

Citizenship Against Democracy? Consequences of Un-Muting Hungarians Beyond the Borders on the EU's Rule of Law Crisis

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Abstract: In the context of the EU's rule of law crisis, peripheral situations which barely fall within the scope of EU law despite their EU-sensitive impact cast a new light on the limits of EU action vis-à-vis Member State discretion. This discretion amounts to abuse in the case of the Hungarian electorate being shaped in a way to consolidate Fidesz's power through the un-muting of "Hungarians beyond the borders". According to Hungarian law, all Hungarians living in neighbouring states are entitled to preferential naturalisation without any requirement of residency in Hungary or proof of Hungarian descent, which entails the automatic granting of EU citizenship and its associated rights, creating circumstances comparable to those in the Maltese golden passport cases. Moreover, statistical analysis based on available data demonstrates that granting voting rights to "Hungarians beyond the borders" has influenced national election results in a favourable manner to Fidesz in the past decade and a half, leading to an even greater distortion of democratic representativeness. In addition, all travel, educational and cultural benefits that only "Hungarians beyond the borders" enjoy by law raise several discrimination concerns. Since this preferential regime is predominantly rooted in prerogatives reserved for Member States, the EU is left with very little room for action within the relevant fields of citizenship, democracy, fundamental rights or economic freedoms.

*“Forty people out of a hundred in orange from head to toe,
So two thirds of a hundred people in orange from head to toe.”¹*

Introduction

Hungary has been an enthusiastic contributor to the EU’s rule of law crisis. Its restructured constitutional order and various policies that weaken democracy and fundamental rights have been rattling core principles of the EU legal order such as mutual trust, mutual recognition, or effective judicial protection. The EU has been trying to address some of those situations through rule of law mechanisms with rather little success². However, there are also peripheral situations which, although equally disruptive to the EU’s political and legal development, do not or only with difficulty allow for an EU-level response. At this point, one might find it interesting to examine the EU’s options for action in the face of Member State discretion within the framework of such a case where this discretion is predominant.

In that regard, the topic of Hungarians living beyond the borders does not at first sight seem to be linked to the EU’s rule of law crisis at all. However, scattered legal instruments connected in the appropriate way reveal the skeletons carefully hidden in the closet. This reversed perspective helps unveil a preferential system disguised as rights’ protection or positive action before investigating the EU’s powers to mute such abusive use of prerogatives reserved for the MS and drawing lessons from this *status quo*.

1. The case of Hungarians beyond the borders: three pillars of electoral autocracy

The longevity of Fidesz’s power is largely attributable to the sophisticated legal instruments implemented in various areas and legitimised within the framework of electoral autocracy. In that regard, a country’s regime is classified as an electoral autocracy when *de facto* multiparty elections are held for the chief executive, but democratic standards are fallen short on due to significant irregularities, limitations on party competition or other violations of institutional requisites for democracies³. Instead of diving into such evolution’s qualitative aspects⁴, the following lines focus on the system in action, dedicated to demonstrating that preferential naturalisation (1.1), voting rights (1.2), and other benefits (1.3) granted to Hungarians beyond the borders unequivocally contribute to maintaining Fidesz in power.

¹ Krúbi, “Orbán, verd ki a Ferinek”, *Nehézlábérzés*, Universal Music Hungary, 2018 (informal translation). Hungarian singer known for his naturalistic and political lyrics.

² A. Kovacs, “Rule of Law Mechanisms: Remote Risk Prevention in a Disorganised Crisis Management”, *European Journal of Risk Regulation* (2024), pp. 1-14, DOI: <https://doi.org/10.1017/err.2024.69>.

³ A. Lührmann, M. Tannenberg and S. I. Lindberg, “Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes”, *Politics and Governance* (2018), p. 60-77, at p. 61.

⁴ On the achievements of Fidesz’s parliamentary supermajority leading to continuous backsliding of democracy, see Freedom House, Country Report on Hungary from 2019 and onwards, available at <https://freedomhouse.org/country/hungary/freedom-world/2019>, V-Dem (ed. S. I. Lindberg), “Democracy Report 2024. Democracy Winning and Losing at the Ballot”, p. 24-25 (Figure 14), available at <https://v-dem.net/publications/democracy-reports/>, and European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0324, which takes over the qualification of Hungary as a “hybrid regime of electoral autocracy”.

1.1. Preferential naturalisation for a new category of supporters

The first pillar of the system equals the establishment of a constitutional status for Hungarians beyond the borders based on Fundamental Law provisions and cardinal acts⁵. Their being mentioned⁶ in the FL even before “plain” Hungarian citizens⁷ as well as other categories of persons such as foreign nationals who are EU citizens⁸, refugees⁹, permanent residents¹⁰, and national minorities¹¹ is symbolic from the outset.

Table 1. Categories of persons under Hungarian constitutional law

Status	Citizenship	Ethnicity	Residence
Hungarian living in Hungary (<i>Magyarországon élő magyar</i>)	Hungarian	Hungarian	Hungary
National minority (<i>nemzetiség</i>)	Hungarian	Foreign	Hungary
Hungarian living beyond the borders (<i>határon túli magyar</i>)	Hungarian	Hungarian	Neighbouring EU country
	Hungarian	Hungarian	Neighbouring non-EU country
	EU	Hungarian	Neighbouring EU country
	Non-EU	Hungarian	Neighbouring non-EU country
Hungarian living abroad (<i>külföldön élő magyar</i>)	Hungarian	Hungarian	Non-neighbouring EU country
	Hungarian	Hungarian	Non-neighbouring non-EU country
Dual (multiple) citizen (<i>kettős (többes) állampolgár</i>)	Hungarian + EU	Hungarian + other	Any country
	Hungarian + Non-EU	Hungarian + other	Any country
EU citizen (<i>EU-s állampolgár</i>)	EU	Foreign	From non-neighbouring EU country to Hungary
Foreign national (<i>harmadik országbeli állampolgár</i>)	Non-EU	Foreign	From non-neighbouring non-EU country to Hungary
Refugee (<i>menekült</i>)	Non-EU	Foreign	From non-neighbouring non-EU country to Hungary
Stateless (<i>hontalan</i>)	None	Foreign	From any country to Hungary

Those persons who live in so-called “neighbouring states”¹² and identify as Hungarians enjoy special advantages under Act LXII/2001 on Hungarians living in neighbouring states, protection under Act XLV/2010 on National Unity, as well as facilitated access to Hungarian citizenship under Act LV/1993 on Hungarian citizenship. This means that HBB whose ancestors

⁵ Cardinal acts complete the Fundamental Law’s scope or regulate specific constitutional domains. To do so, only the votes of *two thirds* of NA Members *present* are required for adopting or amending cardinal acts (Art. T(4) FL), whereas the votes of two thirds of *all* NA Members are required in the case of the FL itself (Art. S(2) FL).

⁶ Art. D.

⁷ Art. G (citizenship), XIV(2) (right to not be expelled from the country and to return from abroad at any time), XXIII(1) (right to vote), XXVII(1) (right to move freely within the country), and XXVII(2) (right to consul protection).

⁸ Art. XIV(1) (right to settle in Hungary), XXIII(2) (right to vote), and XXVII(1) (right to move freely within the country).

⁹ Art. XIV(4) (right to asylum) and XXIII(3) (right to vote).

¹⁰ Art. XIV(2) (right to be expelled only under a lawful decision), XXIII(3) (right to vote), and XXVII(1) (right to move freely within the country).

¹¹ Art. XXIX and 2.

