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CAN SOMEONE BE UNWORTHY TO EXERCISE THEIR RIGHT TO VOTE? QUESTIONS OF THE RIGHT TO VOTE FOR PERSONS SENTENCED TO IMPRISONMENT, WITH SPECIAL REFERENCE TO HUNGARIAN PRACTICE

Abstract

Over time, the generality of the right to vote has become an accepted principle, but it is still possible to disenfranchise a person if they have committed a crime. In international practice, this ground for disenfranchisement is considered accepted, but the ECtHR has pointed out that individualization and discretion are essential. National practice in this respect is quite varied: in some countries, offenders are automatically excluded, but in other countries, this should not happen in any case, and in the third category the disfranchisement is only possible on a case-by-case basis. According to the current Hungarian legislation, the exclusion is only possible if the offender is sentenced to a custodial sentence and is also disqualified from public affairs. The Hungarian practice is in line with the ECtHR practice, however, on the basis of statistical, disenfranchisement for criminal offences remains quasi-automatic. Therefore, the study also outlines possible solutions that could make the Hungarian legislation more forward-looking.

Keywords

exclusion from the right to vote; commission of a criminal offence; custodial sentence; disqualification from public affairs; practice of the European Court of Human Rights; Hungarian practice

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Introduction

The requirement for general suffrage[1] has become an unquestionable principle in democratic states. In general, it is mainly the citizens of each country (although all subject to age conditions) who have the right to vote. However, there are still limits to active and passive suffrage, one of which is the restriction for criminal offences. The 25th General Comment of the UN Human Rights Committee also recognises in paragraph 14 that the restriction of the right to vote on the grounds of criminality is a possible ground for deprivation.[2] A similar view is taken by the Venice Commission of the Council of Europe, which, in its Opinion No 190/2002, also considers disqualification from voting to be possible if the person concerned has committed a serious crime, if the disqualification is based on a legal provision, and if it is decided by a court, which takes into account the requirement of proportionality.[3] In addition –as we will see later – the European Court of Human Rights (ECtHR) and the jurisprudence of some European countries also include this ground for exclusion.

One may ask why, while international practice[4] has moved in the direction of extension for other grounds of exclusion (in particular mental disability[5]), the possibility of exclusion for the commission of criminal offences is still considered to be quasi-unquestionable.

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[1] A question which has already been addressed by the European Court of Human Rights, including in the Sukhovetskyy v. Ukraine case (*Sukhovetskyy v. Ukraine*, Application no, 13716, Judgment of 28.03.2006), In this ruling, the ECtHR stated that the right to vote in a democratic state is not a privilege, as the right to vote has been progressively extended throughout history.

[2] UN Human Rights Committee (HRC), CCPR General Comment No. 25.: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7

[3] See Venice Commission Opinion No 190/2002 (Code of Good Practice in Electoral Matters), point I.1.1.6.

[4] See for example the country report on Tunisia (Implementation of the International Convention on the Rights of Persons with Disabilities. Initial report submitted by Tunisia. Published: 14 July 2010. CRPD/C/TUN/1.).

[5] For more on this, see: T. Ryan, A. Henderson, W. Bonython, "Voting with an 'unsound mind'? A comparative study of the voting rights of persons with mental disabilities", *University of New South Wales Law Journal*, 2016, Issue 3, pp. 1038-1071.

When examining this issue, the primary question that arises is whether, in the light of the widest possible application of the generality of the right to vote, it is really justified to restrict the active[6] voting rights of offenders, and if so, within what limits. If the answer to this question is in the affirmative, then it must also be examined whether, on the basis of international trends, the regulatory and judicial practices of individual countries, and especially that of Hungary, can be considered constitutional.

In my study, I analyse the specificities of the legislation and court practice of each country, especially of Hungary. I also compare the relevant literature and draw my conclusions on this basis. The central part of the research is the analysis of Hungarian court practice, so in order to increase the depth of the study, I also include the analysis of statistical data. However, I think it is important to state at this stage that although the study is based on the comparative method, it focuses primarily on Hungarian practice. Therefore, the statistical analysis is directed only to the latter.

I. On the Unworthiness of the Perpetrators of Crimes

Already in ancient Greek and Roman law[7], as well as in medieval thought, the idea of so-called civil death appeared, which meant, among

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[6] For passive voter eligibility, the answer to this question is relatively simpler. A person who has been sentenced to imprisonment or compulsory institutional treatment for a criminal offence has been judged by the court to have committed an act that is dangerous to society. For this reason alone, he would not be able to fulfil his mandate as a Member of Parliament – to say nothing of the extent to which a person who has committed an act that is harmful to society can be the custodian of people's sovereignty, the representative of the will of the people. In this context, see more: E. Bodnár, *A választójog alapjogi tartalma és korlátai*, HVG Orac, 2014, p. 213.

[7] In Roman law, the public rights of Roman citizens (*Cives Romani*) included the right to vote (*ius suffragii*), which gave Roman citizens the right to vote in assemblies (in contrast to the freed slave, who could only participate in the *comitia tributa*, the assembly of the people convened according to the territorial unit). But Roman law also recognised the concept of loss of Roman civil rights: *capitis deminutio* in Roman law meant a change of status, of which there were three levels: *maxima*, *media,* and *minima*. The *capitis demi-*

other things, the complete deprivation of civil rights for certain acts.[8] Under the Code Napoleon, which entered into force on 21 March 1804, for example, penalties that resulted in the loss of the civil rights provided for by the law, such as the death penalty, were punishable by *civil death*[9]. In the case *of Hirst v. the United Kingdom*[10], the ECtHR argued that the exclusion from the right to vote while imprisoned promotes civic responsibility and respect for the law by excluding those who have seriously violated the fundamental rules of society from expressing their views. In this respect, we can say that the perpetrators of this crime are in fact disenfranchised because they have violated the social contract[11], this makes them unworthy to participate in public affairs (so they cannot exercise their right to vote).[12] A similar idea led the authors of Act

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nutio maxima meant the loss of freedom, civil rights, and family status, which in practice meant that the person became a slave (if, for example, he or she became insolvent or became a prisoner of war). Such a person ceases to have any civil rights and obligations. The *capitis deminutio media*, while retaining freedom, meant the loss of Roman civil rights and family status. This could happen, for example, if the person moved to another state or has been exiled. In contrast to the above, however, the *capitis deminutio minima* did not affect civil rights, but mainly resulted in a change in the property status. H. Goudy, "Capitis Deminutio in Roman Law", *Juridical Review*, 1897, Issue 2, pp.132-142.

[8] H. Itzkowitz, L. Oldak, "Restoring the Ex-Offender's Right to Vote: Background and Developments", *American Criminal Law Review*, 1973, Issue 3, pp. 721-722.

