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Constitutional analysis of challenges related to the principle of general and equal suffrage in the light of Hungarian regulation

Thesis of PhD dissertation

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I. Resume of research tasks

2014 was the year of elections in Hungary, since it has never happened before that in a calendar year three different elections take place in our country. As because of the Basic Law, the full electoral (both substantive and procedural) regulations were renewed, the elections gained special importance. In this context, a number of changes have been introduced (eg. the abolition of the requirement of domicile in the parliamentary elections), which relate to the principle of general and equal suffrage. My doctoral dissertation deals with issues that concern such innovations, the assessment of experiences between 2014 and 2018 (in particular the consequences of the results of the 2014 and 2018 parliamentary elections) and the potential challenges that may arise in the future.

The dissertation aims at examining the impact of the principle of general and equal suffrage on the fundamental right to vote. In my research, I also seek the causes of extension of the right to vote. To what extend should the legislator respond to social needs when determining the suffrage? What non-legal aspects can affect the principle of generality of suffrage? What is the reason for a double standard in the direction of expanding the suffrage? What are the challenges a researcher faces on the generality and equality of suffrage in Hungary? What are the answers to the challenges? And are there absolutely correct or incorrect solutions?

II. The short description of the examinations conducted, the method of collection of material

1. The subject-matter of the research

In my dissertation, I examine first the requirement of residence as a possible territorial limit of the suffrage, secondly, the parliamentary representation of nationalities, thirdly the question of ability to justify elections, as the ”awareness” constraint of the suffrage, and lastly, the exclusion of criminals from the right to vote. The reference point for the areas mentioned above is the theory and the historical development of general and equal suffrage, as well as an overview of possible constraints on general suffrage.[1] Regarding the ”awareness” constraints on the suffrage, two areas should be highlighted:, the question of the right of children to vote on the one hand and the right to vote for persons with disabilities on the other. In my opinion, they can only be analyzed in parallel, since the starting point is ”awareness” census in both cases.

Based on the above, in the third and fourth chapters of the dissertation I present the conceptual framework and the historical development of general and equal suffrage, highlighting the relevant elements, which also have relevance to the constitutional problems outlined in subsequent chapters. Then I consider the main aspects of the limitation of the suffrage through the principle of general suffrage, which are starting points for understanding the current challenges analyzed in the dissertation. In the other chapters of the dissertation, I am going to ask the above questions. Regarding the generality of the right to vote: 1. the relationship between domicile and suffrage; 2. the issue of ”awareness” constraints; 3. as well as the right to vote for those sentenced to imprisonment. In relation to the equality of the suffrage, I deal with the question of parliamentary representation of minorities, as well as certain areas of the relationship between the place of domicile and the suffrage, as well as the equality aspects of family suffrage. Finally I draw conclusions.

In my dissertation, in the constitutional analysis of the challenges examined in connection with the generality and equality of the suffrage, I have drawn my individual conclusions through the prism of Hungarian regulation. I made my findings primarily in connection with

[1] See, among other things, the „awareness” constraint on the suffrage: János FIALA: A fogyatékossággal élő személyek választójogának kérdései a Kiss Alajos kontra Magyarország döntés tükrében. *Fundamentum, 2010. 3. szám*, 109.

the regulation of the parliamentary elections, and I used the practice of European countries primarily when applying the comparative legal method. In order to determine the exact subject of my research it is also important to emphasize that during the examination of the individual questions, I examined primarily the active suffrage. Defining this brings us closer to understanding the challenges of the general and equal suffrage.

2. The methods of research

In order to achieve the goals and to answer the questions set out above, the dissertation first and foremost describes and analyzes the concepts of fundamental rights in a theoretical way in the context of suffrage and the views of the conflicts that can be learned during scientific discourses. Additionally, the dissertation places strong emphasis on the presentation of the development of legal institutions and best practices. For this purpose, research and analysis of legal history sources played a major role in the research (primarily the laws and constitutions, as well as the historical documents of human rights). In my view, the presentation of this perspective promotes the analysis and interpretation of concepts, and contributes to the verification of the tendencies of general suffrage. In order to explore the issues examined more thoroughly, the dissertation also applies a comparative legal viewpoint[2], in analyzing some of the current issues of general suffrage, it describes, categorises and compares the regulations and (in some cases) the jurisprudence of certain European countries that gives an even broader and more thorough picture of the area under study. The analysis of the practice of domestic (constitutional) and international courts (especially the European Court of Human Rights), and the use of conclusions that can be deduced from them (which will help to create a better picture of each chapter) also have great importance. In addition to judicial practice, the dissertation also considers the major human rights documents of some international organizations (such as, for example, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, or the Universal Declaration of Human Rights), as well as the resolutions of international human rights organizations relevant to suffrage (eg. to the general comment of the UN Human Rights Committee or to the guidelines of the Venice Commission of the Council of Europe). I use the above-mentioned methods of

