

HOW THE SEATS ARE ALLOCATED IN THE ELECTORAL CONSTITUENCIES?

"When it comes to decision-making, it is the majority which counts,
but when it comes to representation, it is the proportion which matters." –
Victor Considerant, French Socialist politician, 1808-1893

Abstract

The process of allocation of seats to constituencies¹ in every country is usually defined as a process of translating votes into seats. The process itself requires protection of the principle of equality (equal weight of votes) and equal distribution of seats among the constituencies in a stable and standard ratio, according to several criteria such as, the number of resident nationals (including minors), the number of residents in the constituencies, the number of registered electors/ the number of registered voters in the electoral lists. When the allocation of seats among constituencies is presumed as quite divergent from the objective ratio, than the equal weight of votes (equal suffrage) is not maintained, but it is often prescribed as a breach. The result of such inequalities of representation is usually referred to in the electoral practice as gerrymandering, electoral geometry (in its "active"² and "passive"³ form) or as malapportionment⁴.

Robert Dahl once argued that 'one-person-one-vote principle' is inevitable condition for democracy and in a perfectly apportioned system every vote of the citizen should weigh equally. However, gerrymandering and malapportionment are common features of democracies at present. There are only a few lower chambers in the world that satisfies Dahl's criterion. In other words, lower chambers are typically malapportioned. The paper is explaining not only the constituencies as an electoral mechanism to translate votes into seats, but also all the shortcomings which are produced in the elections as a result of an active and passive electoral geometry which have caused malapportionment and electoral inequality.

Key words: constituency, election, electoral right, principles, standards, instruments, electoral equality

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¹ Constituencies are not an end in themselves but rather a useful vehicle for translating votes into seats in a way which maintains a link between categories of voters or populations, and members or groups of members of parliament. Constituencies are usually geographical, but this need not be the case. For example, in the Irish Senate there are two constituencies representing graduates of the state's two largest universities.

² The most blatant electoral geometry is "active", that is a distribution of constituencies causing inequalities in representation immediately it is applied.

³ Electoral geometry may also be "passive". In this case, the inequality arises from protected retention of an unaltered territorial distribution of seats and of constituencies. In order to avert this situation, two methods may be used. The first is regular reallocation of seats to the constituencies, and the second entails regular redistribution of the constituencies themselves. The first method is simpler but is usable only in multi-member constituencies; the second is mandatory where a system of single-member constituencies applies. Equal weight of votes tolerates certain inequalities of representation between constituencies provided that each constituent weight equally in determining the overall result. See more details: Report by Mr Pierre Garrone, "The Constitutional Principles of Electoral Law", in Collection Science and technique of Democracy, No. 25, New Trends in electoral law in a pan-European context, Sarajevo, 17-18 April 1998, Proceedings of the European Commission for Democracy through Law, Council of Europe Publishing, 1998, p.11-34.

⁴ Malapportionment is defined as "the discrepancy between the shares of legislative seats and the shares of population held by geographical units". See: David Samuels, and Richard Snyder, "The Value of a Vote: Malapportionment in Comparative Perspective," British Journal of Political Science 31, no. 4 (2001), p. 652.

I. INTERNATIONAL AND EUROPEAN STANDARDS FOR THE ELECTORAL LAW PRINCIPLES REGARDING ALLOCATION OF SEATS

The classic constitutional principles of electoral law⁵: universal, equal, free, secret and direct suffrage, as well as the frequency of elections which are commonly defined as a European electoral heritage, are regulated within the international and European instruments, the soft-law instruments and the case-law practice, as well as in the national constitutional provisions and in the national electoral law with a constitutional basis. The **International instruments are:**

- **United Nations Universal Declaration of Human Rights (UDHR) 1948,⁶ Article 21 identifies five basic premises of electoral democracy:** periodic and genuine elections, universal and equal suffrage, and secret voting:

(1) “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ...”

(3) “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”,

- **Article 21(3) in the 1948 Universal Declaration of Human Rights to the UN General Assembly resolution 64/155 (endorsed on 8th March 2010)** ‘Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization’.

- **International Covenant on Civil and Political Rights (ICCPR) 1966, Article 25(b)**

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors, and

- **Authoritative interpretations of the ICCPR by the Human Rights Committee in the form of General Comments 25 which states that:**

“Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant. “The vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”

The **European instruments are:**

- **Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention) and Article 3 of the First Protocol:**

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”,

⁵ Venice Commission, Electoral Law, CDL-EL (2013)006.

⁶ The UDHR is not a treaty, but several of its provisions are universally accepted and considered to be customary international law.

- **Venice Commission's Code of Good Practice on Electoral Matters (Code of Good Practice) Section 2.2.-2.4⁷**. Delimitation practices are also codified in the Code which suggest that delimitation should be done impartially, without detriment to national minorities, taking account of the opinion of a committee, the majority of whose members are independent and should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities. **Other key guidelines given in the Code are equal voting power through the even distribution of seats among constituencies**, which should be applicable at least to elections to lower houses of parliament and regional and local councils. The Code also proposes criteria for the allocation of seats to constituencies. These can be population or number of registered voters, but with a variation of not more than 10 percent. The distribution of seats must be reviewed at least every 10 years, preferably outside election periods.
- **Copenhagen Document (1990) from the Organization for Security and Co-operation in Europe (OSCE)** where the participating States recognized that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms.