[9] As a result of civil death, the convicted person lost his property, which passed to his heirs as if he had died intestate. Such a person was no longer entitled to inherit, to dispose of his or her property either *inter vivos* or in the event of death, to be a guardian or witness, or to contract a legal marriage (and even his existing marriage had ended). The property actually acquired by the civil deceased and in his possession at the time of his or her death was vested in the treasury as uncontested property, but the law allowed the public authorities to make equitable provision for the benefit of the widow, children, or relatives. B. Kún (translated), *A franczia polgári törvénykönyv – Code Napoléon*, Kugler A. (Eggenberger),1874, pp. 6-20.

[10] *Hirst v. the United Kingdom*, Application no, 74025/01, Judgment of 6.10.2005.

[11] A. Randle, "Prisoner Voting Rights and the Social Contract", *Dublin Legal Review*, 2011, Issue 1, pp. 60-70.

In this context, Eszter Bodnár also points out that the claim that the convict violated the social contract implies that the perpetrator committed the crime knowing that it would lead to disenfranchisement – and in most cases this is not a factor in the commission of a crime. Bodnár, *supra* note 5, p. 213., and: J. J. Rousseau, *Társadalmi szerződés*, Phönix-Oravetz, 1947, p. 47.

[12] D. Vig, "További gondolatok a szabadságvesztésre ítéltek választójogáról", *Börtönügyi Szemle*, 2009, Issue 3, p. 73.

V of 1961 of the Criminal Code of the Hungarian People's Republic and Act IV of 1978 of the Criminal Code in Hungary, since the introduction of the secondary punishment of disqualification from public affairs was justified primarily by the fact that some of the perpetrators of serious, intentional acts, even after serving their sentence, do not immediately become worthy of participating in the administration of public affairs as active or passive subjects.[13] That said, it cannot be assumed that a conviction for one offence alone can justify depriving a convicted person of other fundamental rights. In line with this, the ECtHR also ruled in the case *of Hirst v. the United Kingdom* that a prisoner can only be deprived of his liberty and that this cannot be an automatic restriction on other fundamental rights. In imposing a sentence, the primary objective of the State exercising criminal jurisdiction is to ensure that the sentenced person does not exercise rights that are contrary to the purpose of the sentence. The purpose of the penalty, however, is nothing other than to cause a legal disadvantage. However, there is a question as to whether this disqualification for committing a criminal offence must necessarily be a disqualification from voting.[14] It is debatable whether the perpetrator of a crime will be more effectively deterred from committing further crimes or misdemeanours if, in addition to a custodial sentence, he or she is also deprived of his or her right to vote. Eszter Bodnár argues that keeping the right to vote for convicts can strengthen their attachment to society and increase their responsible participation in society[15], therefore the application of the restriction, for this reason, should be reconsidered. Similar views are expressed by Howard Itzkowitz and Lauren Oldak, who argue that if the state's aim is to rehabilitate offenders and reintegrate them into society, then further penalizing them by de-

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[13] E. Belovics, B. Gellér, F. Nagy, M. Tóth, *Büntetőjog I. Általános rész, A 2012. évi C. törvény alapján*, HVG Orac, 2014, p. 610.

[14] Vig, *supra* note 12, p. 78.

[15] Bodnár, *supra* note 6, p. 214., and M. Mauer, "Voting behind Bars: An Argument for Voting by Prisoners", *Howard Law Journal*, 2011, Issue 3, pp. 549-566. By contrast, data from Ireland (where, as in Hungary, prisoners can vote, if they are not otherwise barred from public affairs) show that prisoners exercise their right to vote in small numbers, despite the fact that they would otherwise be able to do so while in prison. K. Dzehtsiarou, "Prisoner voting saga – Reasons for challenges" in H. Hardman, B. Dickson (eds), *Electoral Right sin Europe – Advances and Challenges*, Routledge Taylor & Francis Group, 2017, p. 92.

priving them of their right to vote after they have served their sentence is not an appropriate means of achieving this.[16] In assessing these aspects, however, the question of the purpose of the ancillary sanction of disqualification from public affairs must also be considered. For, in my view, it is necessary to examine not only the legal disadvantages that will lead the convicted person back into society, but also the response that the acts committed by the convicted person require from the state, which represents the majority of society, on the basis of the principle of the people's sovereignty. The principal penalty imposed on the offender (in this case, an executable custodial sentence) is merely the primary response to the offence committed by the offender (i.e. the actual punishment), but it is primarily a sanction for the violation of the protected legal subject-matter. However, by imposing a ban on public affairs, the law enforcement authorities can also react if the convicted person has violated the rules of social coexistence to such a serious extent that he or she is unworthy to participate in the conduct of society[17] (such as the conclusion or ratification of a social contract). Thus, in fact, to be unworthy is not a sanction for the act committed, nor a punishment, but a moral stigmatization, an expression of disapproval on the part of the majority of society. And this unworthiness may result in exclusion from active voting. At the same time, I also agree with the views expressed above, i.e. in my opinion, depriving a prisoner of the right to vote does not help him or her to become a more useful member of society, but in my view, it is the only way for the state to provide an appropriate response to the violation of the rules of social coexistence through criminal activity in the exercise of its criminal power. Nevertheless, as we will see later, the clarification, development, and improvement of case law cannot be considered closed with regard to the issue under examination.

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[16] Itzkowitz, Oldak, *supra* note 8, pp. 739-740.

[17] In this context, Ákos Domahidi says that " the point of the need to restrict rights is to disenfranchise individuals unworthy of public affairs." In his view, an offender is considered unworthy of public affairs if his or her conduct (i.e. the crime he commits) grossly offends the moral and legal norms of society. Á. Domahidi, "70. § [Választójog]", in A. Jakab (ed.), *Az Alkotmány kommentárja I-II.*, Századvég, 2009, pp. 2478-2479.

II. The Relationship Between Crime and Voting Rights in the International Context

The history of the development of the right to vote has always been marked by various censures, including, as we have seen in point I, the restriction for the commission of a criminal offence. In this section of the study, I will look at the international regulation of this restriction and the practice in the various countries.