¹² Croatia, Romania, Slovakia and Slovenia within the EU, as well as Serbia and Ukraine outside the EU. Though a bordering country, Austria is not covered by the term “neighbouring country” as it did not benefit from the annexation of territories from Hungary at the time of the 1920 Treaty of Trianon. This historic event is an important cornerstone of Fidesz’s nationalist ideology and called upon to justify a great number of political and legal acts.

were Hungarian citizens, or whose ancestors were *most likely* – not *certainly* – of Hungarian origin, and who can prove their Hungarian language skills, are eligible for preferential naturalisation *without ever having lived in Hungary*¹³. This is an effective way for Fidesz to gain supporters within Hungarian communities in neighbouring countries.

It is important to note here that, while shared ethnicity constitutes the formal justification for this preferential regime, the rationale behind this purely political decision extends to a much broader concern, discussed in the following section. The ingenuity of this construction lies in the fact that granting rights to people, be it on ethnic grounds, results in a much less contestable dynamic than taking rights away from them. An example based on the difference between HBB and national minorities may prove illustrative here. If voting rights of both categories are derived from Hungarian citizenship, national minorities¹⁴ participate in Hungary's political life because they "have been" Hungarian citizens of non-Hungarian ethnicity, whereas HBB are neighbouring states' citizens of Hungarian ethnicity who, on that sole basis, "have become" Hungarian citizens entitled to express their views. In that context, depriving Hungarian citizens of their right to vote on ethnic grounds is a severe case of discrimination, whereas granting non-Hungarian citizens the right to vote on ethnic grounds is a matter of sovereignty for the Hungarian state. This is the key to the whole system.

On a more global note, HBB do have it much better when compared to the remaining categories of persons. On the one hand, the legal framework for persons outside the EU who are not from neighbouring states, established in accordance with Article XIV(1) and (5), is a much less welcoming one considering either the right of residence of foreign nationals under Act XC/2023 or the right to asylum of refugees and stateless persons under Act LXXX/2007¹⁵. On the other hand, despite their persisting link to Hungary by citizenship, the FL does not even mention¹⁶ or consider the category of Hungarians living abroad, i.e. outside neighbouring states, as part of "national unity" the same way as ethnic Hungarians from neighbouring states who may not even be Hungarian citizens. Muting and un-muting activities of this sort anticipate Fidesz's priorities in regulating which persons' views may be expressed¹⁷ and taken into consideration in the process of shaping the country by lawmaking.

1.2. Muted dissent and amplified consent within the electoral system

The second pillar for maintaining Hungary's electoral autocracy lies in electoral law itself. Based on Article XXIII FL, electoral law consists of Act CXIII/2003 on the election of Members of the European Parliament, Act L/2010 on the election of local government

¹³ Act LV/1993, Art. 4.

¹⁴ Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Rusyn, Serbian, Slovak, Slovenian, Ukrainian are recognised as ethnic groups that have been residing in Hungary for at least a century still using their own language, culture and traditions, see Annex I of Act CLXXIX/2011 on the rights of national minorities.

¹⁵ See C-808/18, *European Commission v. Hungary*, EU:C:2020:1029, C-821/19, *European Commission v. Hungary*, EU:C:2021:930, and C-823/21, *European Commission v. Hungary*, EU:C:2023:504, as well as ECtHR Cases *Ilias and Ahmed v. Hungary* (Grand Chamber), 21 November 2019, paras 151-165, *H.M. and others v. Hungary*, 2 June 2022, paras 27-28, *Shahzad v. Hungary*, 5 October 2023, paras 71-80, and *S.S. and others v. Hungary*, 12 October 2023, paras 60-70.

¹⁶ Even though Art. XIV(2) (right to return from abroad at any time), XXVII(2) (right to consul protection), and XXIII(1) (right to take part in *some* elections) do apply to them.

¹⁷ For the sake of exhaustivity, national and local referendums can be assimilated to parliamentary elections regarding voting rights, except for persons with refugee status who have the right to participate in local referendums (see Art. 8 FL, Act LXXX/2007 on the right to asylum and Act CCXXXVIII/2013 on referendum initiative, European citizens' initiative and referendum procedure).

representatives and mayors, Act CCIII/2011 on the election of members of the National Assembly, and Act XXXVI/2013 on electoral procedure. These provisions reveal that non-Hungarians have the right to vote at local elections on account of residence in Hungary¹⁸; all EU citizens have the right to vote at EU elections on account of EU citizenship¹⁹; and all Hungarians have the right to vote at parliamentary elections on account of Hungarian citizenship²⁰ as well as at local government elections upon residential address in Hungary and physical presence in Hungary on election day²¹.

Table 2. Right to vote of persons at elections

Person	Right to vote upon citizenship		Right to vote upon residence
	EU election	Parliamentary election	Local election
Hungarian living in Hungary	Yes	Yes, complete	Yes
National minority	Yes	Yes, complete with special rights	Yes
Hungarian living beyond the borders	Upon EU/Hungarian citizenship	Upon Hungarian citizenship, incomplete	No
Hungarian living abroad	Yes	Yes, complete or incomplete	Upon permanent address in Hungary + physical presence on election day
Dual (multiple) citizen	Yes	Yes, complete or incomplete	Upon permanent address in Hungary + physical presence on election day
EU citizen	Yes	No	Yes
Foreign national	No	No	Yes
Refugee	No	No	Yes
Stateless	No	No	Yes

NA Members are re-elected every four years²² in a single round²³. Suffrage is universal, equal, direct, secret²⁴, and voting is not mandatory²⁵. As shown by **Figure 1**, it is a mixed system in which a slightly greater emphasis is placed on the majoritarian component than on the proportional component²⁶: among the 199 members, 106 are elected in single member districts (SMD) or individual constituencies where the candidate with the most votes wins²⁷, while 93 are elected from party lists (PL) or minority lists (ML) in the national constituency. Once SMD mandates are allocated, votes for lists that reach the threshold are distributed as shown by **Figure 2**, i.e. after transfer of surplus votes (SV) for the winning candidate and fractional votes

¹⁸ Art. XXIII(3) and (5) FL; Act LXXX/2007, Art. 10(2)(a); see also Art. 20(2)(b) and 22(1) TFEU, Art. 40 of the Charter of Fundamental Rights of the European Union (hereinafter “CFR”).

¹⁹ Art. XXIII(1) and (2) FL; Act CXXIII/2003, Art. 2/A(1) and (1a) ; see also Art. 20(2)(b) and 22(2) TFEU, Art. 39(1) CFR.

²⁰ Art. XXIII(1) and (4) FL; Act CCIII/2011, Art. 12.

²¹ Art. XXIII(1), (4) and (5) FL; Act L/2010, Art. 1(2) and 2.

²² Art. 2(3) FL.

²³ Act CCIII/2011, Art. 11.

²⁴ Art. 2(1) FL. See also Art. 35(1) FL for local government elections.

²⁵ Act CCIII/2011, Art. 2.

²⁶ This is equivalent to 53,3% majoritarian against 46,7% proportionate. Before the 2011 reform, it was the other way around: among 386 NA Members (reduced by nearly half since then), 176 came from SMD and 210 from PL, amounting to 45,6% majoritarian against 54,5% proportionate; ML did not exist at the time. See Act XXIV/1989, Art. 4 (no longer in force).

²⁷ Act CCIII/2011, Art. 13.

(FV) for losing candidates in SMD to PL or to ML²⁸, with respect to minorities' preferential quota²⁹.