In Paragraph 6, the Document provides: "The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect

⁷ 2.2. Equal voting power: seats must be evenly distributed between the constituencies. i. This must at least apply to elections to lower houses of parliament and regional and local elections: ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration. iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity). v. In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods. vi. With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries. vii. When constituency boundaries are redefined – which they must be in a single-member system – it must be done: - impartially; - without detriment to national minorities; - taking account of the opinion of a committee, the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities.

2.3. Equality of opportunity a. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to: i. the election campaign; ii. coverage by the media, in particular by the publicly owned media; iii. public funding of parties and campaigns. b. Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing. c. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections. d. Political party, candidates and election campaign funding must be transparent. e. The principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising.

2.4. Equality and national minorities. a. Parties representing national minorities must be permitted. b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage. c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect in accordance with their laws, their international human rights obligations and international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.

In paragraph 7.3 is entitled that: “To ensure that the will of the people serves as the basis of the authority of government, the participating States will ... guarantee universal and equal suffrage to adult citizens”.

The Soft-law instruments are the following:

- **OSCE/Office for Democratic Institutions and Human Rights (ODIHR) election monitoring observation reports and recommendations.**

The relevant case-law practice:

- Yumak and Sudak v Turkey Application No. (10226/03)⁸
- Bompard v. France No. 44081/2 hudoc (2006) DA
- Davis v. Bandemer 478 U.S. 109 (1986)⁹
- French Constitutional Council Case FRA-2001-1-001¹⁰
- Istvan Mátyus v. Slovakia, Communication No. 923/2000, U.N. Doc. A/57/40 (Vol. II) at 257 (2002), UN Human Rights Committee¹¹,
- SVK-1998-3-010¹²

II. NATIONAL LEGISLATION (CONSTITUTIONS AND ELECTORAL LAW)

The electoral principles (universal suffrage which must be equal, free, direct and secret) are regulated in the national constitutions¹³ and more precisely in the national electoral laws¹⁴.

⁸ [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-87363\"\]}](http://hudoc.echr.coe.int/eng#{\)

⁹ <https://supreme.justia.com/cases/federal/us/478/109/case.html>

¹⁰ <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/sample-of-decisions-in-relevant-areas-dc/decision/decision-no-71-44-dc-of-16-july-1971.135366.html>

¹¹ <http://portales.te.gob.mx/internacional/sites/portales.te.gob.mx.internacional/files/CASE%20OF%20MATYUS%20V%20SLOVAQUIA.pdf>.

¹² Also see informative Irish Cases: O'Donovan v. Attorney General (1961) I.R. 114, Murphy & McGrath v. Minister for Environment (2007) 6 JIC 0701.

In the Matter of Article 26 of the US Constitution and in the Matter of the Electoral (Amendment) Bill, 1961 (1961) 1 I.R., as well as US Supreme Court case *Baker v. Carr* (1962), case *Gray v. Sanders* (1963), case *Reynolds v. Sims* (1964), case *Gaffney v. Cummings* (1973), case *Burns v. Richardson* (1973), *Evenwel v. Abbott* (2013), and many others.

¹³ Article 38 (1), 50-51 of the Basic Law for the Federal Republic of Germany, Article 59(1), and 62 of the Romanian Constitution, Article 69(2) of the Spanish Constitution, Article 64 of the Albanian Constitution, Article 89 of the Armenian Constitution, Articles 26, 34-35 of Federal Constitutional Law of Austria, Articles 82-83 of the Constitution of Azerbaijan, Articles 61-63, 67-68 Of Belgium Constitution, Articles IV/1-IV/2 of Bosnia and Herzegovina Constitution, Articles 63, 67 of the Bulgarian Constitution, Articles 46, 47, 49 of the Constitution of Chile, Article 106 of the Costa Rica Constitution, Articles 71-72 of Croatia Constitution, Articles 62-63 of Cyprus Constitution, Articles 15-20 of the Czech Republic Constitution, IV Articles 28, 31 of the Denmark Constitution, Article 60 of the Estonian Constitution, Sections 24-25 of the Finland Constitution, Articles 24-25 of the French Constitution, Articles 4, 49-50 of the Georgian Constitution, Articles 51, 54 of the Greek Constitution, Article 2 (Chapter “The State-Parliament”) of the Hungarian Fundamental Law, Article 31 of the Constitution of Iceland, Articles 16-16, 18 of the Constitution of the Republic of Ireland, Articles 1, 3-4 of the Basic Law of Israel, Articles

III. ALLOCATION CRITERIA FOR CONSTITUENCIES' DESIGN

The key guideline in the Venice Commission's Code is **equal suffrage seen through equal voting power and equal distribution of seats among constituencies** which should be applicable at least for the elections to lower houses of parliament¹⁵ and regional and local councils. The **second, upper Parliament chambers** often did not represent the people, but the federal entities of a State, or its territorial units or districts. For the election of representatives of the first, lower chambers which represent the people, the inequalities of the voting right are inadmissible. However, **certain exceptions may exist for the benefit of regions in exceptional situations**.