1. International Regulatory Environment

The 25th General Comment of the UN Human Rights Committee[18] (which I alluded to in the introduction), for example, in paragraph 14, recognises the restriction of the right to vote on the grounds of criminality. Paragraph 14 stipulates as a condition that the duration of the disqualification for such a reason must be proportionate to the gravity of the offence and the penalty for it.[19] The same point also states, however, that deprivation of liberty (e.g. a pre-trial detention or a detention order) cannot, in itself, constitute a ground for restricting the right to vote, as it can only be based on a final judgment. The Venice Commission, in its Opinion No 190/2002, also considers it possible to disqualify a person from voting if he or she has committed a serious offence, if the disqualification is based on a legal provision, and if it is decided by a court

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[18] UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

[19] This requirement has been examined in several cases by the UN Human Rights Committee. For example, an analysis of Luxembourg's practice showed that in the period under review, a large number of criminal proceedings (as an additional punishment) had resulted in the quasi-automatic disenfranchisement of convicted persons, in clear violation of the above requirement (see: CCPR/CO/77/LUX (HRC, 2003) point 8). As for the UK, the UN Human Rights Committee has called for a review of the rules that automatically disenfranchise all prisoners sentenced to imprisonment (see: CCPR/C/GBR/CO/6 (HRC, 2008) point 28).

which takes into account the requirement of proportionality.[20] However, in a 2005 report[21] (on restrictions on general suffrage), the Venice Commission also stated that prisoners should be allowed to exercise their right to vote without restriction, unless they have also been banned by a court from exercising public affairs. However, the application of a disqualification from public affairs should not be automatic and should be subject to the criteria of necessity and proportionality.[22] In addition to the above, the Venice Commission has also addressed the issue of the right to vote of persons subject to criminal proceedings and persons whose liberty is restricted, and has established, in accordance with the principle of the presumption of innocence, that such persons cannot be deprived of their right to vote.[23]

So international regulatory and judicial practice shows a relatively uniform picture of the (active) right to vote for offenders: it considers restrictions on the right of offenders to vote to be reasonable and permissible.[24]

2. The Case of the European Court of Human Rights

In the context of international jurisprudence, it is primarily the case law of the ECtHR that is worth examining, including the case of *Hirst v. the United Kingdom*[25] on the one hand and the case of *Scoppola v. Italy*[26] on the

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[20] See point I.1.1.6.d) of Venice Commission Opinion No 190/2002.

[21] Report on the Abolition of Restrictions on the Right to Vote in General Elections [CDL-AD(2005)11].

[22] *Ibid*., point VII, subpoint 41.

[23] See: Europe's Electoral Heritage [CDL 82002) 7rev], point II, subpoint B. 1. d.

[24] The practice of the ECtHR shows that it has always accepted the prevention of crime, the promotion of civil responsibility, and respect for the rule of law as legitimate objectives for restricting the right to vote of prisoners. Antonia Meyer argues, in the context of a restriction on the right to vote because of the commission of a crime, that if it is proportionate to the seriousness of the crime committed, it may be a permissible restriction on the right to vote. A. Meyer, "Grenzen des Unionsbürgerschaftlichen Wahlrechts in der Europäischen Union?", *Freilaw*, 2017, Issue 1, p. 3.

[25] See: *Hirst v. the United Kingdom*, Application no, 74025/01, Judgment of 6.10.2005.

[26] See: *Scoppola v. Italy*, Application no, 126/05, Judgment of 22.05.2002.

other. In the case *of Hirst v. the United Kingdom*[27], decided by the Grand Chamber of the EctHR in 2005, the panel ruled that Britain had violated Article 3 (the right to free elections) of the First Additional Protocol to the European Convention on Human Rights (ECHR) when a person who had been convicted and sentenced to a final sentence was automatically disfranchised without any further investigation. In its reasoning for the judgment, the ECtHR argued that persons sentenced to imprisonment continue to enjoy all the fundamental rights guaranteed by the ECHR, except the right to freedom of movement and personal liberty. Consistent with this, however, is of course (as the ECtHR has argued) the right of states to defend themselves against persons whose conduct threatens the rule of law and democracy – by excluding them from the scope of the people's sovereignty (and this is compatible with Article 3 of the First Additional Protocol to the ECHR). However, this exclusion may only be applied if it is proportionate to the seriousness of the offence committed. However, the ECtHR ruled that it would necessarily be disproportionate for the state to deprive all prisoners of their right to vote[28] – regardless of the length of the sentence and the seriousness of the offence committed. Nevertheless, in the conclusion of this case, the ECtHR did not draw the conclusion that only an individual decision of a court (i.e. not the fact of a custodial sentence) can exclude a person from exercising his or her right to vote on the basis of the commission of a criminal offence, but identified several possible solutions instead of automatic disfranchisement.[29] According to the ECtHR, it is also com-

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[27] Later, several similar cases were brought against the United Kingdom. For example the McLean *and Cole v. the United Kingdo*m, Application no, 12626/13 and 2522/12, Judgment of 11.06.2013; *Dunn and Others v. the United Kingdom*, Application no, 7408/09 and 566/10, and 578/10, Judgment of 13.05.2014; *Firth and Others v. the United Kingdom*, Application no, 47784/09, Judgment of 12.08.2014; *McHugh and Others v. the United Kingdom*, Application no, 51987/08, Judgment of 10.02.2015.

[28] In this respect see also the ECtHR decision in *Kulinski and Sabev v. Bulgaria* (Application no, 63849/09, Judgment of 21.07.2016).

[29] In this respect, the court concluded that the legislature must decide whether to link the restriction of voting rights to a specific offence or to a specific gravity of offences, or, for example, to give the sentencing court a wide discretion to deprive the convicted person of his or her right to vote. See more: E. Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", *Human Rights Law Review*, 2014, Issue 3, pp. 503-540.

patible with the ECHR for a legislator to make disqualification from voting conditional on the commission of specific or serious offences, or to leave its application to the discretion of the court.[30] The ECtHR has subsequently confirmed this position in a number of cases, and has even explicitly concluded that any legislation which automatically excludes those sentenced to imprisonment from the exercise of the right to vote is in breach of the ECHR. However, in the case *of Frodl v. Austria*[31], the ECtHR went even further, stating that disenfranchisement for a criminal offence must be based on an individual judicial decision, taking into account the individual circumstances of the offender, and the offence committed must be related to the purpose of elections or democratic institutions. However, the ECtHR judgment in the case *of Scoppola v. Italy* was a significant turnaround from the *Frodl case*.[32] The ECtHR has maintained its previous practice that the legitimate aim of disfranchisement for a criminal offence is prevention, respect for the rule of law, and promotion of individual responsibility. However, it explicitly departed from the test of proportionality set out in the *Frodl case*. Instead of requiring a judge to decide on a case-by-case basis whether to restrict the right to vote on the basis of a criminal offence, it left open the possibility for states to decide freely, as in the *Hirst case*, whether to leave it to the legislature or the courts to determine when it is proportionate to disqualify a convicted person from exercising his or her right to vote. The ECtHR's decision in the *Scoppola case* found that in the *Frodl case* the ECtHR had applied the requirements of the *Hirst case* too broadly. Thus, in the *Scoppola case*, the ECtHR considered Italy's quasi-automatic deprivation of the right to vote for those sentenced to more than 3 years' imprisonment to be compatible with the ECHR. However, with regard to the limitation by the legislature, the ECtHR[33] has also underlined as

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[30] It is worth noting that several judges attached a dissenting opinion to this decision of the ECtHR, in which they expressed their disagreement with the ECtHR's decision, saying that the body had in fact stepped on the ground of legislation.