Figure 1. Parliamentary election: electorate and National Assembly mandates

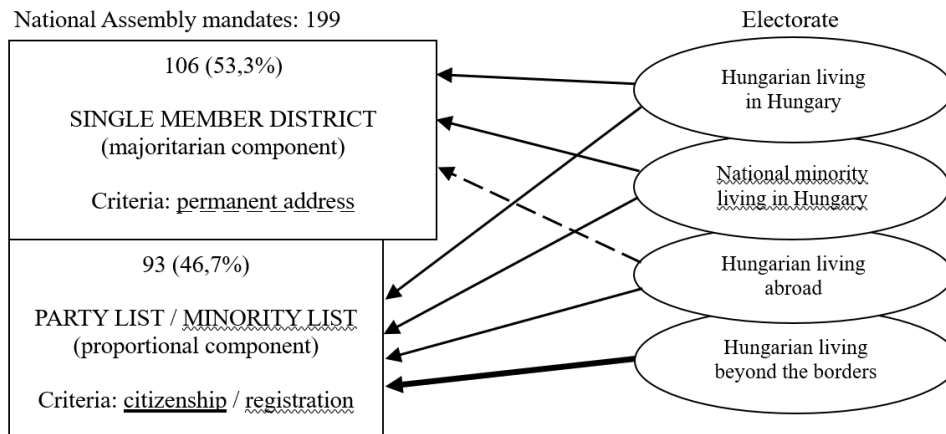
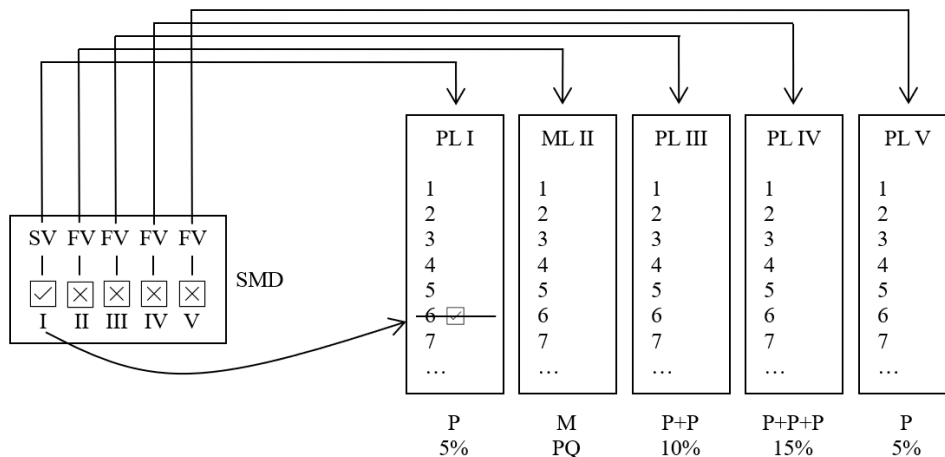


Figure 2. Parliamentary election: surplus votes and fractional votes transferred to lists



The electorate for parliamentary election is composed of citizens living in Hungary, citizens belonging to a national minority, citizens living abroad, and HBB granted citizenship by preferential naturalisation. However, differentiated exercise of the right to vote affects the value thereof, leading to differential treatment between those electors (1.2.1). In that regard, discrimination taking the forms of un-muting ethnic Hungarians and muting those who leave the country directly helps Fidesz win parliamentary elections (1.2.2). Consequently, popular representation also becomes distorted (1.2.3).

²⁸ SV are votes of the winning candidate minus votes of the candidate who obtained the second highest number of votes plus one. FV are votes cast for candidates who did not win a mandate. Both are transferred from the (winning or losing) candidate in the SMD to the candidate's PL or ML. Even though Act CCIII/2011, Art. 15, refers to both as *töredékszavazat*, a terminological distinction in English might prove to be useful, even more so because the definitions used in Art. 15(1)(b) and (a) match those used above.

²⁹ According to Art. 16(c), (d), (e), all PL votes and ML votes are added together into a *total national list votes*; the total national list votes is divided by 93 and the result further divided by 4, the whole of the quotient so obtained is the *preferential quota*. Then, if the number of votes allocated to a ML is greater than or equal to the preferential quota, that ML shall be allocated one and *only one* preferential mandate. Afterwards, the number of seats to obtain via list votes shall be reduced by the number of preferential mandates allocated.

1.2.1. Differential treatment based on physical presence in the country, ethnic background, and country of residence

In the first case, only voters who have a permanent address in Hungary and are physically present in Hungary on election day may vote at local government elections. This means that Hungarian voters who have retained a permanent address in Hungary but are not physically present in Hungary on election day (part of Hungarian citizens living abroad), along with Hungarian voters who do not have a permanent address in Hungary (HBB and part of Hungarian citizens living abroad), may not vote at local representatives' elections. While the fact that permanent address in Hungary does not guarantee the right to vote to Hungarians living abroad might seem odd at first sight, it ensures that only persons who are *de facto* resident in Hungary should have a say in local affairs directly affecting their everyday life³⁰. Thus, such differential treatment enjoys an acceptable justification.

In the second case, distinction between Hungarian voters living in Hungary lies in the possibility for Hungarian citizens belonging to a national minority to register as minority voters³¹ in order to vote for the ML set up by the assembly of their national minority self-government instead of PL³². Indeed, “paying of an old debt”³³ in the form of participation of national minorities living in Hungary in the NA's work fits more or less the nationalist ideology of the party that has been in government for fifteen years. However, the execution of the idea may not be as factually beneficial as symbolically promising³⁴. On the one hand, data show that only one minority out of thirteen has ever won a seat in the NA³⁵. On the other hand, the combined effect of a preferential quota system, an absence of choice for national minority voters, and violation of the secrecy of vote, has been considered discriminatory by the European Court of Human Rights³⁶ – as opposed to the Hungarian Constitutional Court which did not declare this clear differentiation on the grounds of ethnicity contrary to the FL³⁷.

In the third case, a distinction is made between Hungarian citizens living abroad depending on whether they have retained a permanent address in Hungary. If so, Hungarians living abroad may vote at foreign representations, not by post, for PL and for SMD candidates corresponding

³⁰ This aligns with ECtHR case law on national elections: “Restrictions on expatriate voting rights based on the criterion of residence might be justified by several factors: (i) the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less knowledge of them; (ii) the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; (iii) the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; (iv) the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which primarily affect persons living in the country” (see e.g. *Vámos and others v. Hungary* (dec.), 17 February 2015, para 13).

³¹ Act XXXVI/2013, Art. 86.

³² Act CCIII/2011, Art. 9 and 12.

³³ T. Sárközy, *Illiberális kormányzás a liberális Európai Unióban. Politikailag igen sikeres túlhajtott plebejus kormányzás. A harmadik Orbán-kormány 2014-2018* (Park 2019), p. 103.

³⁴ On Fidesz's minority policy in general, see A. L. Pap, *Democratic Decline in Hungary. Law and Society in an Illiberal Democracy* (Routledge 2019), p. 95-119.

³⁵ The German minority won a seat in 2018 and 2022, but not in 2014, when ML voting was introduced, and no minority won a single seat. The National Election Office's statistics are available at <https://www.valasztas.hu/>.

³⁶ ECtHR Case *Bakirdzi and E.C. v. Hungary*, 10 November 2022, paras 51-74.

³⁷ According to the HCC, “the application for registration ensures that the national minorities living in Hungary can exercise their right under Article XXIX (2) of the Fundamental Law and can establish national minority representation in the National Assembly in the manner provided for by the Constitution”, see Decision 1/2013 (I. 7.) AB establishing the unconstitutionality of certain provisions of the Electoral Procedure Act adopted by Parliament on 26 November 2012, III/7 *in fine* (request by the President of the Republic prior to promulgation).

to that address³⁸. If not, they may only vote for PL but may do so by post³⁹, similarly to HBB who have acquired Hungarian citizenship. In this context, traveling to a foreign representation – potentially several hundred kilometres away and without the costs being reimbursed – may make it impossible or at least substantially difficult for some Hungarian citizens living abroad to exercise their right to vote at parliamentary elections. Nonetheless, both the HCC⁴⁰ and the ECtHR⁴¹ have ruled that this differential treatment is justified. Despite its obvious influence on election results, making the exercise of the right to vote materially easier for those who no longer have or have never had a permanent address in Hungary does not seem to have struck a chord.