Firstly, the physical extent of the constituency may be allowed for. For instance, Article 31(3)) of the Danish Constitution lay down as criteria for the appointment of seats not only the

55-57 of the Italian Constitution, Articles 50-51 of the Constitution of Kazakhstan, Article 41 of the Constitution of Republic of Korea, Article 70 of the Constitution of Kyrgyzstan, Section 2, Articles 5, 6 of the Latvian Constitution, Article 46 of the Liechtenstein Constitution, Chapter 4, Articles 51(6) of the Luxembourg Constitution, Articles 56, 61 and 62 of the Constitution of Malta, Articles 53, 56 of the Constitution of Mexico, Article 60 of the Constitution of Moldova, Article 53 of the Constitution of Monaco, Articles 2 and 22 of the Macedonian Constitution, Article 83 of the Constitution of Montenegro, Articles 62, 63 of the Constitution of Morocco, Article 57 of the Constitution of Norway, Article 149 of the Constitution of Portugal, Article 95 of the Constitution of the Russian Federation, Article 100 of the Constitution of Serbia, Articles 149, 150 of the Constitution of Switzerland, Article 1 section 3 of the USA Constitution.

¹⁴ Articles 74-76 of the Albanian Electoral Code, Articles 76-78 of the Armenian Electoral Code, Articles 29, 143 of the Election Code of Azerbaijan, Chapter 1, Articles 87, 88 of the Electoral Code of Belgium, Articles 9.1-9.6, 9.11 of the Election Law of Bosnia and Herzegovina, Articles 246-249, Annex No. 1 to Article 248 of the Election Code of Bulgaria, Articles 8, 16, 38-39 of the Croatian Act on the Election of the Representatives to the Croatian Parliament, Articles 24, 26, 48, 56, 58-59 of the Parliamentary Elections Act of the Czech Republic, Chapter 1 Part 2, 7, 10 of the Parliamentary Election Act of Denmark, Articles 1, 6-7 of Riigikogu Election Act of Estonia, Sections 5-6 of the Election Act of Finland, Part 2, Chapter 2, Articles L.125 of the Electoral Code of France, Articles 109, 110 of the Election Code of Georgia, Article 1 of the Ordinance, sections 1-6 of the Federal Elections Act of Germany, sections 3-4 of the Hungarian Act on the Elections of Members of Parliament, Articles 6-9 of the Act No. 24 Concerning Parliamentary Elections to the Althing of Iceland, Articles 9, 21, 22 of the Constitutional Law on Elections of Kazakhstan, Articles 20, 21, 24, 25 of the Public Official Election Act of Republic of Korea, Articles 13, 59 of the Constitutional Law on Presidential and Jogorku Konesh Elections in the Kyrgyz Republic, Articles 7, 8 of the Saeima (Parliament) Election Law of Latvia, Chapter 2, Articles 9, 14 of Law on Elections to the Seimas of Lithuania, Part 4, Article 17 of the General Elections Act of Malta, Articles 14, 18(2)(d), 32 of the General Law on Electoral Institutions and Procedures of Mexico, Article 73(2) of Moldovan Electoral Code, Article 12 of the Law on the Election of Councillors and Representatives of Montenegro, Articles 1, 2 of the Organic Law of Morocco, Chapter 11 of the Representation of the People Act (the Election Act) of Norway, Article 21 of the Election Act of Peru, Articles 193, 201-3, 256, 260-1 of the Polish Election Code, Articles 12, 13 of the Law Governing Elections to the Assembly of the Republic of Portugal, Article 10 of the Romanian Election Act, Articles 3, 7, 12 of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation, Article 4 of the Law on the Election of Members of the Parliament of Republic of Serbia, Section 44 of the Slovakian Election Law, Article 20 of the National Assembly Election Act, and Article 1 of the National Council Act of Republic of Slovenia, Articles 161, 162, 165, 166 of the Representation of the People Institutional Act of Spain, Chapter 4 Section 1, 2 of the Electoral Law of Sweden, Article 4 of the Macedonian Electoral Code, Article 4 of the Parliamentary Elections Law of Turkey, Article 1 of Law on Ukraine on Elections of People's Deputies, Section 2a of the U.S. Code.

¹⁵ For instance, the United States Senate and the Swiss Council of States consists of two members per state or canton. In the German Bundesrat the representation of each Land only marginally depends on the population of the Land (it may vary from three to six seats). On the other hand, the Spanish Senate comprises four senators per province (with exceptions for the island provinces) far more than are returned by the autonomous communities in proportion to their population.

number of residents and electors but also population density. Further, in Article 28 is stipulated that Greenland shall be represented by not more than two Folketing members, to prevent the results from being distorted by taking the territory's area into account.

Over-representation of (rural) areas with few residents is also quite widespread. For instance, in the Spanish Constitution (Article 68(2)) is established one so-called "basic deputy" to each province. The Constitution says that "the Law... assigns minimum initial representation to each constituency and allocates the remaining seats proportionally to the population".

