

# The Parliamentary Representation of National Minorities in Hungary

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## Abstract Deutsch

Das ungarische Grundgesetz erkennt nationale Minderheiten als „staatsbildende Faktoren“ an. Dies hat nicht nur deklarative oder symbolische, sondern auch normative Bedeutung: Es bringt zum Ausdruck, dass nationale Minderheiten nicht nur in ihrer individuellen, sondern auch in ihrer Gemeinschaftsqualität staatsbildende Faktoren sind. Das Grundgesetz sieht nicht ausdrücklich eine parlamentarische Vertretung der Nationalitäten vor, es bestimmt lediglich, dass die Beteiligung der in Ungarn lebenden Nationalitäten an der Arbeit des Parlaments durch ein Schwerpunktgesetz geregelt wird. Die vorliegende Studie befasst sich mit dem Nationalitätenbegriff, den Möglichkeiten ihrer Beteiligung an der parlamentarischen Arbeit, stellt detailliert die Art und Weise der Wahl von Nationalitätenmitgliedern dar und skizziert die Unterschiede zwischen dem Status von Minderheitenvertretern und Minderheitenführern. Der Autor stellt durch die Bewertung der parlamentarischen Minderheitenvertretung fest, dass die derzeitige Regelungslösung theoretisch die Beteiligung der Volksgruppen an den öffentlichen Angelegenheiten sicherstellt, insbesondere an Entscheidungen, die die Volksgruppen betreffen. Das Wahlgesetz wendet die Vorzugslösung an, die den Grundsatz der Gleichberechtigung des Wahlrechts nicht verletzt, da die günstige Unterscheidung auf verfassungsrechtlichen Gründen beruht. Was die politischen Willensbildung und Entscheidungsfindung betrifft, ist die parlamentarische Vertretung der Nationalitäten jedoch weitgehend formal, mit einer ähnlichen Situation wie bei den fraktionslosen Abgeordneten, was die Frage nach den inhaltlichen Mängeln der parlamentarischen Vertretung der Nationalitäten aufwirft.

## Abstract English

The Fundamental Law recognizes national minorities as “constituent parts of the state”. The significance of this recognition is not only declarative or symbolic, but normative as well: it expresses that national minorities are constituent (‘state-creating’) factors not only as individuals but in a communal capacity as well. The Fundamental Law does not regulate *expressis verbis* the parliamentary representation of national minorities; it only states that the participation of national minorities living in Hungary in the work of the National Assembly shall be regulated by a cardinal Act. The present paper examines the definition of minorities and their possibilities of participation in the parliamentary work; presents in detail the procedure of electing national minority representatives; and outlines the differences between the status of minority representatives and minority advocates. The author, by assessing the parliamentary representation of minorities, establishes that the current legislation theoretically ensures the participation of national minorities in the public affairs, especially in decisions that concern the national minorities. The legislation on elections promotes the preferential approach, which does not violate the equality of voting rights since the favorable distinction is based on constitutional reasons. However, for the purpose of political decision-making, the parliamentary representation of national minorities may be considered only a formality;

their status being similar to those of non-attached MPs, which in turn may raise doubt about the actual substance of the minorities' parliamentary representation.

## 1. Introduction

The Fundamental Law of Hungary – the constitution currently in force<sup>1</sup> – lays down in the preamble bearing the title “National Avowal”: “We proclaim that the national minorities living with us form part of the Hungarian political community and are constituent parts of the State.” In accordance with this declaration, Paragraph (1) of Article XXIX. states that “[n]ational minorities living in Hungary shall be constituent parts of the State”.<sup>2</sup> This pronouncement of the Fundamental Law, which recognizes national minorities as “constituent parts of the state”, may seem to be unnecessary since, in a legal sense, individuals of such minorities are indeed Hungarian citizens, and in that respect are part of the political nation, and are members of the constituent nation, thus possessing the right to vote in general elections and the right to participate in national referendums,<sup>3</sup> therefore as part of the nation they participate in the exercise of power, both directly and indirectly.<sup>4</sup> The recognition as constituent parts of the state is not only declarative or symbolic, but normative as well: it expresses that national minorities – as communities with specific cultures differing from that of the Hungarian majority – are in such capacity the constituent part of the Hungarian state, meaning that not only individually but in a communal capacity are constituent (‘state-creating’) factors. Consequently, Hungary – although the vast majority of citizens are of Hungarian nationality – is, *de jure*, not a homogenic nation state. Besides the majority – contrary to the nation state concept –, individuals and communities of the national minorities are also subjects of the exercising of power, i.e. they may, on the basis of equality, exercise their rights stemming from public sovereignty, they form the state together with individuals and communities of other nationalities of the state, which declares their full political recognition.