[2] It is important to emphasize that the comparative method should be applied in a targeted manner. To achieve this goal, we must carefully choose what, how and by what criteria we compare. The results should be analyzed and their usefulness determined. See: Lóránt CSINK: Hogyan alkalmazzunk összehasonlító módszert? In: In: CHRONOWSKI Nóra – POZSÁR-SZENTMIKLÓSY Zoltán – SMUK Péter – SZABÓ Zsolt (szerk.): A Szabadságszerető embernek Liber Amicorum István Kukorelli, Gondolat Kiadó, Budapest, 2017.197-206.

research from chapter to chapter, so I can analyze the conclusions that can be deduced from each other. For the sake of completeness, the dissertation - such as in the thesis 8.2.4. and 9.3. - also performs statistical analyzes in support of the outlined scientific positions. Beyond the above, the research also describes and analyzes metajuristic views that are necessary for a complete understanding of the issue and for answering the questions that arise (such as arguments in domestic and foreign parliamentary debates, public opinion, positions and sociological arguments).

III. Summary of the new scientific results of the PhD dissertation

1. Paradigm shift concerning the generality of the suffrage

The starting point of my PhD thesis is that, in the majority of cases, there is some political gain or other political aim beyond the expansion of electoral rights - which can also be seen in the fields analyzed in my dissertation. In this regard, it is important to emphasize that the generality of the suffrage has not always had the same meaning throughout history. From the 18th to the 19th century (and even at the beginning of the 20th century), the definition of suffrage did not originate from the idea that everyone having nationality has the right to vote with a few restrictions (such as age or ability to judge). Ont he contrary, the right to vote was considered as a privilege. This privilege could only be obtained if strict, normative and taxative conditions were fulfilled at the statutory level (eg. through compliance with property or literacy censuses). These conditions could also be considered as competence-based filtering conditions: the consideration of age was based on the assumption that uneducated, poor people in general do not understand politics, so there is no need to give them the right to speak for themselves. Later on, such normative (quasi-competence-based) conditions have been eased, making the electoral circle more and more widespread. However, the actual generality, that is, "*everyone*", the nature of regulation has not been fully achieved. Later, from the second half of the 20th century, the right to vote was fundamentally justified, and thus one could observe a paradigm shift: with the introduction of women's right to vote, constraints on the generality of the right to vote have been considerably reduced and the principle of "*everyone, except who...*" became the general rule. The mainstream ideology has changed in a way that people have right to involve in politics just because they are parts of the sovereign.. Today, however, the suffrage is widely defined in virtually every democratically functioning state of law. There are, however, different limitations, but in most cases, they serve the fuller application of sovereignty.

It is a question, however, that if right to vote now follows the principle of „*everyone, except who...*", then in this principle why we need the „*except who...*" turn; as it necessary to restrict the right to vote at all? If, in defining the concept of the people, we accept the hypothesis that it is best to delimit the citizenship, then in order to express the will of the people in the most possible way, we would be entitled to start from the argument that all citizens have the right to vote (there must be) – irrespective to the fact whether some voters can exercise it (eg. because of their age, or because of their reduced ability). It is noteworthy that the state has an

institutional obligation to protect the right to vote as a fundamental freedom. In this context, it must operate the electoral institution system, as well as remedies. On the other hand, it must also protect the integrity of the right to vote. It is the duty of the State to prevent the participation of those who are unable to make a responsible decision.[3] While it is undisputed that in order to fully realize the will of the people, the least possible number of electoral rights must be excluded, but at the same time it is also important that you must set limits on the will of the people. If the State does not preclude people from exercising the right to vote, who do not have a minimum political discretion, on the one hand it erodes the weight of the other elector's decision, and, on the other hand, gives an opportunity to abuse (eg. the fact that, instead of a person who is unable to exercise his or her discretion). Therefore, in the context of the right to vote, the state has a duty to protect the purity of elections, which in many cases can only be guaranteed by the exclusion of certain individuals. Of course, the range of constraints must be defined as narrowly as possible and it must be sought that restrictions can only be taken in the most justified cases.