Generally speaking, each country is **divided into electoral constituencies for the purpose of electing legislative representatives to an office. The type of boundary authority established and the rules this authority is obliged to follow vary across different countries.**

The most common criterion for drawing the electoral constituencies is the population as a number (Belgium, Brazil, Bulgaria, Chile, Costa Rica, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Morocco, Norway, Romania, Slovenia, Tunisia, Turkey).

The geographical/administrative division of the country is also an important allocation criterion for constituencies' design (Algeria, Brazil, Cyprus, Liechtenstein, Lithuania, Morocco, Switzerland, the U.S.). These electoral constituencies consist all of eligible voters who cast their ballots to elect representatives of their geographical/administrative area as well as their political, economic, social and other interests.

While single-member districts should be of the same size to guarantee equal weight of all votes, in multi-member districts the number of representatives *per constituency* should be decided not only to the above mentioned criteria, but also in accordance with other specific criteria or a combination of several criteria, such as, **the number of resident nationals (like in Austria), the number of registered voters (Azerbaijan, Croatia, Denmark, Hungary, Estonia, Iceland, Latvia, Portugal, Sweden, Macedonia, Ukraine, UK) etc.**¹⁶

Electoral constituencies or electoral districts in each country should be based on the principles of equal suffrage and proportionality. Equal suffrage as a general principle guarantees that each voter shall have the same number of votes and that everyone's vote is equal. The votes of all voters have the same weight in respect of the outcome of the election.

On the other hand, proportionality means that if two electoral districts are electing one seat in the parliament, the districts should have similar numbers of voters so that the principle of equality of votes is observed. This means that the census data is the most essential criteria for drawing the national electoral boundaries.¹⁷

IV. PRINCIPLE OF DEGRESSIVE PROPORTIONALITY IN THE EU

The Lisbon Treaty incorporated in the consolidated version of the Treaty on the European Union¹⁸, particularly Article 14(2))1, and Article 4 of the European Council Decision of 28 June

¹⁶ Venice Commission 2002: Explanatory Report, para. 13.

¹⁷ The population data used may be total population counts based on a census or voter registration data. For instance, in the United States, congressional districts are drawn based on a census count of the total population. Also other factors could influence electoral districting, including local administrative or natural boundaries, recognition of communities of interest, such as respecting ethnic or religious minorities' rights to elect representatives who would honor their concerns.

¹⁸ EU Treaty, OJ C 326, 26.10.2012.

2013¹⁹, establishing the composition of the European Parliament (EP)² have introduced the new principle of degressive proportionality for allocation of the seats in the European Parliament.

The European Council Decision states the composition of the European Parliament shall be revised with the aim of establishing a system to allocate the seats between Member States in an objective, fair, durable and transparent way. Decision shall be revised sufficiently far in advance of the beginning of the 2019-2024 parliamentary term on the basis of an initiative of the European Parliament presented before the end of 2016 with the aim of establishing a system which in future will make it possible, before each fresh election to the European Parliament, to allocate the seats between Member States in an objective, fair, durable and transparent way, translating the principle of degressive proportionality, taking account of any change in their number and demographic trends in their population, as duly ascertained thus respecting the overall balance of the institutional system as laid down in the Treaties²⁰.

The two proposed allocation methods²¹ that could satisfy the Decision requirements are the Cambridge Compromise²², and the Power Compromise²³.

According to Art. 10(2) of the EU Treaty, Citizens are directly represented in the EP. 2. The EP shall be composed of representatives of the Union's citizens (Art. 14(2) TEU). 3. Representation of citizens shall be degressively proportional (Art. 14(2) TEU). 4. The size of the EP shall not exceed 751 seats (Art. 14(2) TEU). 5. Every Member State shall be allocated at least 6 seats (Art. 14(2) TEU). 6. Every Member State shall be allocated at most 96 seats (Art. 14(2) TEU). There is a potential ambiguity in the term "Member State" over whether it refers to government or to people. When "Member State" is interpreted to mean "government", Art. 10(2) TEU decrees that the appropriate representative body is the European Council and the Council, rather than the EP. As far as the composition of the EP is concerned, the term "Member State" means peoples, that is, a Member State's citizenry.

¹⁹ European Council Decision of 28 June 2013 establishing the composition of the European Parliament, OJ L 181, 29.6.2013, p. 57–58, as well as OJ L 181, 29.6.2013, pp. 57–58 (www.uni-augsburg.de/bazi/OJ/2013L181p57.pdf).

²⁰ In the Decision further is stipulated that: 7. Any more populous Member State shall be allocated at least as many seats as any less populous Member State. 8. The least populous Member State shall be allocated 6 seats. 9. The most populous Member State shall be allocated 96 seats. 10. The principle of degressive proportionality shall require decreasing representation ratios when passing from a more populous Member State to a less populous Member State, where the representation ratio of a Member State is defined to be the ratio of its population figure relative to its number of seats before rounding.