1.2.2. Effects of discrimination favouring ethnic Hungarians against dissidents

Statistics on the number of naturalisations, coupled with parliamentary election results from 2014, 2018 and 2022, may shed light on the practical impact of the cases of differential treatment put forward in the previous paragraphs. Official statistics cover the period from 2011 to 2015⁴², after which only cumulative numbers can be gathered from ministerial statements. This lack of data⁴³, besides being unacceptable in terms of transparency, might be a

³⁸ As such, they may only request to be enrolled in the foreign representation electoral register (*külképviselési névjegyzék*), see Act CCIII/2011, Art. 12(1), and Act XXXVI/2013, Art. 259(1) and 271(1).

³⁹ As such, they may only request to be enrolled in the register of postal voters (*levélben szavazók névjegyzéke*), see Act CCIII/2011, Art. 12(3), and Act XXXVI/2013, Art. 266(2) and 274.

⁴⁰ HCC, Decision 3086/2016 (IV. 26.) AB rejecting the constitutional complaint, paras 53-55: “voting by post for voters who are abroad on election day but who do not have a permanent address is ostensibly a procedural (technical) rule that is preferential (facilitating the exercise of the fundamental right), but [...] it is accompanied by a restriction (lack of completeness) of the substance of the fundamental right”, whereas “voters having a permanent address [...] may cast their vote at a foreign representation or travel home and vote in Hungary, at their option[; their] right to vote [...] is complete and is therefore not affected or restricted by the difference in the contested procedural rule”.

⁴¹ ECtHR Case *Vámos and others v. Hungary*, paras 20-21: “the voting arrangements reflecting the distinction between the different situations of voters outside Hungary cannot be regarded as overstepping the State’s margin of appreciation in this field. It is not for the Court to pass judgment on the efficiency of the organisation of a voting system. In these circumstances, the Court is satisfied that the impugned measure has an objective and reasonable justification for the purposes of Article 14”.

⁴² Központi Statisztikai Hivatal, *Új magyar állampolgárok. Változások az egyszerűsített honosítási eljárás bevezetése után* (2017), available at https://www.ksh.hu/apps/shop.kiadvany?p_kiadvany_id=955944&p_temakor_kod=KSH&p_lang=hu; A. Örkény and M. Székelyi, “Honosítás és aktív állampolgárság a harmadik országbeli bevándorlók körében” in K. András (ed), *Bevándorlás és integráció. Magyarországi adatok, európai indikátorok* (MTA Társadalomtudományi Kutatóközpont, Kisebbségkutató Intézet, 2013), p. 172-199, available at https://real.mtak.hu/10022/1/12_nyilv.pdf.

⁴³ Figures for the period after 2015 come from press articles referring to ad hoc ministerial statements mentioning these figures, see X., “Orbán bemutatta az egymilliomodik külföldi magyart”, *HVG* (2017), available at https://hvg.hu/itthon/20171216_Orban_bemutatta_az_egymilliomodikat, M. Gál, “Az Orbán-kormány azt is titkolja, hány új állampolgárral bővült a magyar nemzet, de a voksokért bármit megtesz”, *Népszava* (2022), available at https://nepszava.hu/3146590_kulhoni-szavazas-voks-valasztas-2022, X., “Elárulta a kormány, hányan kaptak magyar állampolgárságot 2011 óta”, *HVG* (2024), available at https://hvg.hu/itthon/20240321_kormany-semjen-zsolt-magyar-allampolgarsag-egyszerusített-honositas-visszaeles, and Zs. Semjén, Minister for National Politics, Church Politics and Church Diplomacy, written answer to MP Á. Vadai (DK) to question K/7670 “How many new citizens has Hungary acquired through the simplified naturalisation procedure?”, PSÁT-PF/89/3 (2024), available at <https://www.parlament.hu/irom42/07670/07670-0001.pdf>.

consequence of the effects of citizenship business conducted by Russian and Ukrainian criminal organisations⁴⁴ of which the Hungarian state was aware⁴⁵.

Table 3. Available statistics on naturalisations

\	Naturalisations				Total naturalisations		Total preferential naturalisations	
Year	Of persons living in Hungary	From Romania, Serbia, Slovakia, Ukraine	Of persons living outside Hungary	In Romania, Serbia, Slovakia, Ukraine	Year	Cumulative	Year	Cumulative
2011	20.600	19.900 (97%)	78.700	73.000 (93%)	99.300	99.300	92.900 (94%)	92.900 (94%)
2012	18.400	17.800 (97%)	163.600	154.700 (95%)	182.000	281.300	172.500 (95%)	265.400 (94%)
2013	9.200	8.700 (95%)	168.600	159.200 (94%)	177.800	459.100	167.900 (94%)	433.300 (94%)
2014	8.700	7.800 (90%)	155.900	143.900 (92%)	164.600	623.700	151.700 (92%)	585.000 (94%)
2015	4.000	3.400 (85%)	80.200	70.600 (88%)	84.200	707.900	74.000 (88%)	659.000 (93%)
2017	?	?	?	?	?	1.000.000	?	?
2022						1.100.000		940.000 (85%)
2024						1.175.934		?

At this point, data on citizenship becomes even more eloquent if cross-examined with data on parliamentary election results⁴⁶, on the number of *voters* (persons who exercise their right to vote) and *electors* (persons who are entitled to vote), on PL voting results, and on the final distribution of mandates.

⁴⁴ See the series of investigative journal articles exposing “corrupt officials, lawyers assisting fraud, doppelgangers” involved in the citizenship business, with the help of whom “at least eighty percent of applicants with forged ancestors have been granted Hungarian citizenship”, as well as groups on social media sites and legal companies and law firms openly offering this service in B. Szalai, “Ukrán maffia osztja tízezerrel a magyar állampolgárságot”, *Index.hu* (2014), available at https://index.hu/gazdasag/2014/09/16/magyar_nyelven_szavaltak_szep_magyar_szoveget/.

⁴⁵ J. Lázár, Minister of the Prime Minister’s Office [at the time], written answer to MP A. Mesterházy (MSZP) to questions K/14126 “How do you intend to eliminate the possibilities of abuse?”, K/14127 “Is the Information Office aware of the possibility that Hungarian citizenship has been sold for money in other countries?”, and K/14129 “Has the Information Office investigated the new chapter of the citizenship scandal?”, PARLF-MIN/66/3 (2017), available at <https://www.parlament.hu/irom40/14127/14127-0001.pdf>.

⁴⁶ Data related to elections are available at <https://static.valasztas.hu/dyn/pv14/szavossz/hu/credind.html>, <https://www.valasztas.hu/ogy2018> and <https://www.valasztas.hu/ogy2022>.