The Fundamental Law does not regulate *expressis verbis* the parliamentary representation of national minorities, only states that “[t]he participation of national minorities living in Hungary in the work of the National Assembly shall be regu-

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- 1 The Fundamental Law of Hungary was adopted by the National Assembly on 18.4. 2011, signed by the President of the Republic on 25 April (Easter Monday) and promulgated in the official gazette on the same day. The Fundamental Law entered into force on 1.1.2012.
  - 2 This provision, for the first time upon the communist regime change, was incorporated into Article 68 of the Constitution then in force, by virtue of Act XXXI of 1989 on the amendment of the Constitution with the wording of “national and linguistic minorities living in the Republic of Hungary”. Article 45 of Act XL of 1990 on the amendment of the Constitution changed the term to “national and ethnic minorities”. The constitution coming into effect as of 1 January 2012 – the Fundamental Law of Hungary – still contains the term.
  - 3 Fundamental Law, Article XXIII para (1) and (7).
  - 4 Fundamental Law, Article B) para (4).

lated by a cardinal Act”.<sup>5</sup> From that provision at least two conclusions may be drawn. On the one hand, the constitutional legislator prescribed the participation of national minorities in the work of the National Assembly, which means that the national minorities’ participation in the parliamentary work is to be ensured in regulations. It naturally follows that should the legislator fail to adopt such regulations, then such omission amounts to being in conflict with the Fundamental Law.<sup>6</sup> On the other hand, the legislator enjoys flexibility in terms of the form in which the regulations need be adopted. From the Fundamental Law it cannot be derived that the participation in the parliamentary work must mean complete democratic representation; however, the possibility thereof is not excluded either.

From the provision of the Fundamental Law prescribing the participation of national minorities – and the individuals thereof – in the work of the National Assembly stems a special set of rights that only members of national minorities are entitled to. Therefore the legislator shall determine who may be subject to such rights. The Fundamental Law does not define the term “national minorities living in Hungary” but only states that “[t]he detailed rules relating to the rights of national minorities living in Hungary, the national minorities,<sup>7</sup> the requirements for recognition as a national minority, and the rules for the election of the self-governments of national minorities at local and national level shall be laid down in a cardinal Act<sup>8</sup>”.<sup>9</sup> Based on the quoted article the legislator received authorization to determine national minorities living in Hungary, as well as to regulate the conditions of recognition as national minority.

## 2. Defining the national minorities living in Hungary

The relevant legal provisions unequivocally state that individuals, and groups of individuals, belonging to national minorities living in Hungary are entitled to national minority rights, and therefore defines the terms of national minority groups and national minority individuals. According to the Act, national minorities shall be “ethnic groups resident in Hungary for at least one century, who are in a numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression

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5 Fundamental Law, Article 2 para (2).

6 Act CLI of 2011 on the Constitutional Court, section 46 para (1).

7 The Fundamental Law also states that ‘A cardinal Act may provide that recognition as a national minority shall be subject to a certain length of time of presence and to the initiative of a certain number of persons declaring to be members of the national minority concerned.’ Fundamental Law, Article XXIX para (3) second sentence.

8 According to Article T) para (4) of the Fundamental Law, ‘Cardinal Acts shall be Acts, the adoption and amendment of which requires the votes of two thirds of the Members of the National Assembly present.’

9 Fundamental Law, Article XXIX para (3). This Cardinal Act is the Act CLXXIX of 2011 on the rights of national minorities (Njtv).

and protection of the interests of their historically established communities are considered national minorities”.<sup>10</sup> In addition to this, the Act names and lists the thirteen ethnic groups that are considered national minorities.<sup>11</sup> A national minority individual is, according to the Act, a person having his domicile in Hungary, if he considers himself belonging to a national minority and declares that he belongs to that national minority in the cases and ways specified in the Act. Although the Act grants the right to free choice of identity as an individual right,<sup>12</sup> per which declaring affiliation with a national minority shall be the individual’s exclusive and inalienable right,<sup>13</sup> and though no-one shall be obliged to make a declaration on his affiliation with a national minority,<sup>14</sup> an act – or the law for the implementation of that act – may make the exercise of certain national minority rights conditional on the individual’s declaration.<sup>15</sup> This declaration in certain cases – for instance the election of national minority representatives – is an essential condition of exercising the rights; however, it also satisfies the requirement of avoiding the passive registration – registration not on the individual’s initiative – of Hungarian citizens belonging national minorities.<sup>16</sup> By virtue of the declaration the fundamental requirement of having national minority representatives and their constituents been affiliated with the relevant national minority may be ensured, although – considering the right to free choice of identity – there is no complete guarantee.<sup>17</sup>

10 Njtv, section 1 para (1).

11 Annex 1 to the Njtv lists the ethnic groups living in Hungary that are recognised as national minorities. ‘Under this Act, the following qualify as national minorities: Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serbian, Slovak, Slovene and Ukrainian.’ Section 148 of the Act CLXXIX of 2011 also regulates that if a national minority other than those listed in Annex 1 wishes to verify to meet the relevant conditions, minimum one thousand Hungarian citizens who may vote and be voted for in the elections for local government representatives and mayors and who declare their affiliation with the national minority concerned may initiate, according to the rules of initiating a national referendum, that the national minority concerned be recognised as an ethnic group resident in Hungary.