²¹ Grimmett, G., Laslier, J.-F., Pukelsheim, F., Ramírez-González, V., Rose, R., Słomczyński, W., Zachariasen, M., Życzkowski, K., 2011, The allocation between the EU member states of the seats in the European Parliament. Cambridge Compromise. European Parliament Studies, PE 432.760

²² The Cambridge Compromise stated that "Every Member State is assigned a common number of base seats. The remaining seats are allocated proportionately to population figures, using the divisor method with upward rounding and subject to a maximum allocation. In the case of the current EP, the number of base seats is 5, so that the least populous Member State finishes with 6 seats, and the proportional allocation is capped in order to produce a maximum of 96 seats. For instance, the currently smallest State, Malta, ends with a final tally of 6 seats (with only 4 base seats, Malta would finish with 5 seats; with 6 base seats, it would finish with 7 seats). The initial assignment of 5 base seats to each of the 28 Member States utilises a total of 140 seats, leaving 611 seats for the proportional allocation. The remaining 611 seats are allocated using the divisor method with upward rounding. The allocation key to be determined is the so-called divisor (846 000). For example, when dividing the Austrian population 8 711 500 by 846 000, the resulting quotient is 10.3. This quotient is rounded upwards to obtain the number of proportionality seats (11). Thus Austria is allocated a total of 16 seats: 5 base seats plus 11 proportionality seats. A similar calculation is carried out for the other Member States. In the case of Germany, the quotient $5 + 97.003 = 102.003$ exceeds the capping and is replaced by the 96 seat maximum.

²³ The Power Compromise is a variant of the Cambridge Compromise that it may be explained as follows: "Every Member State is assigned a common number of base seats. The remaining seats are allocated proportionately to adjusted population units (that is, the population figures raised to a common power) using the divisor method with upward rounding".

In the case of the current EP, the number of base seats, the power, and the divisor are determined so that the least populous Member State is allocated 6 seats, the most populous is allocated just 96 seats, and the size of the EP is

It should be stressed out that there is a significant strain between the principles of direct representation and of degressive representation, as they are stipulated in the EU Treaty. The principle of direct representation supports allocation (of seats) proportional to population, while the principle of degressive representation favours allocation of seats by giving certain priority to the smaller states. The Cambridge Compromise may be viewed as prioritizing direct representation over degressivity. In contrast, the Power Compromise allows greater degressivity, but at some cost to direct representation.

The principle of degressive proportionality is however a paradoxical concept. It is presented in the EU debates as a manifestation of members-states' solidarity through the following sentence: "The more populous States agree to be under-represented in order to allow the less populous States to be represented better".

The specification of the principle of degressive proportionality itself has been recognized as in a **potential contradiction with the principle of equal voting power**, because the implementation of degressive proportionality could be the most challenging one. Reference to "Union citizens" appears to place all citizens on an equal footing. However, the principle of degressive proportionality discriminates the "citizens" by Member States²⁴. As said above, the citizens of more populous Member States agree to be under-represented in order to allow the citizens of less populous Member States to be represented better.

The Cambridge Compromise achieves degressive proportionality without distorting the meaning of "citizens" beyond the minimum. It does so in each of its two stages. The first stage of assigning base seats treats all Member States alike. This is extremely degressive since it neglects population figures entirely. The second stage of proportional allocation of the remaining seats embodies a mild form of degressivity through the use of upward rounding. Upward rounding is known to introduce a slight bias in favour of the less populous Member States. This type of bias reinforces the effect of degressive proportionality.

In contrast the Power Compromise achieves degressive proportionality by interpreting the term "citizens" in a rather broad sense. The method replaces lucient population figures, which count concrete citizens, by arcane population units which measure abstract units. For example, Malta's population of 434 403 citizens is transformed to 175 082 population units. Does this mean that only forty percent of the citizenry is accounted for? Or, forty percent of each citizen? Neither interpretation seems profitable. The interim power adjustments remain obscure. The justification of both compromises lies in the final result which thereby achieves a higher degree of degressivity.

751. Every Member State is assigned 5 base seats, plus one seat per 254 500 adjusted population units or part thereof, where the adjusted units are obtained by raising the population figures to the power 0.93. The power 0.93 is determined so that the most populous Member State is allocated just 96 seats. The divisor 254 500 is determined so that the 28 Member States altogether are allocated 751 seats.

²⁴ Germany's Federal Constitutional Court, when ruling on the Lisbon Treaty said that the European Parliamentary election process "does not take due account of equality". In the Court's view, this constitutes one of two key factors in the EU's "structural democratic deficit", "the other being the EP's position in the European competence structure", i.e. its lack of power compared to other EU institutions. See: <https://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>.

V. PERMISSIBLE DEPARTURE FROM THE NORM

Electoral districts must periodically undergo electoral redistricting in order to respond to changes in the population. This process is often referred as "boundary delimitation." In order to ensure equal voting power, as it is defined in the Venice Commission's Election Code, boundaries should be reviewed at least every 10 years.

Multi-member constituencies should have boundaries that coincide with the administrative one. In case of variations in multi-member constituencies, the number of representatives for one constituency should be redefined. The permissible departure from the norm should not be more than 5% (as it is stipulated in the Election Codes/Acts of Croatia, Malta, Macedonia), more than 10% (like in Azerbaijan), and should certainly not exceed 15% (like in Czech Republic for the Senate, Germany, Hungary, Kazakhstan, the Russian Federation, Ukraine) except in special circumstances (protection of a concentrated minority populated in an administrative entity) like in Germany (25%), France (20%), Hungary (exceptionally up to 20%), South Korea (33,3%), Lithuania (20%).