Table 4. Cross-sectional data: citizenship acquisitions and parliamentary election results since 2011

Parliamentary election year	2014	2018	2022
TOTAL ELECTORS (citizens)	8.241.562	8.312.173	8.215.304
Minimum number of emigrants	550.000	650.000	714.420
Minimum number of emigrants since 2011 (Hungarian living abroad with or without permanent address in Hungary)	46.957	167.576	254.336
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300	Min. 659.000	940.000
TOTAL VOTERS (voted)	5.096.310	5.796.268	5.717.182
Foreign representation electoral register (Hungarian living abroad with permanent address in Hungary)	No data	58.310	65.480
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793	378.449	456.129
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820	5.694.751	5.624.225
For Fidesz party list by all electors	2.264.780	2.824.551	3.060.706
Votes for party lists by voters at foreign representations	No data	No data	No data
Votes for party lists by postal voters	128.429	225.025	267.834
For Fidesz party list by postal voters	122.638	216.561	251.468
Surplus votes and fractional votes	3.327.395	3.515.209	3.216.469
SV and FV transferred from SMD Fidesz candidates to Fidesz party list	940.881	1.218.518	1.330.256
TOTAL VOTES FOR PARTY LISTS after vote transfer	8.172.871	8.827.857	8.556.993
For Fidesz party list	3.205.661	4.043.069	4.390.962
NATIONAL ASSEMBLY MANDATES	199	199	199
For Fidesz	133	133	135
Single member district mandates	106	106	106
For Fidesz	96	91	87
Party list mandates	93	92	92
For Fidesz after vote transfer	37	42	48
Minority list mandates	0	1	1

On the one hand, positive discrimination reveals effective, as ethnic Hungarians do seem to favour Fidesz. By 2022, 85% of all naturalisations concern HBB, which means a total of 940.000 persons, and 48,52% of HBB, representing 456.129 persons, are registered postal voters who vote for PL only. Of the 5.624.225 valid PL votes received from all electors, only 54,42% are cast for Fidesz, while almost 94% of the 267.468 votes received by post are pro-Fidesz. Trends are similar in 2014 and 2018. Moreover, chronologically, the greater the number of postal voters (which includes both categories of Hungarian voters without a permanent address in Hungary), the more seats Fidesz wins by PL votes, either retaining 133 mandates in 2018 or even adding two more in 2022. This confirms a link between the granting of Hungarian citizenship and the NA's final composition. As such, inviting HBB to participate in parliamentary elections seems to be more than an appeal to historical sentiments: a strategic decision to protect the party's two-thirds majority. This finding is not undermined even if we know that multiple categories of voters are mixed up in the register of postal voters, since the proactivity of HBB is evidently bound to outweigh the disconnection of emigrants who have renounced their Hungarian address.

Table 5. Cross-sectional data: positive discrimination of ethnic Hungarians

Parliamentary election year	2014	2018	2022
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300 (100%)	Min. 659.000 (100%)	940.000 (100%)
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793 (44,73%)	378.449 (57,43%)	456.129 (48,52%)
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820 (100%)	5.694.751 (100%)	5.624.225 (100%)
For Fidesz party list by all electors	2.264.780 (45,05%)	2.824.551 (49,27%)	3.060.706 (54,42%)
Votes for party lists by postal voters	128.429 (100%)	225.025 (100%)	267.834 (100%)
For Fidesz party list by postal voters	122.638 (95,49%)	216.561 (96,24%)	251.468 (93,89%)
NATIONAL ASSEMBLY MANDATES	199 (100%)	199 (100%)	199 (100%)
For Fidesz	133 (66,83%)	133 (66,83%)	135 (67,84%)

On the other hand, negative discrimination against Hungarians who have moved abroad, most likely for reasons related to dissatisfaction, does not disappoint either. The number of emigrating Hungarian citizens⁴⁷ between 2010 and 2022 amounts to 714.420. The materially impeded exercise of the right to vote seems indeed to discourage electors to the point that only 65.480 emigrants who have decided to stay connected to their home country's political life by retaining a permanent address in Hungary registered to vote at foreign representations in 2022. This means that 90,83% of voices presumed unfavourable to Fidesz remain silent during parliamentary elections. As for the audible 9,17%, a symbolic addition to the picture is the absence of a separate record and explicit data of where votes of emigrant Hungarians are cast. Similarly, lack of proper statistics makes it impossible to trace the votes of those who renounce their permanent address in Hungary; in any case, it would not make a difference, since HBB have sufficient influence on PL votes by postal voters. In other words, moving abroad is tantamount, if not to losing the right to vote, then to giving it up in practice. This serves as an illustration to turning the volume up to hear one category of voters and turning it down to avoid listening to another category longer than democratic politeness requires so.

⁴⁷ In the absence of reliable official statistics on emigration, data are based on statistics available at <https://ourworldindata.org/migration> and https://www.ksh.hu/stadat_files/nep/hu/nep0030.html. Emigrating Hungarian citizens (*kivándorló magyar állampolgár*) are “persons who leave Hungary with the intention of settling abroad, without planning to return (permanently) or planning to return but leaving Hungary on a long-term (temporary) basis and declare this” (see KSH Népszégtudományi Kutatóintézet, <https://demografia.hu/hu/tudastar/fogalomtar/9-kivandorlas>). Minimum number of emigrants since 2011 and minimum number of preferentially naturalised Hungarians beyond the borders since 2011 are cumulative up to the year before election year.

Table 6. Cross-sectional data: negative discrimination of Hungarians living abroad

Parliamentary election year	2014	2018	2022
Minimum number of emigrants	550.000	650.000 (100%)	714.420 (100%)
Minimum number of emigrants since 2011 (Hungarian living abroad with or without permanent address in Hungary)	46.957	167.576	254.336
Minimum number of preferentially naturalised Hungarians beyond the borders since 2011	433.300	Min. 659.000	940.000
Foreign representation electoral register (Hungarian living abroad with permanent address in Hungary)	No data	58.310 (8,97%)	65.480 (9,17%)
Register of postal voters (Hungarian living abroad without permanent address in Hungary + Hungarian living beyond the borders)	193.793	378.449	456.129
Votes for party lists by voters at foreign representations	No data	No data	No data
Votes for party lists by postal voters	128.429 (100%)	225.025 (100%)	267.834 (100%)
For Fidesz party list by postal voters	122.638 (95,49%)	216.561 (96,24%)	251.468 (93,89%)

1.2.3. Low representativity of the will of the people

In addition to the fact that not all voices are heard equally, the electoral system's configuration raises a representativity concern. The issue is rooted in a particular step of allocation of mandates which results in an advantage for larger, already popular parties. As mentioned above, SV and FV cast for SMD candidates are not lost but transferred to the PL and distributed among list candidates to gain additional seats for the party. In the case of the three consecutive parliamentary elections, the transfer of SV and FV from Fidesz's SMD candidates to Fidesz's PL adds 940.881 to 2.264.780 in 2014, 1.218.518 to 2.824.551 in 2018, and 1.330.256 to 3.060.706 in 2022, each time almost half as many votes and one third of the total votes for Fidesz's PL. This is relevant during the allocation of list mandates which happens according to the D'Hondt method: the more votes a party has, the more likely it is to win the next seat. Indeed, even though Fidesz loses first five and then four seats in SMD, it manages to keep 133 seats in 2018 and adds two more in 2022 thanks to list votes (*inter alia* by ethnic Hungarians). The so-called proportional component is not that obviously proportional after all.