12 According to the Fundamental Law, Article XXIX para (1) second sentence, ‘every Hungarian citizen belonging to a national minority shall have the right to freely express and preserve his or her identity.’

13 Njtv, section 11 para (1). The Preamble of the Njtv also states that ‘every Hungarian citizen who belongs to a national minority has the right to declare and preserve his identity freely.’

14 Njtv, section 11 para (2).

15 Njtv, section 11 para (2). According to para (3), ‘the right to a national minority identity and the declaration of affiliation with a national minority shall not exclude the recognition of double or multiple affiliations, except as set forth in this Act.’

16 In Hungary, historical and psychological reasons lie behind the rejection of minority registration of any shape or form, i.e. indicating minority affiliation in any state registry. During and after World War II such registries were used for the deportation and expulsion of certain minorities.

17 In Hungary there is no official registry on ethnic origins, thus no official certificate may be issued in that respect.

### 3. The participation of national minorities in the work of the National Assembly

The participation of national minorities in the work of the National Assembly is regulated by two separate Acts, which are in accordance with one another though adopted at different times. One Act is the Njtv. that declares among the fundamental rights of the national minorities that every national minority community and every individual belonging to a national minority shall have the right to – among others – take part, through its representative or advocate obtaining a mandate from the national minority list, in the National Assembly’s legislative work, especially in legislative work affecting the interests and rights of national minorities.<sup>18</sup> This provision grants the right to parliamentary representation and participation both as an individual as well as a collective right.<sup>19</sup> According to the Njtv. the representation of national minorities may be performed by the representative or advocate obtaining a mandate from the national minority list.<sup>20</sup> These offices are, however, not constituted in the Fundamental Law since they were established by the relevant laws upon constitutional authorization. The Njtv. regulates the main aspects of the activity of the national minority representatives and advocatess, especially those that are in connection with their community or the self-government thereof. The national minority representative and the national minority advocate shall perform their activities in the interest of their respective national minority communities and the national minorities located in Hungary, and they shall cooperate with the self-government of their respective national minorities and their organs and institutions in the course of their activities.<sup>21</sup> In connection with their activities, they shall be entitled to seek information from the chair, general assembly, and institutions of their respective national self-governments of the national minority. At general assembly of their respective national minorities the national minority representative and the national minority advocate shall be entitled to take part, having the right of consultation. The respective national self-governments of national minority shall provide the national minority representative and the national minority advocate with the possibility, at least once every year, to give account of their own and the National Assembly’s activity and decision that affect national minorities.<sup>22</sup> Members of the National Assembly belonging to a national minority and national minority advocates may also use their mother tongues in the National Assembly.<sup>23</sup>

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18 Njtv, section 4 para (1) point c).

19 Earlier the Act on the rights of national and ethnic minorities included that minorities – as prescribed in a separate act – shall have the right to parliamentary representation. See also Par (1) Section 20 of Act LXXVII of 1993. The actual implementation of the provision never took place, however.

20 Njtv, section 21/A.

21 Njtv, section 21/B paras (1) and (2).

22 Njtv, section 21/B paras (4) and (5).

23 Njtv, section 5 para (3).

The other Act is the Ogytv., which regulates the parliamentary activity of the representatives and advocates and enables their participation in the work of the National Assembly. Although adopted in 2012, the provisions regulating the national minority advocates came into effect only in 2014, after the general elections, on the day of the constitutive sitting of the National Assembly.<sup>24</sup> The reason behind was that the election of national minority representatives and the mandate of national minority advocates occurred for the first time at the general elections of the National Assembly of 2014, in accordance with the following rules.

## 4. The election of national minority representatives

### 4.1. The Hungarian election system – in a nutshell

For the national minorities the Act on the election of members of the National Assembly, adopted in 2011,<sup>25</sup> facilitates the obtainment of the preferential mandate, thus ensuring the possibility to elect their own parliamentary representative. The election of the national minority representatives occurs simultaneously along with the members of the National Assembly.

In Hungary, the election system and the number of National Assembly members are determined in the Vjt. and not in the Fundamental Law. The number of seats in the National Assembly is 199, of which 106 are constituency seats, 93 are party-list seats. Based on the formula for mandate-allocation, the Hungarian system is a mixed system, that blends the single-member and party-list systems.

In accordance with the single-member system, one MP may be elected in each district, thus following the maximum number of electable 106 districts were drawn. The district elections are one-round, single-member-plurality-voting systems, therefore the candidate receiving the most votes shall obtain the mandate, regardless of the turnout.<sup>26</sup>

The mandate-allocation system is based on the mandates obtainable from the national party-lists. This system provides the national minorities with the possibility of parliamentary representation, because it provides the obtainment of preferential mandate from the national minority list with a preferential voting count (preferential quota), and further provides those national minorities failing to obtain a mandate this way with a national minority advocate, thus ensuring their direct, though not full, participation in the work of the National Assembly. The mandate-allocation system is, however, restricted by a threshold system, meaning that

24 See Ogytv, section 144 para (4).

25 See also Act CCIII of 2011 on the election of members of the National Assembly (Vjt.). Act XXXVI of 2013 on the election procedures is a separate law, distinct from the substantive Vjt. The procedural act comprises a general part and a special part, wherein the general part contains the common rules and the special part the specific election types (i.e. general election, local governmental election, European Parliament election).