In order to guarantee equal voting power, the distribution of seats must be reviewed at least on every ten years, preferably outside election periods. With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.²⁵

Boundary delimitation should take place in a transparent and consistent manner, established by a law that also regulates the frequency of reviewing boundaries. It should underline the need of an independent inquiry by the election administration, candidates, political parties or any other electoral stakeholders, by also providing certainty that the allocation criteria are in accordance with the international/European standards.

The most prevalent trigger for determining boundaries is the use of the results of the census to redraw constituency boundaries or to reallocate seats by maintaining the equal representation. Countries like Belgium, Bulgaria, Costa Rica, Denmark, France, Greece, Italy, Ireland, and the United States all opt for this system. Notably, these changes are made at different time intervals and with some variations between countries. Substantively, however, all changes are based on census results.

The second very important question is whether the **boundary authority is independent and impartial and whether it is using the following universal principles when guiding the delimitation process**: 1. Representativeness, 2. Equality of voting strength, 3. Independent, impartial boundary authority (or, at a minimum, reciprocity), 4. Transparency, and 5. Non-discrimination.

1. Representativeness

This principle is deeply interrelated with electoral, representative democracy. In a positive, strict way, it requires all citizens are able to intervene in the political decisions by means of representatives elected by universal, free, direct and secret suffrage, and by using the universal principle 'one person, one vote'.

Representativeness contains five relevant features/elements: 1. the extent of electors' participation in the election, 2. the directness of the relationship between electors and the elected, 3. the scope of choice available to electors, 4. the degree to which the effective influence of each elector is equal, 5. the proportion of the electorate which achieves actual representation.

²⁵ Ibid, Venice Commission's Code of Good Practice on Electoral Matters (Code of Good Practice) Section 2.2.

On the other hand, electoral district boundaries should be drawn on a manner that voters will have an opportunity to elect candidates they feel will truly represent them. Very often representativeness as a principle coincides with different “communities of interests” of the voters and the people.

For instance, communities of interests could be assigned by those who share a common ethnic, lingual or religious background. Geographically defined communities within the same administrative boundaries, or physical entities such as islands, lakes, mountains, etc, can also be considered communities of interests. It is generally accepted as an electoral “rule” that if electoral districts are not inter-related with the so-called communities of interest, it may be difficult for representatives to serve the constituencies interests well.

2. Equality of voting strength/voting power

Equality of voting power is a crucial element of parliamentary affairs/parliamentary democracy, electoral competition, electoral districting and the approval voting.

The **electoral districting or mapping the electoral district boundaries** is crucial for the procedure of drawing the districts in a way that is relatively equal in population. Equally populous districts allow voters to have an equally weighted vote in the election of representatives.

If, for instance, a representative is elected from a district that has twice as many voters compared to another district, the voters in the larger district will have half the influence of voters in the smaller district. This violates the essence of the universal principle of electoral democracy that all votes must have equal weight.

Equality of voting strength is a standard developed to reflect the universal principle of one person, one vote, one value, protected not only by the Venice Commission but also by the Organization for Security and Cooperation in Europe (OSCE) and UN Committee on Human Rights (UNCHR).

Existing electoral/administrative divisions or other relevant factors, based on historical, demographic, or geographical aspects, may affect the boundaries of the election districts, provided the design of the districts is consistent with the equality of voting and fair representation for different groups in society.²⁶

The drawing of electoral boundaries and the method used for allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.²⁷

The equality of voting strength is a **crucial standard of the concept of electoral integrity**.²⁸ It directly implies the notion of equal suffrage and serves as a cornerstone of the modern representative democracy. Having in mind the importance of this notion the electoral theory has identified two general **approaches as most relevant for achieving the equal suffrage**.

²⁶ See: OSCE, Inventory of OSCE Commitments and Other Principles for Democratic Elections, <http://www.osce.org/odihr/elections/13956?download=true>.

²⁷ See: UN Committee on Human Rights, General Comment 25, “The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service”.

²⁸ http://daviddefendi.staff.umy.ac.id/files/2013/04/Norris_Frank_Martinez_JoD_Assessing_the_Quality_of_Elections_1.pdf, p.5, and Pippa Norris, *Why Electoral Integrity Matters* (New York: Cambridge University Press, 2014). According to Norris (2013), the electoral integrity refers to ‘international conventions and global norms, applying universally to all countries worldwide throughout the electoral cycle, including during the pre-electoral period, the campaign, on polling day, and its aftermath’.

The first approach is related with the principle that, when territorial constituencies for the election of MPs exist, the ratio of parliamentary representatives to population should be more or less the same across the constituencies. This approach highlights the principle that where there are single-member constituencies, the territorial boundaries can be adjusted to match a standard MP-population ratio (principle of redistricting)²⁹.

The second approach explains the multi-member constituencies and the allocation of parliamentary seats to constituencies that can be adjusted after each population census to match the standard MP- population ratio (principle of reapportionment)³⁰.

