



NEWSLETTER

special edition



WELCOMING THOUGHTS



The participation of the thirteen nationalities enjoying special constitutional protection in decision-making at local and parliamentary level is a central element of the relevant Hungarian legal framework. Members of the communities can form nationality self-governments in local elections according to their own interests and objectives, and through these they can participate directly in local decision-making. For a long time, the Hungarian legislator has been slow to establish a system of political participation at national level: the first time the institution of the preferential nationality mandate was used was in the 2014 parliamentary elections.

The development of the related electoral rules was preceded by a lengthy (constitutional) legal debate - and immediately after the first election, some stakeholders took the controversial provisions to the European Court of Human Rights. As Minority Ombudsman, it is my duty to draw attention to the lessons and implications of the 2022 judgment, in particular for the proper preparation of the 2026 parliamentary elections: the implementation of the judgment is still pending.

In this Special Issue, I present some of the relevant elements of the Bakirdzi and E.C. v. Hungary case.

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1. INTRODUCTION

The European Court of Human Rights (ECtHR), in its judgment of 10 November 2022 in the case of Bakirdzi and E.C. v. Hungary, unanimously held that the electoral system ensuring the participation of nationalities living in Hungary in the work of the National Assembly violates Article 3 of the First Additional Protocol to the European Convention on Human Rights (ECHR), read alone and in conjunction with Article 14 of the Convention. The judgement became final on 3 April 2023, so Hungary has been under an obligation to implement it for more than a year, partly under international law and partly under domestic law. With regard of the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law. (Venice Commission: Code of Good Practice in Electoral Matters. Guideline II.2.b.) As Minority Ombudsman, I consider it my duty to draw the attention of the national and international public to the ECtHR judgment and the obligation to implement it, especially in view of the fact that the 2026 general elections for Members of Parliament will take place in two years' time.

2. LEGAL BACKGROUND

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

[1] 55–56.

3. APPLICATIONS BEFORE THE ECTHR

„The applicants living in Budapest, namely K. Bakirdzi belonging to the Greek national minority and E.C. of Armenian national minority 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.”[2]

„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. (Judgment, para. 25.)

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. (Judgment, para. 36.)

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. (Judgment, para. 37.)

According to the applicants, the measures were discriminatory, as they were treated differently from other voters because of their national minority. (Judgment, para. 38.)”[3]

4. SITUATION OF NATIONAL MINORITIES IN HUNGARY

„[T]o 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 – 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.

[2] 56.

[3] 57.

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)."[4]

national minority	2011	2022	2014	2018	2022
Bulgarian	6 272	6 109	74	104	157
Greek	4 642	6 178	102	159	232
Croatian	26 774	21 824	1 212	1 743	1 760
Polish	7 001	7 398	99	210	281
German	185 696	142 551	11 415	26 477	24 630
Armenian	3 571	4 199	110	159	163
Roma	315 583	209 909	4 048	5 703	–
Romanian	35 641	27 554	362	428	526
Ruthenian	3 882	7 111	463	539	645
Serbian	10 038	11 622	236	296	418
Slovak	35 208	29 881	995	1 245	1 208
Slovenian	2 820	3 965	134	199	219
Ukrainian	7 396	24 615	293	270	396

National minority data of 2011 and 2022 censuses and number of valid national minority list votes cast in the parliamentary elections, 2014-2022

5. SITUATION OF NATIONAL MINORITIES IN HUNGARY

„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. 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.”[5]

[4] 65–66.

[5] 61–62.

6. JUDGMENT OF THE ECtHR

„In the context of the preferential quota system, (...) [t]he 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. (Judgment, para. 55.)

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. (Judgment, para. 56.)

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. (Judgment, para. 57.) (...)

[I]n 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 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. (Judgment, paras. 58-59.)

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. (Judgment, para. 61.) (...)

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. (Judgment, para. 66.)

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 right to secrecy. (Judgment, para. 70.) (...)

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. (Judgment, para. 72.) (...)

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. (Judgment, para. 74.)"[6]

7. IMPLEMENTATION OF THE JUDGMENT

„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*. (...) 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, (see Article 46 (2) ECHR) the method of implementing the judgement, provided that it is in accordance with the judgement of the ECtHR.

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. (...) This also means that, on the basis of the ECtHR judgement, the legislation in breach of the Convention must be amended or repealed.

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.”[7]

[6] 58-60.

[7] 79.

Source:

Elisabeth Sándor-Szalay – Balázs Kiss: An Odd Solution – Comments on the Margins of a Recent Debate on National Minority Suffrage: ECtHR judgement in Case Bakirdzi and E.C. v. Hungary. Pécs Journal of International and European Law 2022/II. 55-79.
<https://journals.lib.pte.hu/index.php/pjiel/article/view/6773/6393>