Protecting the Fairness of European Parliament Elections via Preliminary Ruling

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Supreme or constitutional courts regularly step in to protect the democratic process by deciding election disputes. It is remarkable that the Court of Justice of the European Union (CJEU) has so far barely been engaged concerning the European Parliament (EP) elections. Using Hungary as an example, I will argue in the following that the CJEU is institutionally well-positioned to help protect the integrity of the 2024 EP elections via preliminary ruling procedures.

Hungarian democracy has been in decline, according to the EP, the Commission and various democracy indices. The problems include the lack of a level playing field, targeted action by authorities against opposition parties, overlaps between the activities of the government and the governing party, state funding of campaigning and party financing in general, lack of media pluralism, and the different means of voting for citizens living abroad (postal vote for some and not for others). I argue that the CJEU could and should be engaged to protect the fairness of the EP elections in Hungary.

EU Law on Electing the European Parliament

Article 2 TEU provides for the principle of democracy as a foundation of the EU. Article 10 details this provision, adding the foundational value of representative democracy and direct representation in the EP. According to Armin von Bogdandy and Luke Dimitrios Spieker, *"Article 10(3) TEU can translate the value of democracy into justiciable obligations"*. Article 14 TEU, as well as Article 1(3) of the 1976 Electoral Act, require direct universal suffrage and a free and secret ballot for EP elections. Article 20 TFEU establishes EU citizenship and prescribes that the citizens of the EU have the right to vote and to stand as candidates in elections to the EP. Article 39(2) of the Charter establishes a fundamental right to free elections.

The CJEU has so far been given only limited opportunity to rule on the organisation of EP elections by Member States. In *Delvigne*, the Court ruled that Member States are implementing EU law when organising EP elections, and thus the Charter applies. In *One of Us* and *Junqueras*, the Court established that Article 10(1) TEU gives concrete expression to one of the Article 2 TEU values, namely representative democracy. In *Eman and Sevinger*, the Court set the conditions of equal treatment in the right to vote for the EP elections.

It can well be argued that Art 2 and Art 10 TEU are justiciable. In fact, the European Commission is of this opinion as it launched the infringement procedure in the *Lex Tusk* case primarily based on Article 2 and 10 TEU taken together. The standalone applicability of Article 2 TEU is not yet decided, but this might not be necessary because the problem could be construed in a similar way as Article 19 TEU was used in conjunction with Article 2 TEU by the CJEU in judicial independence cases. The underlying idea is that, just as with courts, the EP elections cannot be fair if one or more national electoral systems comprising it are fundamentally flawed [p. 83]. There is a lively debate [p. 69] about the topic, including the interpretation of Article 10 TEU [pp. 576, 580], some even understand it to mean that Hungary is not entitled to representation in the European Council and the Council, while others disagree.

Submitting a Preliminary Reference

The above legal provisions and the CJEU's emerging rule of law case-law offer solid foundations for adressing the most important issues at the 2024 EP elections

before the Court in order to maintain the integrity of the vote in Hungary. My claim is that a national court (or maybe an election commission) dealing with an electoral dispute shall – in a concrete case – submit a request to the CJEU for a preliminary ruling. After all, under *Donnici* and *Junqueras*, it is up to the courts [p. 75] – national courts or, after a preliminary reference, the CJEU – to decide on the lawfulness of EP elections.

Hungarian election disputes are generally handled by election commissions, and a judicial remedy is available. There have been no cases where a Hungarian court has referred an election question to the CJEU, and Hungarian law does not provide explicitly for a suitable procedure for suspension and referral either. This should, however, not be a matter of concern, because under settled CJEU case-law, the right of national courts to refer a preliminary question derives directly from Article 267 TFEU. Election disputes are to be handled expeditiously, and usually, this is the basic counter-argument against any suspension of the procedure. But the *Kúria* (the Hungarian supreme court having almost exclusive jurisdiction to exercise judicial review in EP election disputes) recognized [para. 23] that election cases might be suspended to refer a constitutional question to the Constitutional Court, despite the lack of a corresponding procedure in the law, if the applicant has no other realistic access to the Constitutional Court, which was a departure from earlier case-law [pp. 28, 65].

Moreover, it might not only be a possibility but an obligation for the *Kúria* to engage the CJEU under Article 267 TFEU. As a court of last instance, the *Kúria* is obliged to submit a preliminary reference unless very specific conditions are met: the question is not relevant to the case, EU law is unequivocal, or the CJEU already decided an essentially similar case. As seen above, none of the latter two conditions are met because of the uncharted nature of the territory. Besides the high relevance of the topic, statistics also tell that the *Kúria* would not run a high risk of its preliminary reference being rejected, as the CJEU accepts almost all questions from courts of last instances. The lack of reference for a preliminary ruling by a court of last instance, on the other hand, might result in several repercussions: infringement proceedings by the Commission, finding of a violation of fair trial rights by the European Court of Human Rights, and a liability for possible damages.