26 The Vjt. prescribes no validity threshold for participation, and the mandate is obtained by the candidate receiving at least one more vote than the others.

the party-list failing to receive five percent (electoral threshold) of the total votes may not obtain a mandate; nor may a national minority list that did not receive the number of votes (preferential quota) necessary for obtaining the preferred national minority mandate.

It is prudent to go over the mandate-allocation system, especially the obtainment of national minority mandates, since national minority mandates may only be acquired through the preferential mandate method.

#### 4.2. The conditions of setting up a national minority list

The preferential nature of mandate-obtainment for the Hungarian national minorities is clear already at the nomination of candidates. Nomination is an important institution since votes may be cast for nominated candidates. The right to vote – including the right to nominate and the right to cast a vote – may be exercised by voters registered in the central electoral register. The central electoral register is an electronic registry<sup>27</sup> managed by the National Election Office.<sup>28</sup> The nomination of MPs follows the method of obtaining the mandate, as it differs for candidates standing for constituency seats (district elections)<sup>29</sup> and for the party lists.

According to the current rules, a national list may be set up either as a party list or as a minority list. A list may be set up by a nominating organization.<sup>30</sup> A nominating organization is a political party lawfully registered in the civil registry on the day of the election, or the national self-government of national minorities, which means that lists may only be set up by them.

A party-list may be set up only by a political party with candidates standing for election – in at least 14 counties and Budapest – in at least 71 constituencies,<sup>31</sup> which means that nomination on a list is conditional on the successful nomination of district candidates. Accordingly, the parties shall have nation-wide “coverage” as in more than two-thirds of the 19 counties and in every case in the capital as well – that is the two-thirds of all electoral districts – shall have candidates stand for election. This rule is meant to ensure that only parties with real public support may present a party-list. A candidate standing for a constituency seat and nominated by a party may appear on the list of that party, which means that the Vjt. does not allow individual candidates to appear on the list of other parties.<sup>32</sup> To mitigate the strictness of these rules, it is possible for two or more parties with a joint constituency candidate – with the participation of those parties having a joint constituency candidate – to set up a joint party-list, but any one party may be al-

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27 Ve, section 82 para (1). The central election register and the district register is automatically updated with the data included in the personal data and address registry.

28 The National Election Office is an autonomous administrative body responsible for the arrangement and technical implementation of elections. See also Ve, section 53.

29 According to Vjt, section 6, a constituency candidate must acquire 500 proposal certificates.

30 Ve, section 3 para (1) point 3.

31 Vjt, section 8 para (1).

32 Vjt, section 10 para (2).

lowed to participate in setting up only one list, independent or joint. The Vjt. prescribes, as a measure of guarantee, that any one party shall be allowed to participate in setting up only one list, independent or joint. It is further regulated that the number of the candidates nominated in the list shall be not more than three times the number of the mandates obtainable.<sup>33</sup> This formula is needed since candidates on the list may stand for elections as constituency candidates and should they win their districts they automatically forfeit their position on the list and shall not be counted upon the allocation of list-mandates as a candidate obtaining mandate.<sup>34</sup>

A national minority list may exclusively be set up by national self-government of national minorities, which means that each national self-government may set one national minority list up. The Vjt. prescribes, as a measure of guarantee, that this nominating organization may not have the right to set up a party-list. An even more important provision is that the national self-government of national minority – if wishing to set up a list, similar to political parties – shall report to the National Election Office<sup>35</sup> as a nominating organization, after the setting of the date of the general elections. Further condition of setting-up a minority list is that the proposal certificate of one percent of the relevant registered minority voters – but no more than 1500 – shall be collected;<sup>36</sup> which means whereas for party-lists having constituency candidates is the condition, for minority list it is the proposal certificate. Minority voters registered in the central electoral register may propose minority lists.<sup>37</sup> This method ensures that only voters declaring their affiliation with the national minority – and expressing the declaration upon the electoral registration – shall participate in setting up the minority list. A voter having his domicile in Hungary may apply to have his minority affiliation registered into the central electoral register, and may apply to have this registration deleted as well.<sup>38</sup> This registration shall only represent the freely given declaration of the voter’s affiliation with minorities in terms of elections. Each voter may declare one minority affiliation.<sup>39</sup> The application for registration as a minority voter shall include the minority in question, the declaration of the voter in which the affiliation is expressed, and that whether the voter requests his registration with an effect encompassing the general election of MPs. The latter is significant since minority voters may participate in the elections of minority representatives of the local governments or may stand for election as minority candidates in the local government elections, but only if registered as minority voters in the central register. The minority voter

33 Since 106 constituency districts exist, the maximum number of candidates on the list is 279.

34 The list may include names of prominent figures who “carry” the list, but upon being elected choose not to take the mandate. The mandate then goes to the next candidate on the list.

