the Framework Convention.

In our view, the omission of the adjective *effective* from the Hungarian translation of Article 15 of the Framework Convention for the Protection of National Minorities is not only a matter of semantics, but goes beyond the ECtHR's assertion that there is no international obligation on the contracting parties to create the conditions for effective, non-discriminatory participation in parliamentary decision-making.

Both the majority decision[109] and the concurring opinion[110] argue that neither the ECHR, nor the First Additional Protocol to the ECHR, nor the relevant international legal norms require different treatment, positive discrimination in the establishment of parliamentary representation of national minorities. In its submission, the Hungarian Government argued[111] that Hungary had sought to eliminate or reduce the de facto inequalities in political representation in domestic law[112] by introducing positive discrimination through the preferential quota system.[113]

Noteworthy is the case-law of the ECtHR in cases where a State Party generally provides a broader or higher level of protection in relation to a human right to be protected than is otherwise required

[106] T. H. Malloy, *Commentary of Article 15 of the Framework Convention for the Protection of National Minorities,* in R. Hofman, T. H. Malloy & D. Rein (Eds.), The Framework Convention for the Protection of National Minorities. A Commentary Brill-Nijhoff, Leiden-Boston, 2018, pp. 269-270.

[107] Malloy 2018, pp. 278-282.

[108] Cf. Malloy 2018, pp. 278-287.

[109] Judgment, 54, 73.

[110] Judgment, Concurring opinion, 6.

[111] Judgment, para. 39.

[112] Judgment, para. 73.

[113] Judgment, Concurring opinion, para. 6.

by the ECHR or its Additional Protocols. The ECtHR also requires respect for non-discrimination in relation to such additional rights.[114] The ECtHR's established case-law and recurring approach to the concept of additional rights providing higher protection than that required by the ECHR or its Additional Protocols requires States to conduct themselves in such cases in a manner consistent with the principle of non-discrimination based on Article 14 ECHR.[115]

The ECtHR confirms the case-law referred to by stating that, in relation to the additional rights granted by the Hungarian legislature to national minorities, it is natural that the measure should strengthen the participation of national minorities in parliamentary elections on equal terms with others, rather than perpetuating the exclusion of national minority representatives from political decision-making at national level.[116]

### 4.5. The scope of discretion – is there or is there not an international obligation?

In the ECtHR's view, if the legislator decides to establish a system aimed at eliminating or reducing the de facto inequalities in political representation, it is natural that the measure should strengthen the participation of national minorities in parliamentary elections on equal terms with others, rather than perpetuating the exclusion of national minority representatives from political decision-making at national level.[117]

The provisions of the Fundamental Law and the legislation in force since 2012 have allowed the interests of national minority communities living in Hungary to be represented in the work of Parliament since 2014. After more than 20 years of the regime change, these provisions were adopted to fulfil internal legal obligations on the one hand,[118] and recommendations made by international fora[119] and neighbouring states[120] on the other.

We agree with the judges who drafted the concurring opinion that indeed the current preferential quota system in the form of a parliamentary mandate does not guarantee political representation for all national minority communities, but the need for participation in public affairs is to some extent

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[114] Szalayné Sándor 2021, p. 340.

[115] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium,* nos. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64, para. 9, the decision of the European Commission of Human Rights of 23 July 1968.

[116] Judgment, para. 73.

[117] Judgment, para. 73.

[118] For the Constitutional Court decisions establishing a constitutional omission in connection with the lack of parliamentary representation of national minorities, see Decision No. 35/1992. (VI. 10.) of the Constitutional Court, ABH 1992, 204. and Decision No. 24/1994. (V. 6.) of the Constitutional Court, ABH 1994, 377.

[119] ACFC: First Opinion on Hungary, adopted on 22 September 2000, 48., Resolution ResCMN(2001)4 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 21 November 2001, 1.

ACFC: Second Opinion on Hungary, adopted on 9 December 2004, 18, 109 to 112, 134 to 135., Resolution ResCMN(2005)10 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 14 December 2005, 1.b), 2.

ACFC: Third Opinion on Hungary, adopted on 18 March 2010, 19, 30, 136–139., Resolution CM/ResCMN(2011)13 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, adopted by the Committee of Ministers on 6 July 2011, 1.b), 2.