[31] See: *Frodl v. Austria*, Application no, 20201/04, Judgment of 8.04.2010.

[32] For more on this, see: J. R. Jaramillo, "Scoppola v. Italy (No. 3): The Uncertain Progress of Prisoner Voting Rights in Europe", *Boston College International and Comparative Law Review*, 2013, Issue 3, pp. 32-46.

[33] From the ECtHR's jurisprudence (in addition to the above three cases), it is worth highlighting, among others, the *Söyler v. Turkey* case (Application no, 29411/07, Judgment of 17.09.2013), in which the ECtHR ruled that Turkey had violated Article 3 of the First

a requirement that in this case rules must be drawn up to ensure that automatic disenfranchisement is avoided.[34]

On the basis of the ECtHR's jurisprudence, it can therefore be concluded that, although it is permissible to restrict the right to vote on the grounds of the commission of a criminal offence, this restriction cannot be automatic. The *Scoppola judgment* does allow countries to make the restriction conditional on a sentence of imprisonment for a certain period, but this must be based on a separate decision of the court.

3. Country-Specific Practices Regarding Restrictions on Voting Rights for Criminal Offences[35]

Having reviewed the above, it is important to look also at the practice of some (mainly European) countries in relation to the right to vote for people sentenced to imprisonment. In this respect, we can basically distinguish three groups: firstly, countries where there are no restrictions on the right to vote, secondly, countries where, despite the consistent practice of the ECtHR, the disfranchisement of prisoners is automatic, and thirdly, countries (such as Hungary) where there is some differenti-

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Additional Protocol to the ECHR by depriving prisoners of the right to vote in cases of both conditional release and suspended sentences. (A similar ruling was made by the ECtHR in the *Murat Vural v. Turkey* case [Application no, 9540/07, Judgment of 21.10.2014]). The case of *Anchugov and Gladkov v. Russia* lso deserves special mention (Application no, 11157/04 and 15162/05, Judgment of 4.07.2013), in which the ECtHR ruled that Russia had violated Article 3 of the First Additional Protocol to the ECHR by depriving convicted persons of their right to vote, regardless of the length of the sentence, the nature of the offence, and its gravity. For details of the cases, see: Dzehtsiarou, *supra* note 14, pp. 101-102.

[34] It would be disproportionate to extend the disfranchisement to all prisoners held in prisons, regardless of the length of their sentence and the seriousness of the offence they have committed. E. Bodnár, "Választójog", in A. Jakab, B. Fekete (eds), *Internetes Jogtudományi Enciklopédia*, p. 51, available at: http://ijoten.hu/szocikk/alkotmanyjog-valasztojog [last accessed 21.11.2023]

[35] I used the following methodology to describe and analyse the regulatory practices in each country. Country practices can be grouped into three categories (as shown in the study). This grouping is not only valid for European countries, but also for countries worldwide (this is confirmed by the example of Canada, which can be considered as a "sample country" of group 1). However, given that the study focuses on Hungarian practice, I have mainly examined European countries in the grouping.

ation (the disfranchisement depends either on the gravity or the nature of the offence, or on the imposition of a secondary penalty, and thus in each case on the individual decision of the courts).

1. The first group includes, for example, *Canada*, where the Supreme Court took a position on the issue when it ruled in a case that a statutory provision automatically disqualifying people sentenced to more than two years' imprisonment from voting was invalid.[36] In that decision, however, the Supreme Court did not say that the detainee had the right to vote, but that the state could not prove that the exclusion of all detainees *ipso iure* was necessary and proportionate.[37] Among the European countries that do not restrict the right to vote for criminal offences, the *Czech Republic* is an example, but the legislator has restricted the right to vote for prisoners in local elections – but no such rules can be found for parliamentary elections.[38] Also included in this group are *Denmark*, *Finland*, *Latvia*, *Spain,* and *Sweden*.[39]
2. The second group includes countries where a prison sentence continues to result in automatic disfranchisement. This includes, for example, *Bulgaria*, where the Constitution states that a person serving a prison sentence does not have the right to vote or to stand for election.[40] And in *Estonia*, Article 58 of the Constitution of the Republic of Estonia provides for a law restricting the right to vote of Estonian citizens who have been convicted by a court and are serving their sentence in a penitentiary. When examining the countries in this group, it is important to note that in the *United Kingdom*, despite the relevant ECtHR rulings, almost automatic disqualification from voting continues to apply to all per-

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[36] A. Gray, "Securing Felons' Voting Rights in America", *Berkeley Journal of African-American Law & Policy*, 2014, Issue 1, pp. 15-17., and G. E. Kaiser, "The Inmate as Citizen: Imprisonment and the Loss of Civil Rights in Canada", *Queen's Law Journal*, 1971, Issue 2, pp. 208-277.

[37] Vig, *supra* note 12, p. 75.

[38] *Ibid*., p. 76.

[39] In this context, it is worth noting that in 2018, there was an initiative in Florida to change the rules that barred convicts from voting for life. See more: M. Morse, "The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida", *California Law Review*, 2021, Issue 3, pp. 1143-1198.

[40] See Articles 42(1) and 65(1) of the Constitution of the Republic of Bulgaria.

sons sentenced to imprisonment.[41] Similar legislation has been in place in *New Zealand* since 2010.[42]

3. The third group of countries has the most diversified regulation. For these countries, additional subgroups can be defined, in line with the ECtHR's decision in the *Scoppola case*.

   The first subgroup includes countries where the decision to deprive a person of his or her right to vote is taken on a case-by-case, purely judicial basis. This includes *Romania*, where a judge can deprive a convicted person of his or her right to vote if he or she is sentenced to at least two years' imprisonment; and (in some respects, albeit on the basis of exactly the opposite logic) *France*, where the sentence of imprisonment deprives the person concerned of the right to vote, but the sentencing judge has the option of allowing the prisoner to vote.[43]

   The second subgroup includes states where the legislator determines the cases in which the sentence of imprisonment also deprives the prisoner of the right to vote.[44] This may depend on the nature of the offence (e.g. in *Norway*, where this is possible for offences of treason and offences against national security, with the exception that the discretion of the judge is also allowed) or may depend on the length of the sentence. The latter includes, for example, *Austria*, where deliberate offenders sentenced to at least one year's imprisonment are disfranchised, or *Italy* (where a min-

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[41] The ECtHR later opened new proceedings against the UK over the lack of change. See: *Greens and M.T. v. The United Kingdom*, Application no, 60041/08 and 60054/08, Judgment of 23.11.2010, in which the court reminded the UK to respect the deadlines. See more: Bates, *supra* note 29, pp. 503-540.