35 The National Election Office is the central administrative body for the election offices.

36 Ve, section 255 para (2).

37 Ve, section 255 para (1), second sentence.

38 Ve, section 85 para (1). Erasure or modification of data regarding affiliation with national minorities from the central register may at any time be requested by the voter.

39 The application must be rejected if the voter is already registered as a minority voter.

may separately decide whether he wishes to appear in the register as a minority voter for the general elections, or if the effect of his registration shall not extend to the parliamentary elections.<sup>40</sup> In case of the former, the minority voter may only vote for the minority list – provided such list was set up – whereas in case of the latter, as any other voter, may cast a vote for the party-lists. A voter therefore is free to decide, by virtue of his registration, which national list he wishes to vote: whether supporting minority representatives or party representatives with his vote.

On the minority list, at least three candidates shall appear as a candidate – for whatever reasons – may get disqualified. A candidate may only be a person with full political franchise registered as a minority voter of the respective national minority. On the one hand, this precludes the candidate to appear simultaneously on minority and party lists, and on the other hand, it ensures that only candidates registered as minority voters shall appear on the list. As opposed to the possibility of joint party-lists, two or more national self-government of national minorities may not set up a joint minority-list, which means that minorities shall not have the right to form “election alliances”, and each national minority shall stand elections on its own.

One voter may accept a nomination for only one national list: it is prohibited to appear simultaneously on both minority and party list, or on more party lists, or on more minority lists. Everyone shall therefore decide which list the wish to appear on. It is possible, however, for the same person to be a constituency candidate and a candidate on a list. This opens the chance for the leading politicians or persons of preference of the parties – and in theory of the national self-government of national minorities – to have greater chance in obtaining a mandate.

Parties and national self-government of national minorities shall determine the candidates and arrange their order of placement on their list, which the voters may not influence. The lists compiled by the nominating organizations are bound and closed: disqualified candidates shall be substituted by the next candidate on the list. The national lists, for the purpose of registration and by the latest the thirty-sixth day preceding the voting, shall be reported.<sup>41</sup> After the report, the order of candidates may not be changed, and new candidates may not be listed. The nominating organization may retract the list or the nomination of candidates on the list by the last day of the deadline for the report; however, the nominating organization may not submit a new list in lieu of the retracted list.

The National Election Office shall register – by the fourth day the latest following the submission – every national list fulfilling the legal requirements. The list shall be dropped – and shall not be voted on – if retracted by the nominating organization, if all candidates get disqualified before the commencement of voting, and if the nominating organizations is deleted from the register by the election office.<sup>42</sup>

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40 Ve, section 86.

41 Ve, section 253 para (1).

42 According to the Ve, the dropped list shall be deleted from the registry and ballots.

### 4.3. Rules for obtaining mandates from national lists

General elections for the National Assembly is a system of one-round<sup>43</sup> and two-ballots (constituency candidate and national list), recognizes wasted votes, in which any voter having his domicile in Hungary may, generally, vote for constituency candidates and national lists. Voters are informed in written notices prior to elections on their appearance in the electoral district register and on their eligibility for voting in the upcoming elections. The notice also includes if the voter is registered in the electoral district register as a minority voter hence eligible for voting for the list of the national minority. Different ballots are available for the district constituencies, the national party-lists and – per national minorities – for the national minority lists.<sup>44</sup> Voters with Hungarian domicile and registered in the electoral register as minority voter – besides their constituency candidate – may vote for the list of their own national minority, but not for party list unless their minority failed to set up a list.<sup>45</sup>

Mandates obtainable from national lists are allocated in the course of a particular, rather complicated process, which may be divided into the following seven steps:

- (1) Firstly, during the mandate-allocation the eligible votes and parties are to be determined. For that, all valid votes cast for party-lists or minority-lists are added up, in other words the voters' so-called second ballots (the ones cast for national lists).
- (2) Secondly, the eligible parties are determined: which parties passed the electoral threshold of 5%, and which did not. The party-list not reaching the 5% threshold out of all the national list votes, may not obtain mandate. The 5% threshold thus means the 5% of all the valid votes cast for the party-lists and minority-lists.<sup>46</sup> For determining the results, the lists below the threshold may not be considered any longer since no mandate may be obtained from them.
- (3) After establishing the parties eligible for mandate – meaning those that did not fail the electoral threshold – comes the counting of votes cast for these parties. This is carried out as follows: to the party's list-votes the so-called fractional votes are added. Fractional votes are votes for candidates not obtaining a mandate in individual constituencies, and if the party's candidate won the mandate, then the number of votes cast for the winning candidate minus the number of votes plus one won by the runner-up (i.e. one vote is added to the number of votes won by the runner-up, then this figure is subtracted from the

43 This system favors the relatively strongest party, either resulting in over-representation or the non-representation of a significant political minority.

44 The ballot issued by the national minority self-government includes the name of the minority.

45 Upon ballot-casting, the minority voter receives the constituency ballot and the minority list ballot, if his national minority presented a list. Absent a minority list, the minority voter may cast a part-list ballot.