[120] For details on the recommendations made by the joint minority committees to Hungary in the context of the establishment of parliamentary representation of national minorities, see B. Kiss, *A nemzeti kisebbségek parlamenti képviseletének kérdése a kétoldalú szomszédsági kapcsolatokban,* Jogi Tanulmányok, Vol. 23, 2022, 35-49.

created by the presence of national minority spokespersons in the work of the Parliament.[121]

The judgement raises the question of the extent to which the ECtHR took Hungary's discretion into account and the extent to which it paid regard to its political development.

Indeed, the ECtHR judgement under examination and the concurring opinion attached to it refer in several places to the wide scope of discretion of the States in election matters,[122] and the judgement also emphasises that any election law must be assessed in the light of the political development of the country concerned,[123] a consideration which must be even more strongly applied when a State, in this case Hungary, is seeking to introduce a more equitable system of representation. The wide discretion of the States is limited by the need to ensure that the free expression of the people's views in the election of the legislature is guaranteed in the representative system established.[124]

The ECtHR judgement analysed (as well as the concurring opinion) refer in several places to the wide discretion of states in election matters, and the judgement also emphasises that any election law must be assessed in the light of the political development of the country concerned, a consideration that must be even more strongly applied when a state, in this case Hungary, is trying to introduce a more equitable system of representation. The wide discretion of the states is limited by the need to ensure that the free expression of the people's views in the election of the legislature is guaranteed in the representative system established.

In our view, having regard also to the case-law of the ECtHR cited above, the ECtHR could not have refrained from finding a violation of Article 3 of the First Additional Protocol to the ECHR, read alone and in taken conjunction with Article 14 of the Convention, even if it had taken greater account of Hungary's scope of discretion and the specific features of its political development.

## 5. Lessons from the judgement – instead of a conclusion

In relation to the effective participation of national minorities in public life, the European Commission of Human Rights has already pointed out that the ECHR does not oblige States to provide for positive discrimination in favour of national minorities.[125] The ECtHR held in the *Partei Die Friesen Case*, also cited in the judgement under examination, that the ECHR and the First Additional Protocol to the ECHR, even interpreted in the light of the Framework Convention for the Protection of National Minorities, do not require different treatment in favour of national minority parties in the context of effective participation in public life,[126] and that the absence of positive discrimination does not result in a violation of Article 3 of the First Additional Protocol to the ECHR read alone and taken in conjunction with Article 14 of the Convention.[127]

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121 Judgment, Concurring opinion, para. 7.

122 Judgment, para. 44, 54.; Judgment, Concurring opinion, para. 3, 5, 7.

123 *Py v. France* (App. no. 66289/01) ECtHR (2005), para. 46; *Yumak and Sadak v. Turkey* [GC] (App. no. 10226/03) ECtHR (2008), para. 111.

124 *Mathieu-Mohin and Clerfayt v. Belgium* (App. no. 113) ECtHR (1987), para. 54, *Podkolzina v. Latvia* (App. no. 46726/99) ECtHR (2002), para. 33.

125 *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996; *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 42.

126 *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 43.; Judgment, para. 54.

127 *Magnago and Südtiroler Volkspartei v. Italy,* no. 25035/94, the decision of the European Commission of Human Rights of 15 April 1996; *Partei Die Friesen v. Germany* (App. no. 65480/10) ECtHR (2016), para. 44.

In its case-law, the ECtHR – due to discriminatory treatment on racial or ethnic grounds – has established in numerous cases violations of Article 14 of the ECHR, in addition to the violation of Article 3 of the First Additional Protocol to the ECHR, the right to free elections.[128]

In the context of State measures to enhance the effective participation of national minorities in public life, the ECtHR has stated in principle that election laws should clearly specify the procedure to be followed in the allocation of seats to organisations representing national minorities. The unpredictability of election laws and the lack of adequate guarantees violate the essence of the rights set out in Article 3 of the First Additional Protocol to the ECHR.[129]

In connection with the significance of the ECtHR's judgement, it is however essential to emphasise that the ECtHR 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.[130]

With regard to the international impact of the ECtHR judgement in Bakirdzi and E.C. v. Hungary, it is undisputed that its binding force relates to the individual case in both personal and material terms, but it also has a character that goes beyond the specific case, since the provisions of the ECHR are interpreted and given concrete content by the case-law of the ECtHR. There is no reason to believe that the judgement of the ECtHR cannot have an impact on States not party to the proceedings. Although the body of law of the ECHR is not formally precedent law, the interpretation of the law given by the ECtHR necessarily becomes part of the content of the individual rights. It is indeed impossible to separate the text of the ECHR from the case-law interpreting it, as they together give rise to the legal obligations to be complied with by the Member States. The reason for this is that the ECtHR, although not formally bound by it, follows its previous case-law and develops it only where justified, usually by extending the rights. In view of this, it can be assumed that "*upon a relevant request, acts of public authority of a Member State contrary to the case-law of the ECtHR will be found by the ECtHR to be contrary to the Convention*".[131]

The ECtHR judgement analysed here is therefore found to have established a standard for the ECtHR's assessment of State measures introduced to enhance the effective participation of national minorities in public life.