For more on the UK position following the ECtHR decision, see: S. Foster, "Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote", *Human Rights Law Review*, 2009, Issue 3, pp. 489-507.

[42] A. Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed", *New Zealand Law Review*, 2011, Issue 3, pp. 443-474.

[43] Vig, *supra* note 12, p. 76.

[44] However, it is important to ensure that disenfranchisement is only imposed for serious offences. In the case of less serious offences, the application of this legal disadvantage raises – also on the basis of the ECtHR's practice – the question of the Convention's violative character. See in the context of: R. M. Re, C. M. Re, "Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments", *The Yale Law* Journal, 2012, Issue 7, pp. 1584-1670.

imum of 2 years' imprisonment is required), and *Poland* (where a minimum of 3 years' imprisonment is required).[45]

The third sub-group includes countries where, on the one hand, the legislator defines the range of offences for which a conviction may result in the deprivation of the right to vote, but leaves the deprivation to the discretion of the judge. Such a system can be observed, for example, in *Greece* (where the judge has the possibility to apply this sanction in a differentiated, graduated system), or in *Germany*, where the court can decide to restrict the active electoral right in case of imprisonment for certain offences (e.g. against the state and state bodies or electoral offences) (but the convicted person loses his passive electoral right for 5 years in any case).[46]

The practice in the countries studied is therefore far from uniform. Although most of the countries are in line with the *Scoppola case* (although there are also a number of national specificities), many countries (e.g. the United Kingdom) still adhere to the logic of "civil death" and consider offenders inherently unworthy of the right to vote.

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[45] Vig, *supra* note 12, p. 76.

In relation to the 3-year rule, it is worth referring to a 2007 Australian High Court decision (case of *Roach v. Electoral Commissioner*). In 2006, the Federal Parliament passed legislation introduced by the Howard conservative government that denied the vote in federal elections to anyone who, on polling day, was serving time for an offence. 2 Prior to this, only prisoners serving three years or more - or anyone unpardoned of treason - were disenfranchised. In 2007, the High Court, Australia's 'top' court, struck down the blanket ban on prisoner voting in a suit brought by Vicki Roach, an indigenous woman serving a six year sentence, who claimed that the ban was inconsistent with the Australian Constitution. The Court agreed by a majority of 4-2,4 and instead upheld the prior three year rule. See: G. Orr, G. Williams, "The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia", *Election Law Journal*, 2009, Issue 2, pp. 123-140.

[46] Bodnár, *supra* note 6, p. 226.

III. The Practical and Constitutional Issues Raised by the Hungarian Legislation in the Light of the Generality of Electoral Law

Following an overview of international practice and the categorization that can be determined on the basis of the regulations of individual countries, it is essential to take a closer look at the legal environment and enforcement practice in Hungary.

The Hungarian Fundamental Law[47] (in addition to disqualification from voting by a court decision on the grounds of reduced capacity to discern) also allows for disqualification from voting on the basis of a conviction for a criminal offence (on the grounds of unworthiness). However, for this reason, a person can only be disqualified from voting (i.e. deprived of the right to vote in addition to the right to stand as a candidate[48]) if he or she is disqualified from public affairs (as a secondary penalty) by a court.[49] Article XXIII (6) of the Hungarian Fundamental Law states that "a person who has been disqualified from voting by a court of law for having committed a criminal offence […] shall not have the right to vote" – but the Fundamental Law refrains from laying down detailed rules. Similarly, the Act CCIII of 2011 on the Election of

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[47] In article XXIII(6).

[48] According to Hungarian law, the passive right to vote is automatically lost when the person is sentenced to imprisonment (and compulsory medical treatment). According to paragraph (3) of Article 2 of Act CCIII of 2011 on the Election of Members of Parliament, e.g. "any person serving a sentence of imprisonment or a sentence of compulsory treatment in an institution ordered by a final judgment shall not be eligible to stand as a candidate in elections to Parliament". Pursuant to Section 1 (4) of Act L of 2010 on the Election of Local Government Representatives and Mayors "any person serving a sentence of imprisonment or a sentence of compulsory treatment in an institution ordered by a final judgment in criminal proceedings shall not be eligible to stand as a candidate in elections for local government representatives and mayors.". Pursuant to Article 2/A(2) of Act CXIII of 2003 on the Election of Members of the European Parliament " Any person serving a sentence of imprisonment or a sentence of compulsory treatment in an institution under a criminal procedure which has the force of res judicata shall be ineligible to stand as a candidate for election to the European Parliament."

[49] Similar legislation can be observed in Germany. S. Bühler, "Die Aberkennung des aktiven Wahlrechts von Strafgefangenen nach § 45 Abs. 5 StGB – eine noch zeitgemäße 'Nebenfolge' der Verurteilung?", *Freilaw*, 2017, Issue 1, p. 7.

Members of Parliament (hereinafter: Act CCIII of 2011), Act L of 2010 on the election of local government representatives and mayors (hereinafter: Act L of 2010), and Act CXIII of 2003 on the election of the members of the European Parliament do not contain rules on the restriction of the right to vote due to a criminal offence.[50] In this respect, therefore, we can only take as a starting point the provision of the Hungarian Fundamental Law that only the court can decide on the disfranchisement of a person for a criminal offence. In this regard, it is therefore necessary to examine how the current Hungarian Criminal Code Act C of 2012 (hereinafter: the Criminal Code) provides in this respect. The Article 61 (2) (a) of the Criminal Code provides that "Persons deprived of civil rights (…) a) shall not have the right to vote and may not participate in any referendum and popular initiative, (…)." Paragraph (1) of the same § states that "any person who is sentenced to executable imprisonment for an intentional criminal offence, and is deemed unworthy of the right to participate in public affairs, shall be deprived of these rights" – and its duration may be between one and ten years in accordance with § 62 (1). The period of deprivation of liberty does not include the time during which the convicted person is serving a sentence of imprisonment or escapes from the penitentiary. It follows that a person who has been disqualified from public affairs by the court as an ancillary punishment may not exercise his or her right to vote during the period of imprisonment and during the period of disqualification from public affairs starting from the completion of the sentence (or from the date of his or her release on parole).[51] From the above, it is also clear that only the executable imprisonment can be accompanied by the imposition of

[50] Article 98 (1) of Act XXXVI of 2013 on Electoral Procedure provides only that "the National Election Office keeps the register of citizens who are not entitled to vote. The register shall include citizens of legal age and minors over the age of seventeen who (...) b) are serving a sentence of compulsory institutional treatment ordered in criminal proceedings, c) are disqualified from public office, d) are serving a sentence of imprisonment."