Table 7. Cross-sectional data: distorted proportional component

Parliamentary election year	2014	2018	2022
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820	5.694.751	5.624.225
For Fidesz party list by all electors	2.264.780 (70,65%)	2.824.551 (69,86%)	3.060.706 (69,7%)
Surplus votes and fractional votes	3.327.395	3.515.209	3.216.469
SV and FV transferred from SMD Fidesz candidates to Fidesz party list	940.881 (29,35%)	1.218.518 (30,14%)	1.330.256 (30,30%)
TOTAL VOTES FOR PARTY LISTS after vote transfer	8.172.871	8.827.857	8.556.993
For Fidesz party list	3.205.661 (100%)	4.043.069 (100%)	4.390.962 (100%)
NATIONAL ASSEMBLY MANDATES	199 (100%)	199 (100%)	199 (100%)
For Fidesz	133 (66,83%)	133 (66,83%)	135 (67,84%)
Single member district mandates	106	106	106
For Fidesz	96	91 (-5)	87 (-4)
Party list mandates	93	92	92
For Fidesz after vote transfer	37	42 (+5)	48 (+6)
Minority list mandates	0	1	1

As a whole, Hungary's electoral system cannot be characterised as highly representative either. Again, data from 2022 show that the total population is 9.689.010⁴⁸, the number of electors is 8.215.304, of which 5.717.182, or 69,6%, participate in parliamentary elections. Regarding the so-called proportional component, 3.060.706 out of 5.624.225 valid votes are cast for Fidesz's PL, which makes up 54,42%. Yet, Fidesz gains a 67,84% (two-thirds) majority in the NA. This confirms the distortion of representativeness. Were the exercise of the right to vote mandatory, i.e. 100% of 8 million electors went to the polls and the same number of votes were cast for Fidesz, the party would have obtained only 37,25%; this is even farther from two-thirds. If the number of PL votes is projected onto the total population of 9 million, Fidesz has only 31,6% support; this is hardly even one third.

Table 8. Cross-sectional data: distorted representativity in the electoral system

Parliamentary election year	2014	2018	2022
TOTAL ELECTORS (citizens)	8.241.562	8.312.173	8.215.304
TOTAL VOTERS (voted)	5.096.310	5.796.268	5.717.182 (69,6%)
TOTAL VOTES FOR PARTY LISTS before vote transfer	5.027.820 (100%)	5.694.751 (100%)	5.624.225 (100%)
For Fidesz party list by all electors	2.264.780 (45,05%)	2.824.551 (49,27%)	3.060.706 (54,42%)
NATIONAL ASSEMBLY MANDATES	199 (100%)	199 (100%)	199 (100%)
For Fidesz	133 (66,83%)	133 (66,83%)	135 (67,84%)
Single member district mandates	106	106	106
For Fidesz	96	91	87
Party list mandates	93	92	92
For Fidesz after vote transfer	37	42	48
Minority list mandates	0	1	1

Therefore, a correction of the motto quoted at the beginning of the paper might be in order: “thirty-one out of a hundred in orange from head to toe”. Although one-third representativity may lack democratic legitimacy, deciding to listen only to those who countersign plans and actions is perfectly sufficient to maintain Fidesz in power thanks to this framework of electoral autocracy.

1.3. Additional benefits as insurance for pocketing votes

The third pillar to this preferential regime slightly differs from the two previous ones. If rules on citizenship acquisition and means of exercising voting rights are classic elements of public law linked to a state's sovereign conception of its own mode of operation, favouring a certain category of persons for certain reasons rings a bit different. This is what happens in the case at hand: HBB also enjoy travel⁴⁹, educational⁵⁰ and cultural⁵¹ benefits, which may not have as spectacular impact as the citizenship business but do help buy pro-Fidesz votes in the elections and therefore contribute to Fidesz's power's consolidation.

⁴⁸ Available at https://www.ksh.hu/stadat_files/nep/hu/nep0001.html.

⁴⁹ Act LXII/2001, Art. 8; Government Decree 39/2024 (II. 29.) on the different application of Act LXII/2001 on Hungarians living in neighbouring states during a state of danger, Art. 2 and 3.

⁵⁰ Act LXII/2001, Art. 9-12; Government Decree 206/2003 (XII. 10.) on the implementation of the provisions of Act LXII/2001 on Hungarians living in neighbouring states concerning teachers and academics; Government Decree 319/2001 (XII. 29.) on student benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states; Government Decree 31/2004 (II. 28.) on the rules for grant of subsidies under Act LXII/2001 on Hungarians living in neighbouring states; Act CXV/2011 on national public education, Art. 9(4); Act CCIV/2011 on national higher education, Art. 39(1)(e), 48/B (3) and (5), 80 (4)-(7), 91(5).

⁵¹ Act LXII/2001, Art. 4-5; Decree 18/2003 (XII. 10.) of the Ministry of National Cultural Heritage on cultural benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

In that regard, it is not necessary to assess those benefits' full extent; an illustrative example of each type may suffice to emphasise the fact that the Hungarian state favours HBB over "plain" nationals to whom these benefits do not apply. Travel benefits include free rides on domestic local and intercity scheduled public transport⁵². Education benefits include the possibility to apply by tender for reimbursement of all or part of the costs of stay and studies in Hungary⁵³. Cultural benefits include discounts for museum visits and library use⁵⁴, although concern feels less legitimate here, as the promotion of MS's cultural diversity is one of the EU's top priorities⁵⁵. Eligibility for these benefits, i.e. belonging to this category of persons, is proven by the so-called Hungarian Card (*Magyar Igazolvány*) that solely HBB may apply for⁵⁶.

In this case, a Member State disadvantages "original" nationals by granting more advantageous treatment to foreigners becoming "new" nationals. This falls under the concept of discrimination, and possibly reverse discrimination, should granting of benefits qualify as a purely internal situation.

2. The EU's limited capacity to interfere with prerogatives reserved for Member States

In the event of a conceptual disagreement between the EU and a Member State, which is the case for an electoral system being used to undermine supranational cooperation, any interaction must be based on the principle of conferral, national identity, and EU identity. The EU shall act only within the limits of the competences conferred upon it by MS, whereas competences not conferred upon the EU in the Treaties remain with the MS⁵⁷. Also, the EU must respect national identities of MS even when the ball falls within its court, but not at the expense of its own identity⁵⁸.

The preferential regime outlined above reposes on those three pillars, i.e. citizenship, voting rights and other benefits, precisely because of MS' large margin of discretion therein. As this scheme aims to perpetuate situations fragilizing the EU all the while producing discriminatory effects, it lies within the EU's interest to intervene whenever its competences related to EU citizenship (2.1), democracy (2.2), and non-discrimination in the contexts of fundamental rights (2.3) and economic freedoms (2.4) allow so.

⁵² Government Decree 39/2024 (II. 29.), Art. 2 and 3.

⁵³ Act CCIV/2011 on national higher education, Art. 80(6).

⁵⁴ Decree 18/2003 (XII. 10.) of the Ministry of National Cultural Heritage on cultural benefits for persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

⁵⁵ Art. 3(3) TEU (objective); Art. 6(c) (support competence), 107(3)(d) (state aid considered to be compatible with the internal market), 165 (education), 167 (culture), 207(4)(a) (common commercial policy) TFEU; and Art. 22 CFR.

⁵⁶ Act LXII/2001, Art. 19-22; Decree 318/2001 (XII. 29.) on the procedure for the issuance of Hungarian cards and Hungarian Relative Cards; Joint Decree 46/2004 (VIII. 11.) of the Ministry of Interior and the Ministry of Foreign Affairs amending Joint Decree 49/2001 (XII. 29.) of the Ministry of Interior and the Ministry of Foreign Affairs on the content and formal requirements for Hungarian Cards of persons subject to Act LXII/2001 on Hungarians living in neighbouring states; Decree 33/2010 (XII. 31.) of the Ministry of Culture and Innovation on the content and formal requirements for Hungarian Cards of persons subject to Act LXII/2001 on Hungarians living in neighbouring states.

⁵⁷ Art. 5(1) and (2) TEU.

⁵⁸ C-156/21, *Hungary v. European Parliament and Council* (Full Court), EU:C:2022:97, paras 232-234 and C-157/21, *Poland v. European Parliament and Council* (Full Court), EU:C:2022:98, paras 264-266.