Sometimes, both above-mentioned approaches may be used simultaneously.

For instance, in the U.S. where the *reapportionment* principle is used to reallocate seats to states after each census, while *redistricting* is used to distribute these seats within states. Also both approaches could be seen in Germany, where one set of seats is redistributed periodically between provinces (Länder), while another set is filled from single-member constituencies whose boundaries are revised as necessary.

Sometimes the allocation takes place on a two-tier basis: most seats are allocated to constituencies, but some are held over to a higher level and are allocated on the same mathematical basis (like in Greece, Austria, Sweden, Norway and Denmark, though in the last two cases the allocation formula is not based exclusively on population).

Electoral systems can be also analyzed based on the types of electoral constituencies, in context of the importance of the equal voting power:

For example, the electoral systems that take the whole of the national territory as one constituency, as it is in Armenia, Moldova, Montenegro, Serbia, Slovakia, Kazakhstan (for Lower Parliament chamber), Kyrgyzstan),

Another example would be when single-member electoral districts are predominantly tied to a majority election system (plurality and two-ballot system), like in the U.S., UK, Azerbaijan, France),

In some cases, the electoral systems are using the existing geopolitical units as constituencies. Usually those geopolitical units are linked to the proportional elections in multi-nominal constituencies and (like in Albania, Bulgaria, Czech Republic, Finland, Iceland, Italy, Latvia, Luxembourg, Switzerland, Liechtenstein, Malta, Portugal, Sweden)

And finally, there are states that use mixed constituencies, attempting to combine the proportional with the majority systems, by means of a national constituency with a very

²⁹ The redistricting principle exists in countries that use the plurality system (such as the U.S., UK and Canada) or other systems that are normally based on single-member districts (such as France, with the two-ballot system). It is usually put in context with the boundary delimitation process, with the most disputes taking place in the U.S., where allegations of gerrymander are widespread (McDonald, 2008; Brunell and Grofman, 2008). In 1962, the US Supreme Court in *Baker v. Carr* interpreted the Equal Protection Clause of the 14th Amendment to the U.S. Constitution to require that electoral districts be periodically adjusted or redrawn to account for population shifts among them.

Redistricting has to follow certain criteria to be accepted: 1. compactness, 2. contiguity, 3. equal population, 4. preservation of existing political communities, 5. partisan fairness, and 6. racial/social fairness.

³⁰ The reapportionment principle exists in countries that use the party list system. Where there is a single-tier system, the design of constituencies and the allocation of seats between them is a simple, automatic process.

The basic administrative units become constituencies: in Switzerland, the cantons; in Spain, the provinces; in Belgium, the provinces, except for Brabant (which has been partitioned in response to problems of linguistic politics); in Luxembourg, four groups of cantons; in Portugal, administrative districts; and in Finland groups of municipalities, which correspond substantially to provinces. Seats are allocated between these constituencies strictly on the basis of population as defined by the most recent census.

high electoral barrier and districts in which another block of seats is chosen by means of majority systems (like in Germany, Austria, Georgia, Republic of Korea, Lithuania, Mexico, Russian Federation, Spain, Ukraine)

3. Gerrymandering v. Redrawing Constituencies

Although it is defined as a negative and manipulative act of the politicians to redraw the legislative/electoral district boundaries in order to gain more political power, gerrymandering is still very present in the electoral practice. Simply said, gerrymandering means favoring one party by means of an artificial delimitation of the constituencies to advantage or benefit one particular party or group, or to cause disadvantage or harm to an opposing party or group.

Gerrymandering (partisan and bipartisan)³¹ is also known as a manipulative political tool which distorts the democratic electoral process, undermines democratic and universal election principles, and renders legislative elections a meaningless exercise. Both partisan and bipartisan gerrymandering are extremely damaging to voters, as they deprive the electorate of a meaningful influence on who gets elected. The General Comments of the ICCPR warn against any system of boundary delimitation which restricts unreasonably the right of citizens to choose their representatives freely.³²

Gerrymandering relies heavily on winner-take-all approach. Namely, when 51% of voters earn 100% of representation, this electoral engineering can easily make some votes count to their full potential and annul other votes. Gerrymandering has become easier today due to application of new technologies which precisely draw districts, in combination with partisan voting body that makes it easier to project the outcome of new districts.

On the other side of the coin, an independent, non-partisan approach to redrawing electoral constituencies aims to avoid partisan or bipartisan gerrymandering. Many countries, like Azerbaijan, Iceland, Kazakhstan, Latvia, Lithuania, Poland, Portugal, Malta, Romania, Russian Federation, Ukraine and Turkey vest the power to redraw constituencies in an Electoral Commission/Authority which deals with elections.

Other countries, however, opt for an Independent Commission which deals solely with constituencies boundaries. For instance, Article 25 of the French Constitution requires the establishment of an independent Commission to deal with same. Section 3 of the German Federal Elections Act also specifies that a Constituency Commission is responsible for boundary alterations. Thus, boundary delimitation need not be within the remit of the Electoral Board of a country.