It would require further investigation whether a Hungarian election commission would satisfy the *"court or tribunal"* criteria under Article 267 TFEU. The question is relevant because the independence of the *Kúria* is under threat, and judges in general are discouraged from using the preliminary reference procedure. Therefore, all possible options require careful assessment to reach the CJEU. It is up to the CJEU to decide whether a body qualifies as a *"court or tribunal"*, and the CJEU uses several criteria: whether the body is (i) established by law, (ii) permanent, (iii) entrusted with a compulsory jurisdiction, (iv) applies rules of law, and (v) independent; and (vi) whether the procedure is *inter partes*, (vii) the existence of a dispute, and (viii) the judicial nature of the decision. The CJEU considers all factors as a whole and might accept the reference even in the absence of one or more individual criteria. While many of the criteria are most probably met by Hungarian election commissions, two issues remain: due to their composition of elected and delegated members by political parties, their independence can be questioned, and proceedings before the election commissions are not *inter partes*. As for the independence criterion, the CJEU has an extensive case-law on all types of bodies under which a detailed review can be done as to the nature of Hungarian election commissions. The CJEU also accepted references from procedures which were not *inter partes*.

Possible Questions for Referral

The election of the EP is running on short deadlines, for which even the rarely granted expedited procedure of the CJEU is not fast enough. Such an expedited preliminary ruling procedure lasted, on average, 7.4 months in 2022, which is way too long for an election dispute. Sure, some election-related questions might only be raised during an election period, but others might be raised afterwards as well. Persuading a judge to submit and the Court to rule in favour might be

easier outside of the election periods with more time available and less attention focused on the dispute. In other words, it should not be a problem if a question does not bear immediate results, rather, it focuses on establishing precedent in a somewhat similar fashion to *Eman and Sevinger*.

Possible topics for a preliminary reference might include the following:

Lack of neutrality of public authorities

Hungarian law does not require state neutrality during elections. In a judgement, the *Kúria* contrasted the recent decisions of the Constitutional Court with the well-established German case-law on state neutrality and found that this requirement has been removed from the legal system: *"After the amendment of* [the Election Procedure in 2018] *the Kúria's case-law on state neutrality … can no longer be maintained. … Reviewing the decisions of the Hungarian Constitutional Court, the Kúria found that the application of the doctrine* [of state neutrality] *cannot be inferred … rather, it can be concluded that it does not exist and the case-law* [of the Constitutional Court] *allows for the overlap of party and government communications. Therefore, … the Basic Law of Hungary does not require the neutrality of state bodies, which are otherwise not neutral in nature, in the election campaign"* [paras. 21-23]. It might be fruitful to provide the CJEU with an opportunity to set standards for state communication (including public broadcast companies and state-run news agencies) during EP elections.

Postal vote for some and not for others

Some Hungarian nationals living outside the country have the possibility of postal vote while others do not have this option. This practice heavily favours ethnic Hungarians living in neighbouring countries, who have voted 96 % for the governing parties in the 2019 EP elections, while more opposition-leaning emigrants living in Western Europe can only vote in-person at embassies. The difference is based on having a Hungarian address. In practice, a Hungarian national studying in Birmingham (who did not renounce his or her Hungarian address) has to travel to London to vote in-person at the embassy while his or her fellow Hungarian citizens born and living in Subotica, the centre of Hungarian life in Serbia, might vote via post. The ECtHR accepted this regime for national elections, but building on *Eman and Sevinger*, this practice might be challenged. This question can be raised both during an election period (through an appeal against not being enrolled as a postal voter), and also after the elections through an action for damages caused by the violation of EU law (the material loss is basically the cost of a Birmingham-London train ticket).

Targeted action by authorities

According to opposition parties, the Hungarian State Audit Office (SAO) discriminates against them by investigating their expenses and not that of the governing coalition. Although this question is a bit removed from the organisation of the EP, a discriminatory fine against some parties might heavily undermine their ability to run for elections and thus poison democracy at the EU level.

A problem for the EU as a whole

Unfair EP elections in Hungary are not just a problem for Hungarian citizens, whose representation in the EP will be distorted. It is also a problem for the EU as a whole, as the EU's central legislative institution (and therefore the legitimacy of all its decisions) will be tainted by the presence of unfairly elected MEPs. Moreover, this also affects *all EU citizens* who have a right to be democratically governed both under EU law and under their national constitutions. Failure to enforce this right at the EU level might then easily lead to a new *Solange-I*-style (or even worse: a *PSPP*-style) case-law of national constitutional courts in liberal democratic EU member states about EU democratic standards. The constitutionality of the conferral of national competences on the EU presupposes in some member states that the EU itself fulfils certain democratic criteria, which include, among others, the fairness of the EP elections. If this precondition is not fulfilled anymore, then member state constitutional courts might question the competence conferral on the EU in general. Therefore, it is not an option to avoid these difficult legal questions. Otherwise, they will just keep popping up at places where they will be even more difficult to solve.

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