[51] The disqualification from public affairs thus constitutes a specific double legal disadvantage: on the one hand, it deprives the convicted person of certain rights and, on the other hand, it prevents him from acquiring certain rights for the duration of the secondary sentence. Belovics, Gellér, Nagy, Tóth, *supra* note 13, p. 612.

a disqualification from public affairs[52], and only in this case can the disqualification from active voting be imposed. This means that it is possible to be disqualified from voting only for a criminal offence, but not for a misdemeanour, so, for example, people serving a detention order or a paying a fine still have the right to vote in any case. Additionally, there should be no restriction of the right to vote in the case of other sentences, even if, for example, the fine or community service is replaced by imprisonment. In addition, people in pre-trial detention and those on temporary compulsory treatment can also vote. A custodial sentence does not therefore automatically result in the loss of the right to vote, as exclusion from the right to vote always requires individual discretion and an independent judicial decision on the exclusion. It is also important to point out that, under the principle of equal treatment, prisoners can exercise their right to vote in EU elections under the same conditions as those based on nationality, so if a court deprives them of their right to vote in national parliamentary elections, they will not get it back in European elections. Community law does not give rise to a *sui generis* right to vote, even if an EU citizen is imprisoned in another Member State and, while his or her own country would allow him or her to vote, the law of the state of detention would not.[53]

1. Historical Perspectives in Hungary

Following an overview of international practice and the categorization that can be determined on the basis of the regulations of individual countries, it is essential to take a closer look at the legal environment and enforcement practice in Hungary.

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[52] In the context of the ancillary punishment of disqualification from public affairs, it is worth noting that the Code of Csemegi already recognised, in addition to the loss of office, the suspension from the exercise of political rights, which in practice meant the disqualification from active and passive suffrage. However, its application has shown serious inconsistencies (for example, it made the suspension of political rights compulsory for the perpetrators of theft, embezzlement, robbery, and extortion, but made the loss of office compulsory only for crimes against life). See more: Belovics, Gellér, Nagy, Tóth, *supra* note 13, p. 610.

[53] É. Márton, A. Princz, N. Vajcs, "A szabadságvesztésre ítéltek választójoga", *Börtönügyi Szemle*, 2008, Issue 4, p. 71.

In Hungary (since the advent of electoral law), the legislator has always restricted the right to vote and to stand as a candidate for criminal offences. The April 1848 acts[54], for example, already precisely defined the crimes whose perpetrators were disqualified from voting.[55] The Transylvanian Act II of 1848, however, was more general, when it stated that those who are under sentence of criminal conviction shall not generally benefit from the exercise of the right to vote. The joint revision of the 1848 suffrage rules took place in 1874[56], under which the restriction of the right to vote for criminal offences was broadened to automatically cover all felonies and misdemeanours and press offences (only for the duration of the sentence). In addition, however, in this Act[57] the scope of disqualification from public affairs in the present sense was introduced: Act XXXIII of 1874 stipulated that those who had been deprived of their electoral rights (during the period of their deprivation) were not entitled to vote. The first half of the 20th century was characterized by a widening range of restrictions on the right to vote for criminal offences. In this context, the 1913 Act[58], for example, defined a wide range of restrictions, according to which not only those sentenced to imprisonment, but also those sentenced to a fine[59] or even remand in prison lost their right to vote. Moreover, this provision also provided, in point 9, for the maintenance of the disqualification from voting for a certain period of time after the completion of the term of imprisonment for certain offences[60] – which also bears similarities to today's rules on disqualification from

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[54] Article 2 of Act V of 1848 on the election of parliamentary ambassadors on the basis of people's representation.

[55] Such acts included disloyalty, smuggling, robbery, murder, and arson.

[56] In § 12 of the "Act XXXIII of 1874 amending and supplementing Act V of 1848 and Act II of Transylvania", cited several times before.

[57] In the Article 12(3) of Act XXXIII of 1874.

[58] Article 14 of Act XIV of 1913.

[59] For example, for being drunk in a public place causing a scandal (see Article 14 of Act XIV of 1913, and Article 3(7) of Decree 2.200/1922 of the ME.).

[60] See Article 14 § 9 of Act XIV of 1913: " Excluded from the right to vote is (...) anyone who has committed a crime for profit or against the State, or in the second paragraph of Article 172 of Article V of Act V of 1878 on Crimes and Misdemeanours, or in Articles 43-44 of Act XXXVI of 1908 on the amendment of the Penal Code, etc., or in Articles 43-44 of Act II of 1909 on Emigration, etc. or the provisions of Article 19 of the Law on Immigration or the Law on Emigration, within five years from the date of the sentence imposed or from the date of the expiry of the statute of limitations, and if he has already been con-

public affairs. The People's Act I of 1918, adopted after the First World War, did not explicitly provide for a restriction on the grounds of criminal offences, but it referred[61] to the exclusion from the right to vote of persons who are suspended from exercising their political rights. The 1918 Act on the Election of Members of Parliament[62], adopted in the same year, similarly to the 1913 electoral law, excluded the exercise of the right to vote for the period following the period of imprisonment[63], and already also declared the temporary disfranchisement of parolees.[64] The electoral legislation of 1919[65] and 1922[66], as well as Act XXVI of 1925 on the Election of Members of Parliament[67], laid down stricter rules than the above, as it was already considered a ground for exclusion if criminal proceedings were instituted against the person concerned or a decision of indictment was issued against him, and if a main hearing was scheduled in his case. In addition, under the 1922 legislation, being sent to a workhouse or placed under remand also resulted in disqualification from voting. Act VIII of 1945, adopted after World War II, further extended the scope of exclusions, e.g. it excluded from the electorate anyone against whom the People's Prosecutor's Office had issued an indictment, or anyone who was in police custody (interned).[68] In Act XX of 1949 (i.e. the former Constitution), the enemies of the working people were excluded from the right to vote, which was, by definition, a rather broad category. Act II of 1953 amending the legislation on parliamentary elections, on the other hand, deprived of the right to vote persons disqualified from public office, persons serving a sentence of imprisonment for a criminal offence, persons under remand in custody, and persons in po-

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victed once for one of the same offences, within ten years from the date of the sentence imposed or from the date of the expiry of the statute of limitations (...)"

[61] In § 3, point 1.

[62] Article 11, points 9-10 of Act XVII of 1918.

[63] A similar regulation was provided for in Section 28(1) of Act XIX of 1938 on the Election of Members of Parliament.

[64] Similarly, the United States of America's 1918 Voting Rights Act excluded felons from the right to vote. F. A. Magruder, *American Government with a Consideration of the Problems of Democracy*, Allyn and Bacon, 1921, p. 361.

[65] See Decree No. 5.985/1919. of the ME., § 3, point 2.

[66] See Decree No. 2.200/1922. of the ME., § 3, points 8-14.

[67] See Article 6 § 12 of Act XXVI of 1925.