It is also worth taking into account the possible impact of the ECtHR judgement on the decision of the Hungarian Constitutional Court in a possible future review of constitutionality by the Constitutional Court.

In its case-law, the Hungarian Constitutional Court has argued that for certain fundamental rights, the Fundamental Law formulates the substantive content of the fundamental right in the same way as an international treaty. In these cases, the level of protection of fundamental rights provided by the Hungarian Constitutional Court may in no way be lower than the level of international protec-

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[128] *Aziz v. Cypirus* (App. no. 69949/00) ECtHR (2004) (the exclusion of Cypriot citizens of Turkish origin from exercising their right to free elections, in contract with those of Greek origin); *Sejdić and Finci v. Bosnia-Herzegovina* [GC] (App. nos. 27996/06, 34836/06) ECtHR (2009) (the exclusion of citizens of Bosnia and Herzegovina of Roma and Jewish origin from the right to stand as a candidate for higher public office); *Zornić v. Bosnia-Herzegovina* (App. no. 3681/06) ECtHR (2014) (the exclusion from the right to stand as a candidate in elections to the House of Representatives of citizens of Bosnia and Herzegovina who do not claim to belong to the three constituent ethnic groups).

[129] *Grosaru v. Romania* (App. no. 78039/01) ECtHR (2010), para. 49, 57.

[130] Judgment, para. 53. Judgment, Concurring opinion, para. 4.

[131] E. Bodnár, *46. cikk Az ítéletek kötelező ereje és végrehajtása,* in P. Sonnevend & E. Bodnár (Eds.), Az Emberi Jogok Európai Egyezményének Kommentárja, HVG-ORAC, Budapest, 2021, p. 533.

tion, typically as elaborated by the ECtHR.[132] As a consequence of the principle of *pacta sunt servanda*,[133] the Hungarian Constitutional Court must follow the case-law of the ECtHR and the level of fundamental rights protection set out therein, even if this would not necessarily follow from its own previous "precedent decisions".[134] Furthermore, the Hungarian Constitutional Court has stated in principle that in interpreting the provisions of the Fundamental Law, it also takes into account the case-law of the ECtHR.[135]

The ECHR can not only contribute to the interpretation of the provisions of the Fundamental Law, but is itself a constitutional standard, insofar as the legislation under the Fundamental Law should not be contrary to it, otherwise the rule of consistency enshrined in Article Q (2) of the Fundamental Law is violated.[136]

With respect to examining the conflict of a provision of domestic law with an international treaty – by excluding the competence of the ECtHR to examine the abstract legislation of the Member States[137] –, the Hungarian Constitutional Court reserves to itself the exclusive right to carry out such a review[138] subject, of course, to the restriction that it cannot rule on a conflict with the ECHR without taking into account the case-law of the ECtHR.[139]

The case-law of the Hungarian Constitutional Court regarding the examination of the conflict of laws with an international treaty also provides examples of the Hungarian Constitutional Court building its decision directly upon a judgement of the ECtHR.[140] The Hungarian Constitutional Court formulates its decision on the basis of a specific ECtHR judgement if the defendant in the case before the ECtHR is Hungary, if the ECtHR in its decision assesses an alleged violation of a convention arising from the application of a provision of Hungarian law, or if the Hungarian Constitutional Court has to rule on the constitutionality or the conflict with an international treaty of the same provision of Hungarian law. The exceptional, mandatory consideration of the ECtHR judgement is justified by the fact that it reveals the infringement of a convention by a provision of Hungarian law. [141] In its case-law, the Hungarian Constitutional Court has also pointed out that, by virtue of Article Q of the Fundamental Law, it must refrain from assessing a legal solution declared by the ECtHR to be contrary to the Convention as compatible with the ECHR.[142]

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[132] Decision No. 61/2011. (VII. 13.) of the Constitutional Court, ABH 2011, 290, 321. Reinforced in Decision No. 32/2012. (VII. 4.) of the Constitutional Court, Reasoning [41]; Decision No. 7/2013. (III. 1.) of the Constitutional Court, Reasoning [30]; Decision No. 8/2013. (III. 1.) of the Constitutional Court, Reasoning [48]; Decision No. 22/2013. (VII. 19.) of the Constitutional Court, Reasoning [16]; Decision No. 13/2014. (IV. 18.) of the Constitutional Court, Reasoning [33]; Decision No. 30/2015. (X. 15.) of the Constitutional Court, Reasoning [35]; Decision No. 15/2016. (IX. 21.) of the Constitutional Court, Reasoning [42]; Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [63]-[64].

