Putting an End to Minority Voter Disenfranchising in Hungary

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On 11 November, the European Court of Human Rights published its decision in a case initiated eight years ago, which found that the Hungarian parliamentary electoral system's regulations on the representation of national minorities in parliament violates the right to free elections (Article 3 of the 1st Protocol to the ECHR, *Bakirdzi and E.C. v. Hungary*). The applicants claimed that the Electoral Act of 2011 was unlawful on three points: the secrecy of the vote, the real election and the preferential quota for minority representation. In its judgment, the Court found in favour of the applicants on all three points and ordered the Hungarian State to pay damages, putting an end to a decade-long violation of voting right. The following analysis is not primarily intended to provide a detailed description of the judgment itself, but to review the unlawful situation and the necessary actions resulting from the judgment.

The principles of secret ballot and of real election

The issues of secrecy of the vote and genuine elections hardly require detailed explanation: these anomalies have been criticised on several occasions in recent years in the academic literature and in the reports of the OSCE/ODIHR election observation missions. If I register as a minority voter, I lose the possibility to choose between lists and candidates, since the law stipulates who can be the only nominating organisation for candidacy. With only one list available, minority voters do not choose, they just vote: for the only list prescribed by the legislator. However, this solution cannot in any way be regarded as a real choice between alternatives, so that the Convention is clearly violated on this point. As the judgment puts it, minority voters under this system „could not express their political views or choice" by casting their vote in the ballot box, "but only the fact that they sought representation in political decision-making system as members of a national minority group". The court therefore "doubts that a system in which a vote may be cast only fo a sepcific closed list of candidates, and which requires voters to abandon their party affiliations in order to have representation as a member of a minority ensures 'the free expression of the opinion of the people in the choice of the legislature'".

The lack of choice almost automatically makes secret ballots impossible: if, as a minority voter, I can only vote for one candidate (list), my vote can be identified by everyone in the polling station. The only exception to this is if some minority voters in a polling station cast an invalid vote or do not vote for that list – but the results suggest that this is not the general case, but the opposite. For proof of this, it is worth looking at the 2022 results. The 12 nationalities on the list received a total of 30,635 votes: of these, 12,866 votes can be clearly identified because there were no invalid or missing votes for that nationality in the polling district, so every single minority voter (whether one or more) voted down the only list that the law allowed them to vote on. To give a sense of scale, the entire population of a small town (my home town of 12000 people, for instance) has been deprived by the legislature of a secret ballot, which is unacceptable even if this situation may not have been deliberate, but merely negligent, on the part of the legislature. The only way to guarantee the secrecy of vote would be to count the votes not locally, at polling districts, but nationally, thus breaking the direct link between the register and the votes cast, which would allow for identification. This practice has already worked well for postal votes and votes cast at diplomatic missions and should not pose any difficulties for the aggregation of

votes cast by minority voters. In the 2022 election, 19 missions had 100% turnout; if the Hungarian state is able to provide a secret ballot for the 277 voters who voted at these diplomatic mission, by taking 4, 8 or even 9 votes home for processing, then aggregating minority ballot papers nationwide should not be a challenge. Secret vote is not an option, not only for party voters, and not only in large constituencies, but is one of the most important guarantees of a free and fair election. As the Court's judgment says, „the voting system must assure voters that they would not be compelled directly of indirectly to disclose for whom they have voted", and and minority voters have the same rights as voters who vote for parties or independent candidates, so they must be guaranteed secrecy.

The violation of secret vote by the current rules is also partly due to the lack of a choice between candidates: this restriction should also be lifted and multiple nominations should be allowed. The judgement mentions the possibility of an open list, i.e. the possibility for voters to vote not only for the entire list but also for individual candidates on the list. However, this is not a complete solution, as only one nominating body, the national minority's self-government concerned, would still be able to draw up a list. Only a plurality of nominating organizations and candidates can provide genuine competition and thus a real choice in elections.

The preferential quota

Although both the principles of real choice and secrecy are essential for democratic elections, the most important part of the judgment concerns the electoral formula (preferential quota) applied to minority candidates' elections. The complainants argue that the present system means that they lose their list vote as minority voters: they cannot vote for parties, but, in the meantime, the majority of the 13 national minorities is so small that it is impossible to achieve the number of votes calculated by the preferential quota required of the electoral system. The complaints were lodged in 2014, but the elections since then have in all cases been based on the applicants' grievances, although the court has not examined them, the judgement does not include the results achieved there, either pro (some minorities have managed to reach the preferential quota) or con (most minorities have not even managed to come close to the quota). According to the judgment, a preferential quota that imposes unachievable conditions that are unattainable for most potential beneficiaries violates the principle of free elections. The well-known formulation is that the legislator has a wide margin of appreciation in the way it designs the electoral system. It is not obliged to ensure representation for any minority and it is not obliged to create a preferential procedure for obtaining seats: but once it does, it cannot impose conditions that are achievable for some minorities and unachievable for others. And this is the case with the current Hungarian parliamentary electoral system: the preferential quota is too high for most minorities, so that meaningful parliamentary representation (the possibility of obtaining a mandate) is excluded for them by the system. The legislator allows only those registered in the minority voters' register to vote for the minority list, while parties can gain votes from the entire eligible population, thus increasing their chances of winning a seat. Thus, the paradoxical situation arose that, while in principle the parliament made it easier for national minorities to obtain seats through the preferential quota, in reality it made it impossible, thus putting minority voters at a disadvantage in establishing their own list-based representation compared to voters who voted for party lists.