46 In case of joint party-lists, the threshold is 10% for joint lists of two parties, and 15% for three or more; failing to pass the threshold results in no mandate.

votes obtained by the winner, and the remaining votes are added as fractional votes).<sup>47</sup> Fractional votes for individual party-lists may be the fractional votes of the parties' individual constituency candidate.<sup>48</sup>

- (4) After establishing the number of votes for the party-lists of the parties, these are to be added up. The result is the "total party-list votes".
- (5) To that figure, all votes for the minority-lists are to be added; the result of which shall be the "total national list votes".
- (6) The total national list votes must first be divided by the number of mandates obtainable from the lists – i.e. 93 –, then the result is to be further divided by four. The quotient is the preferential quote, which is applied when allocating the preferential national minority mandates. If the number of votes for the minority list is higher than or equal to the preferential quote, then the minority list obtains a preferential mandate. Each minority list may obtain one preferential mandate, and only if the list reached the preferential quote. Minority lists not reaching the preferential quote may not obtain mandates.
- (7) Afterwards from the number of mandates obtainable from the national lists – i.e. 93 – the number of obtained preferential mandates shall be subtracted, but only if preferential mandates were obtained. The remaining mandates are to be allocated among the eligible party lists and those minority lists that obtained preferred mandates and they reach the 5% electoral threshold. In such a case the minority lists are treated equally with the party-lists. The remaining mandates are allocated by the application of the D'Hondt method.<sup>49</sup>

The mandates allocated among the national lists are obtained by the candidates on the respective lists in their order of placement. If one candidate on the national list obtained a mandate as a constituency candidate, then the candidate shall be disqualified from the national list. Disqualified candidates shall be substituted by the next candidate on the list. If fewer candidates are on the list than the number of allocated mandates, the unobtained mandates remain unfilled.

National minorities – as is guaranteed in the Fundamental Law – may participate in the work of the National Assembly even in the absence of obtaining a mandate from the minority list. In such a case, national minorities presenting a minority list but failing to obtain mandates therefrom shall be represented by a national minority advocate in the parliament. The advocate shall be the top candidate from the minority list. Not only the representatives elected from national lists, but also the national minority representatives shall be provided with mandate letters by the National Election Office.<sup>50</sup>

Should a national list mandate become vacant in between elections, no by-elections are held. Such vacant mandates shall be filled by a candidate originally

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47 This system distorts the proportionality by over-representing the winning party.

48 In terms of joint lists, fractional votes are the votes cast for constituency candidates nominated by the same parties.

49 In terms of mandate allocation, parties passing the 5% threshold shall have a column in the table.

50 See also Ve, section 299.

appearing on the national list and chosen by the party or the national self-government of national minority that presented the list;<sup>51</sup> if the nominating organization does not choose a candidate, the vacancy is filled by the candidate next on the original list. In case of no remaining candidates, the mandate shall remain unfilled. The same applies to the position of national advocates;<sup>52</sup> in case of no remaining candidate, the national minority shall have no advocate until the mandate of the National Assembly.<sup>53</sup>

## 5. National minority representatives and national minority advocates in the National Assembly

### 5.1. The national minority representative

National minority representatives elected by a preferential mandate are full members of the parliament as they possess an MP mandate, and according to the Fundamental Law members of the National Assembly shall have equal rights and obligations, and they shall perform their activities in the public interest, and they shall not be given instructions in that respect<sup>54</sup> – which means that it is irrelevant whether the MP obtained the mandate from a district or from a national list, or whether it was gained via preferential quota or not. However, only MPs obtaining mandates from national minority lists may be considered national minority representatives,<sup>55</sup> regardless of preferential quota.<sup>56</sup> This distinction is significant in the sense of political fragmentation of the parliament, as national minority representatives have a unique status: formally, they are not members of the ruling party nor the opposition,<sup>57</sup> thus not being a member of any parliamentary groups. To national minority representatives the rules on non-attached members shall apply – except for issues on the agenda concerning the interest and rights of national minorities. Deciding what issues may qualify as concerning the interest and rights of national minorities falls within the purview of the Parliamentary Commission,<sup>58</sup> one of the most significant decision-making body of the parliament.<sup>59</sup> Due to his special sta-

51 According to the Fundamental Law, Article 4 para (3), the mandate of a Member of the National Assembly shall terminate: a) upon the termination of the mandate of the National Assembly; b) upon his or her death; c) upon the declaration of incompatibility or a conflict of interest; d) upon his or her resignation; e) if the conditions required for his or her election no longer exist; f) if he or she has failed to participate in the National Assembly's work for one year.