2. Relationship between domicile and suffrage

The main question to be answered in the relationship between domicile and the suffrage is whether there can be citizenship without the right to vote. In this context, Michael C. DORF clearly argues that the right to vote is associated with citizenship. Citizens are subject to rights and obligations under the Basic Law. Of course, for a number of eligibility (even obligations), the Basic Law itself applies restrictive conditions. For example, the right to peaceful assembly can not be exercised alone, since its conceptual element is multi-practice. Similarly, there are limitations on the suffrage: eg. age bondage and citizenship. However, according to the practice of the ECtHR and the European countries, I find that covering all citizens who meet the general conditions (such as age and other reasons, is not excluded from the suffrage) is an immanent element of universal suffrage. In my opinion, in general, nationality is associated with the suffrage. I agree with Károly TÓTH's position in this regard: I consider that the principle of the generality of the suffrage does not allow for the distinction between the existence of a right of eligibility on the grounds that someone has their place of residence within or outside the country. The reason for this is that the right to vote can only be interpreted as the political fundamental right associated with people's sovereignty, that is, the

[3] See: FIALA i. m. 109.

states are typically members of the political community, which is most commonly reserved for citizens. László TRÓCSÁNYI also stresses that Hungarian citizens living outside the borders are clearly parts of the political community consequently they fulfil the criteria of suffrage. Thus, there may be an acceptable limitation on the requirement to reside in a resident (as applied by Hungary in the local elections), but the general rule is not to stipulate domicile as the criterion for suffrage.

Regarding the relationship between domicile and suffrage, one cannot form a unified view upon the practice of each country and the opinion of international fora. The requirement of residence is not an indispensable element of the suffrage. Based on the practice of the ECtHR, consideration of local characteristics is very important: for countries in which lots of members of the political community live outside the borders (which is more true for our country) the imposition of a resident's domicile can be regarded as an unjustified restriction. On the other hand, it is also clear from the practice of the ECtHR that the imposition of a domicile may be a reasonable limit to the general suffrage. Of course, the practice of different countries in this regard may and should be the subject of constitutional review. The problems of Hungarian regulation (such as the question of equality of suffrage, because of the so-called "semi-voting" system) constitute integral parts of the research, since if the equality of the suffrage is infringed, the right to vote itself is endangered. In this regard, however, the dissertation concludes that the constitutionality of substantive and procedural law can be justified, since the legislator has shaped the regulation in the light of local circumstances – which would have been very difficult to achieve otherwise.

3. Issues of parliamentary representation of minorities in the light of the equality of suffrage

In a multinational society, the question of the parliamentary representation of the minorities, the necessity and the way in which they are implemented, are of special importance. The minorities living in a country are also subjects of people's sovereignty (especially if they are regarded as state factors). Thus, if a country provides them individual and collective rights, then their parliamentary representation can also be regarded as an extremely important issue. There are many questions about the suffrage of minorities. Whether their representation in the parliament was truly unresolved? Can a member elected on a minority basis be represented in a single-chamber parliament at all? Does the current system solve the previous problems? What are the dangers of creating an independent minority list? Is there another way? It is the

main issue with respect to the suffrage, whether it would be possible to find a solution based on the Slovenian sample[4], which gives the minority voters three votes instead of two at the election of parliamentarians. In addition to the generality of the right to vote, who is considered to be a national minority voter? In this chapter of my dissertation I have examined these issues. I conclude that, for the sake of parliamentary representation of minorities, it is possible to derogate from the equality requirement, but in the present Hungarian regulation a number of alternative solutions could be introduced, which would be able to ensure the presence of minorities in Parliament more efficiently - without the existing dissonances (eg ineffectiveness encoded in the electoral system). It is not possible to clearly choose the method that best suits the representation of minorities. However, it is essential to make sure that the system provides the widest possible representation for minorities. Taking into account all the elements of the current system, the electoral law is more of an election of minorities advocate than a real election of parliament's delegate – even if in 2018 the German community was able to send a full-fledged representative to the Parliament.

4. The questions of ”awareness”constraints

In my research, among the current challenges of general and equal suffrage, one of the examined elements is the question of “awareness” constraints. In this regard, it should be emphasized that the “awareness” constraint does not mean that the voter makes a rational decision when voting. Instead, it means that the voter is able to make rational decisions. Such ability is presumed. The ”awareness” constraint, therefore, in my interpretation, does not mean that only voters who, when casting their votes, can make a rational, well thought-out decision that takes economic and political considerations can participate in the elections. In my view, this requirement would be completely against the principle of the generality of the suffrage, as it would essentially lead to a quasi-literacy censorship. However, in the exercise of the right to vote, voters do not necessarily have to make rational decisions. The fullness of the suffrage (in view of the fundamental nature of the suffrage) means, that voters there is no need to decide on economic and political analyzes, but also they are sufficient for emotional reasons, family conventions or just about habitual decision making (of course not excluding