2.1. EU citizenship: no grip on acquisition rules

According to established case law, laying down the conditions for acquisition and loss of nationality – an expression of a genuine link between a MS and its nationals⁵⁹ – belongs within MS discretion⁶⁰. However, a general obligation to have regard to EU law still applies even to purely internal situations⁶¹ and interferes with MS’ reserved prerogative in cases where national measures deprive of genuine enjoyment of the substance of rights conferred by virtue of EU citizenship⁶², lead to loss of citizenship⁶³, or amount to commercialisation of MS nationality and, by extension, of EU citizenship⁶⁴.

In the case at hand, none of those exceptions apply: HBB’s right to vote does not concern *exclusion from* but *inclusion in* the political life of Hungary⁶⁵, the preferential naturalisation regime leads to *acquisition* and not *loss* of Hungarian citizenship and, contrary to Malta’s investor citizenship scheme⁶⁶, the authorities steer clear of any officialised commercialisation of Hungarian citizenship (i.e. promising HBB voting rights in exchange for investments). As long as this citizenship scheme successfully influences election results, Fidesz-led authorities do not seem to mind “private initiatives” with a “payment option” motivated by the benefits linked to EU citizenship. In that respect, it is likely that under Article 20(1) TFEU several hundreds of thousands of persons⁶⁷ have been granted EU citizenship and, on that account, the rights to free movement (Articles 20(2)(a) and 21 TFEU) and to vote in the European Parliament elections (Article 20(2)(b) TFEU). Yet, even with its refashioned approach to golden passports, the Court has a long way to go before being able to grasp the Hungarian citizenship business more substantially than through a tenuous link with potential negative externalities accompanying international conflicts (e.g. institutional espionage, propaganda, and corruption⁶⁸) that could, to an unknown extent, constitute risks for EP elections. Indeed, the current state of EU law would make it extremely difficult to develop a harmonisation project analogous to rule of law conditionality mechanisms all the while bringing something different

⁵⁹ C-221/17, *M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken* (Grand Chamber), EU:C:2019:189, para 35.

⁶⁰ C-135/08, *Janko Rottmann v. Freistaat Bayern* (Grand Chamber), EU:C:2010:104, para 39, C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, EU:C:1992:295, para 10, and C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* (Full Court), EU:C:2004:639, para 37.

⁶¹ *Tjebbes*, para 30 and case law cited.

⁶² E.g. *Rottmann*, para 42, and C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)* (Grand Chamber), EU:C:2011:124, para 42.

⁶³ E.g. *Tjebbes*, para 32.

⁶⁴ See C-181/23, *European Commission v. Republic of Malta* (Grand Chamber), EU:C:2025:283, paras 100, 103, 113, 120, 121.

⁶⁵ This is why findings in C-808/21, *European Commission v. Czech Republic* (Grand Chamber), EU:C:2024:962, paras 98, 104, 154, 158-164, and C-814/21, *European Commission v. Republic of Poland* (Grand Chamber), EU:C:2024:963, paras 97, 153-161, are irrelevant here.

⁶⁶ See e.g. P. J. Spiro, “Investment Citizenship and the Long Leash of International Law” in Kochenov and Surak (eds.), *Citizenship and Residence Sales. Rethinking the Boundaries of Belonging* (Cambridge, 2023), p. 137-160, or D. A. Azzopardi, “Golden Passports and Pension Plans: Malta’s Business of Aiding the Ultra-Wealthy”, *Transnational Law & Contemporary Problems* (2022), p. 1-32.

⁶⁷ In the absence of official country-by-country statistics, the exact distribution between neighbouring EU and non-EU states of the 940.000 preferentially naturalised HBB who have been granted Hungarian citizenship cannot be determined.

⁶⁸ See e.g. V. Jakupc, *Dynamics of the Ukraine War. Diplomatic Challenges and Geopolitical Uncertainties* (Springer 2024), 120 p.

to the table than Directive 2004/38⁶⁹, even if the political will existed and without stepping on MS' toes.

2.2. Democracy: no common conception despite the rule of law connection

As seen above, variable extents of suffrage and, in general, configuration of the electoral system to keep Fidesz in power, show an especially unique understanding of democracy. Enshrined in Article 10 TEU, democracy is also an Article 2 TEU value, meaning that MS are supposed to share the same understanding of it. At the moment, however, no such common concept of democracy binds the MS, whose national identities include “the organisation of national political life”⁷⁰.

It has also been established that the Hungarian electoral system contributes to maintaining rule of law breaches. Thus, a first step towards finding a way out of the woods could be to determine the nature of the relationship between the rule of law and democracy as values. There is still no consensus among EU institutions, Member States, or scholars as to whether the rule of law is to be understood as a meta-principle embodying other principles⁷¹, or as a common value of the same hierarchical position as the others. It follows that democracy, i.e. the principle that “the peoples should take part in the exercise of power through the intermediary of a representative assembly”⁷², can be understood as a “co-value” being one of the (only) two principles the Union is based on according to the Charter’s preamble (horizontal or equal relationship) or as a component of the rule of law in the form of “democratic and pluralistic law-making process” (vertical or subordinate relationship).

Considering democracy and the rule of law on the same level, both Article 2 TEU’s justiciability and Article 10 TEU’s operability come into play. If the Court were to recognise the autonomous justiciability of Article 2⁷³, it could constitute a legal basis for infringement proceedings under Article 258 TFEU for failure to respect any EU value. This would go beyond the current stage of mutual amplification between Articles 2 and 10⁷⁴, and allow to drop a plethora of ineffective rule-of-law mechanisms. Still, democracy must be defined. The Court would certainly not be able to impose an identical implementation of the Article 10 concept in each MS. Theoretically, however, it could set minimum standards of protection in the same way as in the context of fundamental rights⁷⁵. Democratic legitimacy could be the standard below which the MS could not fall, with a basis on the right to vote and the equality of votes, stemming from the “right to

⁶⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, p. 77-123.

⁷⁰ C-808/21, para 154, and C-814/21, para 153.

⁷¹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433/1, Art. 2(a).

⁷² 138/79, *SA Roquette Frères v. Council (Isoglucose)*, EU:C:1980:249, para 33.

⁷³ C-769/22, *Commission v. Hungary (Valeurs de l’Union)*, case in progress.

⁷⁴ Confirmed in C-502/19, *Criminal proceedings against Oriol Junqueras Vies* (Grand Chamber), EU:C:2019:1115, para 63, repeated in C-808/21, para 161 and C-814/21, para 158. On mutual amplification as a legal strategy, see L. D. Spieker, “Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision” in von Bogdandy, Bogdanowicz, Canor, Grabenwarter, Taborowski, Schmidt (eds), *Defending Checks and Balances in EU Member States* (Springer, 2021), pp. 250-260.

⁷⁵ See C-399/11, *Stefano Melloni v. Ministerio Fiscal* (Grand Chamber), EU:C:2013:107, para 60.

influence the way state power is exercised”⁷⁶. With this, the case at hand hits a wall again, as the problem is not the inexistence of such rights, but the fact that their exercise is made difficult in a way on which the EU cannot have an opinion.

Should democracy fall under the umbrella of the rule of law, concerns are limited to Article 2 TEU’s justiciability, and further relieved thanks to direct applicability of Regulation 2020/2092. In addition to its residuary character, breaches of “transparent, accountable, democratic and pluralistic law-making process” (Art. 2) would still have to “affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way” (Art. 4); without going into an analysis of the other features, defining democracy is again a problem here. One way to overcome this conceptual obstacle is by empirically assessing whether the rule of law mechanisms applied vis-à-vis Hungary⁷⁷ address issues related to the electoral system in particular, or the state of democracy in general. This occurs in only two cases: on the one hand, the chapter on Hungary in the Commission’s latest Rule of Law Report mentions “challenges [that] persist with regard to political party and campaign financing rules”⁷⁸; on the other hand, the EP articulates erosion of democracy in Hungary in multiple resolutions adopted to trigger Article 7(1) TEU and to criticise the stagnation of proceedings ever since⁷⁹. Therefore, rule of law mechanisms are not suitable either, or at least have not been applied so, to harmonise democracy as a concept or to determine its minimum standards of protection.