52 Ogytv, section 29/A. para (2).

53 Vjt, section 20 para (3).

54 Fundamental Law, Article 4 para (1).

55 See also National Assembly Proclamation 10/2014. (II. 24.) (HHsz.) section 158 point 20.

56 See also HHsz. section 10 para (3).

57 See also HHsz, section 158 point 5.

58 See also the Reasoning to Ogytv, sections 11–13.

59 HHsz, section 158. point 19.

tus – as the national minority representative is not attached to any parliamentary groups – his “parliamentary appearance” (speech before the agenda, right to address questions or interpellations) is, both in terms of scope and method, limited. Generally, he may perform parliamentary appearance in relation to issues on the agenda that concern the interest and rights of national minorities, and may speak following the speeches of parliamentary groups, same as non-attached MPs. The exceptions are the issues concerning the interest and rights of national minorities; in their case, once all ruling and opposing group had at least on MP to speak, then the national minority representatives, then the non-attached MPs, and then the national minority advocates shall have the floor. If a bill before the parliament was proposed by the committee on minorities, then the opening speech is held by either the chairman of the committee or a national minority representative (or advocate) asked by said committee. Furthermore, the national minority representative may address an interpellation regarding national minority-related issues after all parliamentary group had one speaker to address an interpellation. At every sitting of the National Assembly where questions may be debated, it must be ensured that at least one question raised by national minority representatives or advocates is debated. MPs affiliated with a national minority, MPs obtaining mandate from national minority lists, and national minority advocates may address the National Assembly in their mother tongue or submit texts written therein.<sup>60</sup>

## 5.2. The national minority advocate

The national minority advocate is the guarantee and the manifestation of the provision set forth in the Fundamental Law that national minorities shall participate in the work of the National Assembly even if no national minority representative obtained mandate (not even preferential mandate). Consequently, the main role of the advocate is to represent the relevant minority in the parliament. The advocate’s status is similar, though not the same, as that of the national minority representative. Since in the elections an advocate did not receive the legitimation of the people as he failed to obtain even a preferential mandate, the advocate – as is suggested by the name – is not an MP, therefore has no vote in the plenary sessions of the National Assembly.<sup>61</sup> The advocate does not count into the plenum and thus has no bearing on the quorum of the plenary session. However, in issues concerning national minorities the advocate is entitled to numerous rights similar to those of the representative. The rights and obligations of the advocates – similar to the MPs’ – shall be equal, and they shall perform their activities in the public interest, and they shall not be given instructions in that respect.<sup>62</sup> The advocate has the right and obligation to actively participate in the work of the National Assembly, further the effective operation thereof, and are obliged to attend the sittings of the National Assembly and of the committee representing national minorities to which

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60 Ogytv, section 38/B para (2).

61 Ogytv, section 29 para (2).

62 Ogytv, section 29 para (1).

advocates are members. According to the law, the advocate has the right to address the National Assembly if the Parliamentary Commission deemed the issue on the agenda as relevant in terms of the interest and rights of national minorities. With the permission of the Speaker of the National Assembly – in accordance with the general rules of procedure and after the speeches of the parliamentary groups – the advocate may, before the agenda and in extraordinary issues even after the agenda – address the National Assembly, and may submit a proposal for a Parliamentary Decision in subject matters concerning the national minorities.<sup>63</sup>

The advocate sits on the committee representing national minorities with voting rights, therefore the advocate is a full member and may participate in the decision-making. However, at the sessions of the sitting committees and the legislative committee – upon the permission of the chairman of the respective committee or if the item on agenda concerns national minorities – may take part having only the right to consultation.<sup>64</sup> The advocate has no right to address interpellations but may request information. Therefore, the advocate may address a question to the Government or a member thereof, to the ombudsman, to the president of the State Audit Office and to the Prosecutor General regarding issues concerning the interest and rights of national minorities and falling within their purview of the addressee. The right to request information is limited compared to the rights of the representative in that the advocate may only exercise it in connection with issues concerning the interest and rights of national minorities, and may not use it regarding general information.

The advocate, similar to MPs, shall be entitled to immunity,<sup>65</sup> and the same rules apply to them as to MPs regarding reporting, incompatibility,<sup>66</sup> assets declaration, remuneration, and disciplinary sanctions.

## 6. Assessing the parliamentary representation of the national minorities

The current legislation's great merit is that it established the legal possibility for the parliamentary representation of the national minorities living in Hungary, and by virtue of the institutions of national minority representative and advocate the national minorities take part in the National Assembly with more weightage, and thus theoretically ensures the participation of national minorities in the public affairs, especially in decisions that concern the national minorities. The legislation on elections promotes the preferential approach, which does not violate the equality of voting rights since the favorable distinction is based on constitutional rea-

63 The advocate shall exercise these rights only after taking the oath and signing the pledge deed.

64 Ogytv, section 29 para (3).

65 See also Ogytv, section 29/A para (1).

66 The advocate has a further incompatibility rule: he may not be the chairman or member of the national minority self-government.