[4] In connection with this, it is worth mentioning that the Slovenian Constitutional Court in February 1998 stated that the double vote of the Hungarian and Italian nationals can not be regarded as unconstitutional. Although it is a derogation from the principle of equality of the right to vote, it is only in this way that the right of representation of nationalities to be represented in the Constitution is ensured.

the first opportunity). So when I use the term ”awareness” constraint in my dissertation, I mean the electorate's political ability to understand.[5]

In the notion of ”awareness” constraints, it is important to emphasize that virtually all electoral systems currently in the world contain restrictions that aim to guarantee the ”conscious” decision of the electorate.[6] The ”awareness” constraints can therefore be interpreted as a kind of political „maturity” (if the voter concerned able to perceive the events of the outside world and can evaluate them in some form and „use” in making their decision), which someone must possess to exercise the suffrage. However, the definition of this „maturity” is a result of discretion: deciding whether a 16-year-old person already has this maturity or not depends on the sovereign decision of the state. On the other hand, however, we could say that the ”awareness” constraints are the results of the obligation of the state to protect the integrity of the electoral system.

The dissertation raises two questions concerning the ”awareness” constraints: the issue of children's suffrage and the issue of the suffrage for persons with intellectual disabilities.

The introduction of children's suffrage is often on the agenda, but has not used yet because of the difficulties of its implementation. The examination of this question, however, reaffirms the hypothesis that any change to broaden universal suffrage takes place when the legislator sees some political benefit in it. However, this turning point has not taken place yet at the case of children's suffrage. However, considering the options available, it is possible to introduce the substitution model or reduce the age limit – taking into account constitutional principles. At the same time, we can see that it is a fairly divisive issue amog professionals. Gábor Dániel ANTALI, for example, is concerned about it, that some people hire a child for extra rights and benefits. On my part, however, I share the standpoint of Balázs SCHANDA: the legislator should encourage politics – for example by extending the suffrage in some form to children – to make favorable political and economic choices for young people. By extending the suffrage, it could reduce the democratic deficit that age censorship causes.

When the right to vote is restricted due to the lack of capability of reasoning (which is therefore primarily concerned with people with disabilities) raises specific issues even for the reasons of limitation. In that respect, electoral systems face a fundamental contradiction. On the one hand, the non-discriminatory exercise of the suffrage as a fundamental political right requires that everyone (who would, in principle, belong to the electorate) is entitled to vote?.

[5] It is important to emphasize, therefore, that the "awareness" constraints do not mean that whoever has the right to vote is a "conscious" person who does not have the right to vote, the quasi-unconscious.

[6] Stefan OLSSON: Children’s Suffrage (A Critique of the Importance of Voter’s Knowledge for the Weel-Being of Democracy). *The International Journal of Children’s Rights 2008/16*., 62-67.

On the other hand, the state has an obligation to protect the integrity of the electoral system. By the new electoral law, in line with the changed legislation of the Basic Law, the method of exclusion from the suffrage has changed. Thus, only a decision independent of the guardianship can be limited to the person's suffrage. According to Zoltán POZSÁR-SZENTMIKLÓSY, however, the extension of the right to vote can not be considered a completed, closed question - not even at the level of constitutional norms. In his view, there are convincing arguments that mental disorder alone does not provide a legitimate basis for exclusion from the suffrage. In this respect, the dissertation analyzes statistical data, in addition to national and international practice. On the basis of the data, it can be concluded that the courts in the majority of guardianship procedure withdraw the defendant's suffrage; despite of the fact that, following an individualized examination, subject to appropriate filtering questions, a separate decision is made on the deprivation of the suffrage. In my view, however, these statistical data and the filtering questions put by the courts in order to determine the suffrage do not lead to the conclusion that it is necessary to modify the regulation. The state must guarantee the integrity of the electoral system among its duty of institution-protection, which would otherwise be difficult to conceive otherwise than by providing a restriction. Any problems emerging during the court's procedure requires the modification of jurisprudence, rather than amending the law. If the courts were able to develop a uniform suitability test, which can more effectively and objectively assess the suitability for choice, it would be possible to avoid the quasi-automatic deprivation of suffrage. So, in my opinion, it would not be necessary to amend the Basic Law and change the rules of procedure to resolve the problem. Instead, a single test and practice in the application of the law would be needed to enable the individualized test required by the procedural rules to be effective.