2.3. Non-discrimination in fundamental rights: lack of proper instruments

It makes sense to first approach the situations of differential treatment and discrimination developed above from a fundamental rights perspective. However, EU law in that context has little to offer regarding these specific inequalities within the electoral system and benefits advantaging HBB.

Non-discrimination is enshrined in Article 21 CFR as a principle, which means that it needs specific expression in other legal instruments by the EU and by MS only when implementing EU law⁸⁰. Even though Directive 2000/43 provides that specific expression by remedying discriminatory situations on racial or ethnic grounds, it does not apply to voting rights, and the benefits at hand are also difficult to bring within its scope. Indeed, travel benefits (Art. 3(1)(f)) and educational benefits (Art. 3(1)(g)) *advantaging* HBB and *disadvantaging* “plain” nationals equal “one person being treated less favourably than another is” (Art. 2(2)(a)). However, for direct discrimination to take place, HBB must be recognised as one or – given six different

⁷⁶ P. Sonnevend, “How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary” in Bobek, Bodnar, von Bogdandy, Sonnevend (eds), *Transition 2.0: Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023), pp. 575-579.

⁷⁷ For a summary, see R. D. Kelemen, “Will the European Union escape its autocracy trap?”, *Journal of European Public Policy* (2024), DOI: 10.1080/13501763.2024.2314739.

⁷⁸ Commission, *2024 Rule of Law Report. Country Chapter on the rule of law situation in Hungary*, SWD(2024) 817 final, p. 24.

⁷⁹ Art. 7(1) TEU proceedings have been triggered by European Parliament Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)). In addition to resolutions on the state of after hearings, serious follow-up on the proceedings has been requested in European Parliament Resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)). For a recent positioning, see European Parliament Resolution of 24 April 2024 on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications (2024/2683(RSP)).

⁸⁰ Explanations relating to the Charter of Fundamental Rights, OJ C 303/24.

countries of residence – multiple ethnicities⁸¹ *distinct* from “plain” Hungarians, albeit the very reason for their preferential treatment is the *one same ethnicity* shared by *all* Hungarians condemned by history to neighbouring states or the homeland⁸². Could this obstacle be overcome, MS are still allowed to take positive action and “compensate for disadvantages linked to racial or ethnic origin” (Art. 5). Should such justification prove insufficient, as a last resort, the Commission could always bring an action against Hungary for failure to abide the directive’s provisions in practice under Article 258 TFEU.

As far as the treaties go, non-discrimination as a value remains inoperable on its own as long as the current non-autonomous justiciability of Article 2 TEU persists. Upon ethnic recognition of HBB despite the odds, Article 19(1) TFEU could possibly provide legal basis for harmonisation initiatives targeting the situations at hand more directly. Until then, standing by.

2.4. Non-discrimination in economic freedoms: limited scope of EU law regarding travel benefits

Discrimination also has a disruptive effect on the internal market when MS measures differentiate between national and non-national “objects” (goods, capital) and “subjects” (service providers, workers, citizens) crossing intra-EU borders in a way that is prohibited in the context of economic freedoms. Given that voting rights have *a priori* no internal market dimension, only benefits creating differential treatment between persons are relevant here.

As for educational benefits, EU citizenship in its equal treatment aspect could be considered regarding social assistance⁸³ allocated to HBB students. However, its application is limited from the outset to HBB from EU MS, namely Croatia, Romania, Slovakia and Slovenia. On the one hand, Hungarian citizens or not, HBB will have no interest in invoking EU law against Hungary since the national measure benefits them. On the other hand, even though they aim for equal treatment of all EU citizens, both Article 24 of Directive 2004/38 and Article 18 TFEU require cross-border movement by the foreign national using their freedom of movement, which does not allow “plain” Hungarians to invoke these provisions against their own MS (Hungary). This approach remains inconclusive.

As for travel benefits, Article 58 TFEU states that the freedom to provide services in the field of transport is governed not by Article 56 to 62 TFEU but by provisions of the Title relating to transport⁸⁴. Indeed, “travel in Hungary on domestic local and intercity scheduled public transport”⁸⁵ qualifies as transport service. Based on Article 91(1) TFEU, the EU legislator has provided some guarantees similar to those envisaged by Article 56 TFEU by prohibiting any “direct or indirect discrimination on the basis of the passenger’s nationality or of the place of

⁸¹ “Societal [group] marked by common nationality, religious faith, language, cultural and traditional origins and backgrounds” in C-83/14, *CHEZ Razpredelenie Bulgaria* AD v. *Komisija za zashtita ot diskriminatsia* (Grand Chamber), EU:C:2015:480, para 46.

⁸² Act LXII/2001, Art. 2(1).

⁸³ “All assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State”, C-140/12, *Pensionsversicherungsanstalt v. Peter Brey*, EU:C:2013:565, para 61.

⁸⁴ See also C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v. Landeshauptmann von Wien*, EU:C:2010:814, para 29, and C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain, SL* (Grand Chamber), EU:C:2017:981, para 44.

⁸⁵ Government Decree 39/2024.

establishment within the Union of the railway undertaking, ticket vendor or tour operator”⁸⁶. Even though this provision only applies to rail travel, excluding all other public transportation means, it prohibits discrimination, by transport service providers established in the EU (in this case, the railway undertaking MÁV Magyar Államvasutak Zrt established in Hungary), between passengers on the basis of their nationality including, by virtue of Article 21 CFR, grounds of ethnic or social origin and membership of a national minority as well. Consequently, if a question in this matter was referred for preliminary ruling, these travel benefits granted to HBB would likely be contrary to the CJEU’s interpretation of Article 5 of Regulation 2021/782 *juncto* Article 58 TFEU. Therefore, the Hungarian government would have to annul its Decree 39/2024. Nonetheless, the same discrimination would continue to apply to all other forms of public transport.

Concluding remarks

By exploring the way in which the right to vote resulting from preferential naturalisation of Hungarians beyond the borders influences electoral results in favour of Fidesz, on the one hand, and identifying cases of differential treatment created within the electoral system and by travel, educational and cultural benefits advantaging Hungarians beyond the borders, on the other hand, the extent Member State discretion can be stretched to becomes apparent. In this context, the EU has very limited options at its disposal, as the current state of the EU law on citizenship, democracy, or the principle of non-discrimination in terms of fundamental rights and economic freedoms, hardly proves adapted to conceive, address and tackle this specific preferential regime deepening the rule of law crisis.

Another perspective to adopt would be the support of candidates to elections either through inflows of foreign funds into Hungary or through state subsidies. If shortcomings of the Hungarian electoral system affecting the rule of law were to be approached from this point of view, rather than through the consequences of the preferential naturalisation of Hungarians beyond the borders, then EU law in the areas of free movement of capital and state aid would be of greater help in dismantling Fidesz’s power. This also goes beyond the classic institutional approach to the rule of law crisis, not proving effective anyway apart from, perhaps, the money-related conditionality mechanism. Following on from that thought, instead of focusing on constitutional aspects of the rule of law crisis, another, maybe even more viable solution would be to identify its economic aspects covered by areas of EU law that have proven their efficiency since the beginning of the EU project. Then, perhaps, as matters affecting the internal market remain a shared competence (Art. 4(2)(a) TFEU), Member States would have a harder time stretching discretion that far.

⁸⁶ Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers’ rights and obligations (recast) (Text with EEA relevance) [2021] OJ L 172/1, Art. 5.