[68] See Act VIII of 1945, § 5, points 5-6.

lice custody or under police supervision.[69] Following the amendment to the Constitution adopted after the change of regime, the constitutional legislator excluded from the right to vote those who are banned from public affairs, those serving a final prison sentence, and those sentenced in criminal proceedings to compulsory treatment. This regulation did not change until the entry into force of the Fundamental Law.

2. Constitutional Dilemmas Based on Hungarian Practice

It is clear from the above that both jurisprudence and international practice uniformly consider disenfranchisement for the commission of a criminal offence to be permissible. However, this does not automatically lead to the conclusion that Hungarian judicial (and even regulatory) practice is problem-free. On the basis of the generality of the right to vote, the aim should be to ensure that only the most obvious cases of exclusion from the right to vote are taken into account.

As we have seen above, the grounds for deprivation of the right of reply for the commission of a criminal offence are based on the breach of a social contract or on unworthiness in the exercise of public affairs, including the people's sovereignty. If we compare this idea with the international standards, we can see that the Hungarian legislation fully complies with international requirements, and even exceeds the (guiding) benchmark set in the *Scoppola case*, since the Fundamental Law makes the deprivation of the right to vote dependent on an individual judicial decision in each case (which, however, is not the only possible solution, as we have seen in the case of *Italy* or *Poland*). It follows from the Hungarian legislation that only those prisoners who, in addition to being sentenced to a custodial sentence, are also disqualified from public affairs lose their right to vote. However, if a prisoner is not disqualified from public affairs while serving a custodial sentence, he or she may participate in elections and referendums while in prison.[70] It is there-

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[69] See Act II of 1953, § 2.

[70] The Hungarian Commissioner for Fundamental Rights has also addressed the issue of the obligation for prison authorities to actively contribute to the exercise of and access to the right to vote by prisoners. See *inter alia* the report in case AJB-2095/2014.

fore clear that the Hungarian legal provisions (as opposed to the pre-Fundamental Law deprivation of the right to vote, which automatically entails a sentence of imprisonment regardless of the gravity and nature of the crime committed) are in line with international standards (and in some respects even go beyond them). According to Zoltán Pozsár-Szentmiklósy, however, it is also worth recalling that in practice, the court's decision on disqualification from voting (i.e. disqualification from public affairs) for a criminal offence does not mean an individualized examination adapted to the nature of the offence committed, but in almost all cases a secondary penalty in addition to the final custodial sentence. In his view, the exception is therefore the general rule in judicial practice, thus maintaining the general/automatic exclusion from the right to vote under the previous legislation.[71] This point was reinforced by the OSCE/ODIHR Limited Election Observation Mission's final report on the 2014 parliamentary elections in Hungary, which found that a very high proportion of persons sentenced to a final custodial sentence continue to be ineligible to vote.[72] In this respect, Mónika Weller is also of the opinion that disqualification from public affairs is practically automatically applied alongside the imposition of a custodial sentence, and

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In this regard, it is also worth pointing out that Article 24.11 of the European Prison Rules provides that "the prison authorities shall pay attention to the possibility for prisoners to participate in elections and referenda and other events in public life; provided that the exercise of this right by the person concerned is not restricted under domestic law."

Point 6 of the Council Recommendation on the electoral, civil, and social rights of detainees [Rec (62) 2] reminds Member States that "the mere fact of detention does not prevent a detainee from exercising his civil rights in person or through a representative."

[71] See more: Z. Pozsár-Szentmiklósy, "Alapjogok az új választójogi szabályozásban", *MTA Law Working Papers*, 2014, Issue 16, pp. 1-2.

[72] According to the report, more than 38,000 criminals have been disenfranchised, of whom around 26,000 have already served their prison sentences. According to the OSCE/ODIHR, restrictions on the voting rights of the convicted and former convicts should be reviewed to ensure that the restriction is proportionate to the crime committed and that the restriction is clearly defined in law. In addition, the current practice in the courts of depriving almost all felony offenders of their right to vote for a period longer than their prison sentence should be reviewed. Available at: https://www.osce.org/odihr/elections/hungary [last accessed 21.11.2023]. And more: E. Bodnár, "A Velencei Bizottság választási ajánlásainak érvényesülése a magyar szabályozásban és bírósági gyakorlatban", *Jogtudományi Közlöny*, 2018, Issue 3, p. 142.

that it is therefore essential to develop a more differentiated jurisprudence.[73]

In the light of the above, we have to examine the question (accepting the possibility of restricting the right to vote on the grounds of criminal offences, but also the importance of the fact that, in order to ensure the most complete enforcement of the universality of the right to vote, the court may apply the restriction only in the most obvious cases), of what trends can be inferred from Hungarian judicial practice in the light of the Hungarian legislation, and on the basis of these, whether the Hungarian practice can be considered forward-looking.

As a starting point for answering this question, it is worth examining and analysing the sentences handed down by the courts for criminal offences.[74] To this end, I addressed a request to the Hungarian National Office for the Judiciary[75] (hereinafter: NOJ)[76] and processed the available court statistics.[77] These show that for the years 2012–2022:

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[73] M. Weller, "Az emberi jogok európai egyezményének hatása a hazai jogalkotásra és jogalkalmazásra", in J. Tóth, K. Legény (eds), *Összehasonlító alkotmányjog*, Complex, 2006, p. 384.

[74] In this respect, only the data for the years following the entry into force of the Hungarian Fundamental Law are worth examining, since under the Hungarian Constitution in force before that date, all persons sentenced to a custodial sentence were automatically deprived of their right to vote.

[75] The National Office for the Judiciary (NOJ) is the administrative body of the Hungarian judicial system. In Hungary, there is a model of so-called judicial self-administration, i.e. the courts perform administrative tasks independently of other state bodies. Since 2012, this task has been carried out in Hungary by the NOJ, which is also responsible for the statistical analysis of sentencing practices.

[76] I put the following questions to the NOJ in the context of the data:

1. In the years under review, how many disqualifications from public affairs were imposed, broken down by year?

2. How many final convictions for criminal resulted in a custodial sentence?

3. In how many cases under question 2 was executable imprisonment imposed?

4. In the breakdown of questions 2 and 3, in how many cases did the courts impose prison sentences of less than 3 years and more than 8 years?

[77] Available at: https://birosag.hu/statisztikai-evkonyvek [last accessed 21.11.2023].