5. The right to vote for persons sentenced to imprisonment

Article XXIII of the Basic Law Article declares for deprivation of the suffrage by committing criminal offenses – due to the unworthy of the perpetrator. The exclusion from the right to vote due to the commission of a crime makes it possible primarily because of the unworthy. For example, in Hirst v. in the United Kingdom case, the ECtHR argued, in addition to the exclusion from the right to vote, to promote civil liability and respect for the law, since those who have seriously violated the basic rules of society exclude the expression of opinion. In this regard, it can be stated that the perpetrators of the crime actually lose their right to vote

because they have violated the social contract, thus becoming "unworthy" in participating in public affairs. In Eszter BODNÁR's view, the view that retaining the right to vote for convicts can strengthen their attachment to society and increase their responsible participation in society, and therefore the use of a restriction for this reason should be reconsidered. When assessing these aspects, however, the question arises: what is the purpose of disqualification from public affairs as supplementary punishment? In my view, it is necessary to examine not only the kind of sanctions that bring the sentenced person back to society, but also if there are other responses the state should introduce as a reaction to the crime. The main penalty (in this case the prison sentence to be enforced) against the perpetrator is only the primary response to the offense committed by the convicted person, which it primarily penalizes the violation of the protected legal subject. With the imposition of a disqualification from public affairs, however, court practice can also react if the convicted person has seriously violated the rules of social coexistence and has become unworthy of participating in the practices commonly held by society (such as the conclusion or confirmation of a social contract). In fact, becoming unworthy is not a sanction for the act committed, it is not a punishment, but a moral stigma and disapproval of the majority of society.

In Hungary convicted persons are excluded from the suffrage only, if the court also excludes them from exercising public affairs. Similarly to the question of the suffrage under guardianship, in my view, in the case of the deprivation of the suffrage of imprisonment, the basic problem concerns jurisprudence. According to the ECtHR's guiding practice (see, for example, the Scoppola case), Hungarian regulation is considered to be forward-looking and internationally compliant. However, statistical data are clearly visible, that in the case of sentences to be convicted for many criminal offenses, the court also applies the disqualification from public affairs, which would not necessarily be justified in view of the length of imprisonment. Therefore, despite the progressive regulation, it would be appropriate to clarify and improve the practice. For example, by changing legal regulation (determined the minimum length of imprisonment, which could be disqualification from public affairs, or prohibitions covered by disqualification from public affairs are differentiated), or by a uniform practice in court practice. For these, it would be possible to exclude from the scope of the electorate only those persons who seriously violated the "social contract", and so they have become truly unworthy of participating in the formation of a people's will.

IV. List of publications in the subject matter of the thesis

1. Előzetes regisztráció az alkotmányosság mérlegén, Pázmány Law Working Paper 2012/43. szám.
2. A nemzetiségek parlamenti képviseletének kérdéséről. Pázmány Law Working Paper 2013/1. szám.
3. Az előzetes regisztráció kérdéséről. In: CSÁKI-HATALOVICS Gyula – DERES Petronella – KUN Attila – MISKOLCZI Bodnár Péter – PÁKOZDI Csaba – RIXER Ádám (szerk.): VIII. Jogász Doktoranduszok Országos Szakmai Találkozója, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2013.
4. A választójog (az országgyűlési képviselők, a helyi önkormányzati képviselők és az európai parlamenti képviselők választása). In: CSINK Lóránt (szerk.): Alkotmányjog. Novissima Kiadó, Budapest, 2014.
5. A nemzetiségek parlamenti képviseletének kérdéséről. Közjogi Szemle 2014/1. szám.
6. On the issue of the representation of nationalities in the Parliament. In: Petra Lea LÁNCOS – Réka VARGA – Tamás MOLNÁR – Marcel SZABÓ (szerk.): Hungarian Yearbook of International Law and European Law 2014.
7. A fővárosi közgyűlés megválasztásának választójogi anomáliái. Pázmány Law Working Paper 2016/24. szám.
8. Dilemmák a fővárosi közgyűlés megválasztásával és működésével kapcsolatban. Iustum Aequum Salutare 2017/2. szám. (társszerző: VARGA Ádám)
9. A belföldi lakóhely követelménye, mint az általános választójog korlátja. Iustum Aequum Salutare 2018/1. szám.
10. Az általános választójog elvének aktuális kihívásai. Államtudományi Műhelytanulmányok 2018/3. szám.
11. Az általános választójog elvének aktuális kihívásai. In: TÉGLÁSI András (szerk.): A Választás és Demokrácia Ludovika Kutatócsoport kutatási eredményei (2017-2018). Dialog Campus, Budapest, 2019.