In the last three elections, this preferential quota has always meant more than 20,000 votes (22,022 in 2014, 23,831 in 2018 and 23,085 in 2022). Experts also calculate that the preferential quota is around 25,000 votes per election, which, according to the 2011 census, is the number of votes that is – in theory – achievable only for the Roma, German, Slovak, Romanian, and Croat minorities. However, according to the data in the register of minorities, only the two largest minorities, the Roma and the Germans, have a chance of obtaining a mandate, as the number of voters from the other minorities is nowhere near this figure: for the 2022 elections, a total of 40 570 minority voters have been registered, of whom 31 856 are of German

nationality, while 11 other minorities share the remaining 8 714 voters. (As the Roma minority self-government was unable to nominate a list, Roma were not able to register as minority voters for this parliamentary election.) It should be noted that the number of people in the electoral registers of minorities for the parliamentary elections has increased from election to election for almost all minorities: a slight decrease is only seen in the 2022 election (the German register has decreased by 1,154, the Slovak by 22, the Croatian by 1, while the Roma electoral register contained noone, because no Roma people could register as they could not put up a list).

Is preferential representation possible?

In order to put an end to this situation of voter disenfranchisement, Parliament needs to fundamentally rethink the representation of minorities in the legislature. This, assuming the current legislative (unicameral) structure, could mean modifying the preferential quota: in this case, however, a formula would have to be devised which would not result in an unattainable number of votes for any minority, i.e. an unachievable condition. The question is whether such a solution exists without seriously violating the principle of equality: is it possible to find a model that gives representation to groups of 2 400, or 5 600, or 130 000 people without creating an unacceptably large difference in the weight of votes? According to the 2011 census, the smallest nation minority was Slovenian (2 385); if we want a quota that means representation that is accessible to the Slovenian minority, and it follows from the judgment that if representation is to be given, it must be accessible to all minorities, well, then in this case this quota should be a tenth of the current one. Accordingly, the quota should be not the total number of list votes divided by the number of list seats (93) then divided by four, as the recent rule says, but the last step must be changed to a division of forty instead of four. This, in turn, would lead to a difference in the weight of votes many times: while a minority representative would thus gain a seat with up to 2,400 votes, the parties would have to obtain one seat with at least 120 times that number, i.e. 12,000 percent. In this case, the question inevitably arises as to whether there is a constitutional justification for such a huge difference in the weights of votes, and whether a minority voter's list vote can worth 120 times more than a non-minority voter's list vote. Moreover, since in such a case it is likely that one candidate from the first place on each national minority list would be elected to the legislature, the number of representatives elected in the parties' contest would be reduced by 13 mandates. This is more than 6 per cent of parliamentary seats; apart from Fidesz, no party has a parliamentary group of at least this size – just to put this in perspective. This does not mean, of course, that minority MPs would form a joint parliamentary group – but it does indicate how important 13 MPs can be in a parliament of 199 MPs. These 13 representatives could decide on every issue on the agenda without any partisan or ideological background, programme or mandate, even though their mandate is not based on ideological or party political convictions, but on nationality. However, if the 6% of seats in parliament are decided by around 5 thousandths of the electorate, if there is a difference of around 120 times between the weight of votes cast for minorities and votes cast for party lists, this is at least as much a violation of the principle of free elections as the current form of minority representation, which is impossible to achieve.

Another possible solution is that the legislator abolishes minority representation in its current form: there are huge discrepancies between the numbers of minorities, and since parliamentary seats could therefore only be allocated in a way that would seriously violate the equality of the electorate, the legislator offers minorities the institution of a non-voting representative instead of a mandate (national minority advocates), giving their self-governments or registered voters the opportunity to elect a representative. In this way, minority voters would 'get back' their party-list vote, but would also have the opportunity to elect their own advocate, who can represent them in the national legislature.

The two options outlined here do not, of course, exclude the possibility of a third, fourth, or other possible solution. However, it is clear from the judg-

ment that the current arrangements cannot be allowed to stand: this situation could even be an opportunity for the legislator to ask the stakeholders themselves what they propose to do about this problem. Make no mistake: the stakeholders in this case are not only the ethnic minorities living in Hungary, but also parliamentary and extra-parliamentary parties and, in a broader sense, the whole of Hungarian society. After all, Hungarian parliament represents the people, and the right to free elections is an expression of the opinion of the pople. For this reason, and also based on the already decade-old recommendations of the national and international human rights advisory and monitoring bodies, NGOs, scholars ignored by the governing party, a fair legislative preparation based on genuine socio-professional consultation would be well deserved, finally.

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