[133] Fundamental Law, Article Q para.graphs (2) to (3).

[134] Decision No. 61/2011. (VII. 13.) of the Constitutional Court, ABH 2011, 290, 321. Reinforced in Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [63].

[135] Ruling No. 3215/2016. (X. 26.) of the Constitutional Court, Reasoning [7].

[136] L. Blutman, *Törésvonalak az Alkotmánybíróságon: Mit lehet kezdeni a nemzetközi joggal? (Breakpoints at the Constitutional Court: what to do with international law?),* Közjogi Szemle, 2019/3, p. 4.

[137] See in *Nikolova v. Bulgaria* [GC] (App. no. 31195/96) ECtHR (1999), para. 60.

[138] Decision No. 32/2014. (XI. 3.) of the Constitutional Court, Reasoning [52] and Decision No. 21/2018. (XI. 14.) of the Constitutional Court, Reasoning [15].

[139] Ruling No. 3215/2016. (X. 26.) of the Constitutional Court, Reasoning [7].

[140] On taking account of specific rulings from the Constitutional Court's case-law relating to international treaties, see Decision No. 6/2014. (II. 26.) of the Constitutional Court, Reasoning [24]; Decision No. 23/2015. (VII. 7.) of the Constitutional Court, Reasoning [36]; Decision No. 10/2020. (V. 28.) of the Constitutional Court, Reasoning [22].

[141] Blutman 2019, p. 5.

[142] Decision No. 166/2011. (XII. 20.) of the Constitutional Court, ABH 2011, 545, 557. and Decision No. 32/2014. (XI.

In our view, the ECtHR judgement under examination must necessarily be taken into account in a potential review by the Constitutional Court – either in a question of examining the conformity of relevant legislation with the Fundamental Law or in the case of a conflict with an international treaty –, since it is binding on Hungary and, on the basis of it, the relevant laws are in conflict with the ECHR.[143]

The implementation of the ECtHR judgement is an obligation for Hungary under both international law and domestic law. Obligation under international law to implement the ECtHR judgement is created by Article 46 (1) of the ECHR and the underlying principle of *pacta sunt servanda*.[144] In the Hungarian legal system, Article Q (2) of the Fundamental Law creates an obligation under domestic law by regulating that "*In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law*".

The ECtHR did not prescribe how the judgement should be implemented, nor did it impose any specific obligation on Hungary. Hungary is therefore free to choose, under the control of the Committee of Ministers of the Council of Europe,[145] the method of implementing the judgement, provided that it is in accordance with the judgement of the ECtHR.[146]

However, in the context of the implementation of the ECtHR judgement by the Member States, it should be stressed that the aggrieved party is obliged to take general measures in its domestic legal system to eliminate the violation and to remedy its consequences.[147] This also means that, on the basis of the ECtHR judgement, the legislation in breach of the convention must be amended or repealed.[148]

In the process of implementation by the Member State, when amending the relevant legislation, it is essential to obtain the opinions of the communities concerned and to become acquainted with their position. However, one should not forget that the position of national minority communities is not necessarily unified about their participation in the work of the Parliament, the way in which they are represented there, and the effectiveness of their representation. In this context, the opinion of the Parliament's Committee on the National Minorities in Hungary might as well differ from the position of the national-level national minority self-governments.

3.) of the Constitutional Court, Reasoning [52].

[143] Cf. Blutman 2019, p. 5.

[144] *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 61.

[145] Article 46 (2) ECHR.

[146] *Scozzari and Giunta v. Italy* [GC] (App. nos. 39221/98, 41963/98) ECtHR (2000), para. 249; *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 88.

[147] Cf. *Verein gegen Tierfabriken v. Switzerland (no. 2)* [GC] (App. no. 32772/02) ECtHR (2009), para. 85.

[148] Bodnár 2021, pp. 539-540.

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