	Number of persons sentenced to imprisonment[78]	Number of executable custodial sentences			Number of sentences of disqualification from public affairs
		Total	Less than 3 years	More than 8 years	
2012.	23 589	8 094	6 645	214	7 559
2013.	21 809	7 827	6 354	215	7 313
2014.	22 435	8 149	6 407	268	7 522
2015.	22 793	11 544	9 592	296	7 675
2016.	20 943	9 201	7 317	281	7 140
2017.	21 064	8 237	6 881	378	6 956
2018.	20 432	7 526	6 041	247	6 734
2019.	19 186	7 161	5 764	219	6 443
2020.	15 793	5 284	4 279	136	4 697
2021.	17 399	6 367	5 125	194	5 571
2022.	18 581	7 196	5 784	228	5 787

The data in the table above show that in the period 2012-2022, (on average) only 38.6% of all custodial sentences were executable. However, in the case of the use of disqualification from public affairs as an ancillary sanction, the trend is that in 84.7%[79] of the executable custodial sentences the court also disqualified the prisoner from public affairs.[80] Based

[78] The figures shown in the statistical data reflect only the number of convicted persons of adult age, i.e. over 18 years of age, given that according to Article XXIII (1) of the Hungarian Fundamental Law only citizens of legal age are entitled to vote (both passive and active).

[79] If we compare the figures for the imposition of a disqualification from public affairs as an ancillary sanction to the total number of custodial sentences (which is not necessary in practice, as disqualification from public affairs can only be imposed in the case of an executable custodial sentence), we can see that on average 32.7% of custodial sentences include a disqualification from public affairs as an ancillary sanction.

[80] This figure is supported by a statistical analysis carried out by the Prosecutor General's Office in 2012, which puts the rate at 95%. Available at: http://www.mklu.hu/repository/mkudok8246.pdf [last accessed 21.11.2023].

on the statistical analyses, two further ratios are also worth recording, based on the length of the executable custodial sentences. In the case of convictions where the court applies a sentence of imprisonment of less than 3 years, it can be assumed that, based on the principles of the Hungarian Criminal Code on sentencing, the offence was of lesser gravity, less dangerous to society, based on the offence or the identity of the convicted person or the circumstances of the case. However, in cases where the length of an executable custodial sentence exceeds 8 years, it is reasonable to assume the seriousness of the offence committed and the high degree of danger to society posed by the convicted person. On the basis of these data, it can be concluded that, in 81% of the executable custodial sentences in the period under review, the court sentenced the offender to less than 3 years' imprisonment, and in only 3.1% of the executable custodial sentences was a sentence of 8 years' imprisonment or more applied.

The above statistics clearly show that the jurisprudential and OSCE/ODIHR positions detailed above can be considered justified in practice. It can be observed that in a significant number of executable custodial sentences of less than 3 years, the courts also automatically disqualify the sentenced person from exercising public affairs (including the right to vote) – as when, under the former Hungarian Constitution, the executable custodial sentence was automatically accompanied by loss of the right to vote.[81] It can therefore be stated that, despite the fact that with the entry into force of the Fundamental Law, the legal environment for the possibility of depriving people of their right to vote on the grounds of criminal offences has changed in a positive direction in line with international standards, and in many respects is even more forward-looking than European trends, there is still a significant restriction of fundamental rights in the activity of the courts in this respect.

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[81] In contrast, in Germany, although the regulatory environment is very similar, there are far fewer cases of prisoners being deprived of their right to vote. Statistics show that between 1978 and 2008, for example, there were only 178 cases, one in 2012 and none in 2013 and 2014. Bühler, *supra* note 45, p. 8.

Conclusions

It can therefore be seen from the above that disenfranchisement for criminal offences continues to be a source of problems because, although the regulatory environment is appropriate, the associated jurisprudence still does not follow a fundamental rights-friendly approach. However, before looking at possible solutions, I think it is important to reiterate that I believe it is necessary to maintain the possibility of restricting the right to vote on the grounds of criminal offences (as described above). Thus – in my opinion – a move in the direction of Hungary joining the group of countries that do not consider it permissible to restrict voting rights on the grounds of criminal convictions is not justified, not least because the current regulatory environment allows the legislator to differentiate properly and to decide on the question of the restriction of the right to vote in a specific way, based on the case (in this case, the gravity of the offence committed and the circumstances of the offender).

Against this background, I envisage three possible directions to address these concerns.

1. *One solution* (despite the appropriateness of the Hungarian legal environment) could be to switch between the directions set out in the *Scoppola case*. On the basis of this, similar to the Austrian, Polish, Italian, but mostly the Romanian model, the minimum period of imprisonment to be served could be defined in the section of the Hungarian Criminal Code on disqualification from public affairs (say, a minimum of two or three years), while in the case of a longer sentence of imprisonment to be served, the judge could decide, on the basis of further individual discretion, to apply the additional penalty of disqualification from public affairs and thus the disqualification from voting. This solution would be a further development of the current legislation, as the judge's individualized assessment obligation would still exist, but would limit the courts to applying disqualifications only in an average of 19% of executable custodial sentences, i.e. for the most serious offences (where courts impose executable custodial sentences of more than 3 years).

2. *Another possible direction* could be to differentiate the list of bans as an ancillary sanction to the disqualification from public affairs. According to Article 61 (1) of the Hungarian Criminal Code, a person who is prohibited by the court from public affairs will be subject to all the prohibitions listed in paragraph (2) (from (a) to (i) [82]) of the same Article. Thus, the court has no possibility to order a person banned from public affairs (according to the Article 61(2) of the Hungarian Criminal Code) from exercising public affairs only with regard to certain points. In the event that the amendment of this § of the Hungarian Criminal Code allowed the court, when imposing the ancillary penalty of disqualification from public affairs, to disqualify the convicted person from exercising public affairs only with regard to the points specified in the sentence, then, on the basis of an individualized examination, it would also be possible to disqualify the person concerned while retaining his or her active right to vote, e.g. 61(2)(c) of the Hungarian Criminal Code, or from exercising his or her passive right to vote, or from exercising the rights set out in other points of this paragraph.
3. The third possible solution is the drafting of case-law guidelines for the practice of the judiciary. In this case, the Hungarian supreme judicial forum, the Curiae, should determine the criteria on the basis of which the courts should decide on the imposition

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[82] According to this provision of the Hungarian Criminal Code:
" (2) Person disqualified from public affairs
a) shall not have the right to vote, participate in referendums and popular initiatives,
b) may not be an official,
c) may not be a member of a body or committee of a representative body of the people, nor participate in the work of such bodies or committees,
d) may not be delegated to the general assembly or body of an organization established by an international treaty proclaimed by law,
e) may not hold a military rank,
f) not be awarded a national decoration or authorized to receive a foreign decoration,
g) may not be a defence counsel or legal representative in official proceedings,
h) hold office in a public body or public foundation; and
i) be an executive officer of a civil society organization as defined in the Act on Civil Society Organizations."

of a disqualification from public affairs as an additional penalty to the sentence of imprisonment. This solution would further increase the discretion of the judge, but it could still be used to force the judges to make more rational decisions.

Whichever solution the legislator or the law enforcer opted for, it would certainly further strengthen the Hungarian practice, which is based on European standards.