sons, namely providing the national minorities with parliamentary representation. The preferential mandate also guarantees that the members of the National Assembly are elected in one way and through the same process, i.e. through the direct voting of the people and thus with direct legitimation. The election of the national minority representative through preferential mandate, although based on a complicated formula, does not require special effort on the part of the national minority voters, only their registration as minority voters. In terms of nomination and ballot-casting, there are no significant differences between minority-lists and party-lists, therefore the election of the national minority representative may be considered a simple matter. In practice, however, this system does not appear to be exceptionally successful, given that in the two elections under the current rules only a single national minority representative was elected. In the elections of 6.4.2014 no preferential mandate was allocated, although every national minority self-government had managed to present a list and thus were eligible to delegate advocates to the National Assembly.<sup>67</sup> In the election of 8.4.2018, the German minority was the only ethnic group that managed to obtain an MP mandate through the preferential quota; the other 12 national minorities have been represented in the parliament by their advocates.<sup>68</sup> The reasons for the unsuccessful elections for national minorities may root in the differing number of people belonging to each minority, in their inclination as to registering as minority voters, and also in the fact that as Hungarian citizens they may give priority to their party-preferences matching their political values and interest as opposed to their representation as a minority, and thus vote for party-lists rather than for minority list.<sup>69</sup> This may be only logical given that the complex political issues and the different alternatives represented by the different parties may appear more important than the so-called national minority interests. Although national minorities – owing to their special status and situation – may naturally have some so-called common national minority interests, but this shall not mean that in every issue the parliament may decide upon all minorities would share the same interests. The different national minorities – as ethnic communities – are in different situations even vis-à-vis other national minorities, and such differences appear in the diverging interests and separate agenda; furthermore, the interests of individuals affiliated with national minorities are not necessarily homogenic, either. However, the question may then be asked what exactly the national minority representatives (and advocates) are representing: the interest of the nominating organization, or the minority voters? Because for the latter there is no mechanism for political will-making, which exists, for better or for worse, in the case political parties. Since MPs represent every individual in the political community, they have free mandate and equal rights. The equality of MPs is an important and indispensable guarantee of the modern parliamentary representation, but the equal status of the MPs is connected to the is-

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67 <https://static.valasztas.hu/dyn/pv14/szavossz/hu/dont.html>.

68 <https://www.valasztas.hu/orszagos-listak-credmenye>.

69 Probably that is the reason why so-called “ethnic” parties that might have been successful in obtaining mandates never formed in Hungary.

sues of effectiveness of the parliamentary structure and operation, which should be assessed from the perspective of participating in the parliamentary decision-making. In the National Assembly – as a unicameral body of democratic representation – the inner structure and operation are divided along the political party-lines in the form of parliamentary groups, which is crucial in a party-based political system. Since the role of the parliamentary groups in the parliamentary decision-making is determined by the political goals and endeavors of the groups – that may originate from firstly the policies of their parties and secondly from the dynamics between majority and opposition –, the national minority representatives “hang in the air”, as they are not attached to either parliamentary group and consequently may not take part in the decision-making within the group or the exercising of rights that the groups are entitled to. Their position is similar to those of the non-attached MPs, but still unique: their rights to address are practically limited to agenda items concerning the interest and rights of national minorities, and they are usually unable to meaningfully influence the parliamentary decision-making when voting. An exception may be when there is but a slim majority and even the few (or currently, the single) vote(s) of the national minority representatives may make a difference in voting with the majority or the opposition.<sup>70</sup> For that reason, the parliamentary representation of national minorities may be considered a formality: even if the minority representatives spoke up and reason against and oppose bills that are contrary to their interest, the parliament – owing to the majority principle – would be able to vote the national minority representatives down.

Compared to the current system, an alternative solution may be if the political parties operating in Hungary would embrace the national minority issues or put more emphasis on the representation of national minorities, meaning the inclusion of distinctive minority policies in their programs, and in their inner policy- and decision-making system they would provide room for the national minority interests. This may allow individuals affiliated with national minorities to select among the parties based on their political beliefs, considering the parties’ stances on minority issues as well. Parties may – during the setting-up of lists – nominate national minority candidates on top (and winning) places of their lists, who would in their person represent the minorities in parliament. However, such possibilities were open prior to the new legislation. Any party could have, either as a constituency candidate or on their list, put forth minority candidates (as it indeed happened numerous occasions) who in turn, upon obtaining mandate, could have represented his own or all national minorities, but – as a member of a parliamentary group – only with the limits of being bound to vote as the group, and thus the representation of national minorities occurred through filters of party-policies. Even national minorities deemed this system inappropriate. The other problem is that the parties upon nominating a minority candidate do indeed consider the number of minority voters and their willingness to participate in elections, which at the get

70 It is worth noting that promoting national minority interests is easier with the support of the ruling majority. In a slim majority, this may mean a role as “tip of the scale” that carries good political bargaining power.

go differentiates between the national minorities and consequently their parliamentary representation.

In summary, although the Fundamental Law and the current legislation provides the national minorities living in Hungary with parliamentary representation, or at the very least with the participation in the work of the National Assembly, this system – owing to the political decision-making – is rather a formality. However, this formal solution still fulfills the long-overdue demand of national minorities regarding their own parliamentary representation, as well as certain other expectations – especially with neighboring states on the basis of reciprocity. This system further provides the national minorities with the opportunity to express their opinions and suggestions on the highest political and decision-making levels and even participate in the decision-making concerning their interests and rights. However, in order to draw meaningful conclusions from, or assess the benefits and drawbacks of, this political and legal solution, longer time and the experiences thereof would be needed.