Chile, Costa Rica, Iceland, Latvia, Norway, Sweden, Switzerland, and Portugal all favor reallocation of seats between fixed constituencies. Switzerland has a hybrid system whereby its Council of States is fixed while the National Council permits seat reallocation before each election.

In the U.S., independent redistricting commissions are trying to reduce gerrymandering within winner-take-all voting rules. But on the other side, there is a common belief that reasonable goals will always be in conflict, such as: the more districts are designed to be compact and maintain county voting lines, the more likely they are to be safe for one party; the

³¹ A distinction exists between partisan and bipartisan gerrymandering. Bipartisan gerrymandering results in polarized electoral districts without leaving moderate and competitive ones, while partisan gerrymandering results in a one-sided allocation, leaving some competitive districts. See: Konishi & Pan, *Partisan and Bipartisan Gerrymandering*, Boston College, 2016, p.6.

³² ICCPR General Comments under Article 40.4 of the ICCPR paragraph 21.

more districts are designed to be competitive, the more likely that representation will be distorted; the more competitive a state or other administrative districts makes its Parliamentary House, the more other states/administrative districts/provinces etc. are gaining power in the Parliament by protecting their voters.

4. Independent, impartial boundary authority

National legal frameworks for boundary delimitation are expected to provide that the persons or institutions responsible for drawing the electoral boundaries are independent and impartial. The administration of elections must be conducted autonomously, free from government or other interference, by officials or bodies operating transparently under the law.³³

Appointees to the election administration shall be required to carry out their responsibilities in an effective and impartial manner and should be individuals with the competence and commitment to do so.³⁴

The recommendations of the boundary authority are expected to be observed by the government or by the national legislators. The procedure for delimiting electoral districts should be defined precisely in a law, so that the process remains the same, regardless of who is drawing the district boundaries. The process should be based on **reciprocity**, meaning, if there are political concerns that could play a role in the process, then all political parties must be given access to the process.

6. Transparency

The process of delimitation of the constituencies will be considered transparent when the result is seen as legitimate by both the stakeholders and voters. The delimitation process should be based on legislation published well in advance. The public ought to be also given a chance to make comments and remarks at a broad public debate organized prior to the delimitation process.

7. Non-Discrimination

The process of drawing the electoral boundaries should also be modeled in a way that will pay utmost importance to the presence of minorities groups. For instance, dividing a geographically-concentrated minority group among several electoral districts so that the group constitutes a minority of the voters in every single electoral district should be prohibited.³⁵

³³ See: UNHRC Comments, 20, CDL Guidelines, II, 3.1, ODIHR Legal Review Guidelines, VI; ACEEEO, 5(2.5), 13; IPU, 4(2). Also see, for instance, IPU, id., indicating that: "... States should take the necessary ... steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections." Emerging democracies, without a strong tradition of accountability for government administration, often prefer to achieve impartiality through the formation of independent election commissions". In this connection see also CIS Electoral Convention, 11(1), 19(2)(j), ACEEEO.

³⁴ "... States should ... [e]nsure that those responsible for the various aspects of the election are trained and act impartially." ACE

³⁵ See: UN Minorities Declaration; CDL Guidelines, I, 2.4.b and ODIHR Guidelines to Assist National Minority Participation in the Electoral Process (Warsaw, OSCE/ODIHR, 2001), (Minority Electoral Guidelines).

See: Copenhagen Document, *ibid*, 31:

"Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. "The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms." The CIS Electoral Convention, 18(1)(b), excludes from its prohibition against discrimination "special measures undertaken in

The Electoral Law can enshrine special measures seeking to address traditionally existing imbalances in universal representation as European Commission have stressed in 2008. In principle, such measures do not go against the principle of equal suffrage.³⁶

In some states minimum representation is secured to national minorities, such as in the Italian, Slovenian and in the Hungarian Constitution where ethnic communities are entitled to per one MP each at the National Assembly. Also in Poland, the Constitutional Tribunal has even held that lists put up by “registered” organisations of national minorities may, at their request, be taken into account in the allocation of parliamentary seats even if they do not attain the 5% quorum required of other lists. And German Electoral Law has the similar rule.

In Romania, “there is a certain number representing national minorities if the latter have not captured a parliamentary seat but have obtained at least 5% of the average number of votes validly expressed throughout the country for the election of one Deputy”

Furthermore, the Council of Europe’s Committee of Ministers in its Recommendation Rec(2003)3 on balanced participation of women and men in political and public decision-making recommends that governments of member states: 1. promote balanced participation, meaning that representation of either women or men in any decision-making body in political life should not fall below 40%; 2. promote the equal civil and political rights of women and men, including those running for office; 3. promote and encourage special measures to stimulate and support women to participate in political decision making; 4. consider setting targets, with a timescale for delivery to reach balanced participation of women and men, and 5. monitor and evaluate progress and report regularly on measures taken and progress made.

Special measures can also apply for people with special needs such as those with disabilities. It is important to note that the international law does not prohibit such special measures, provided that there is an objective and reasonable justification for their application (proportionality principle) and that these measures are not contrary with other guaranteed human rights. Thus, special measures could be inadmissible if they themselves appear discriminatory.³⁷

VI. CONCLUSION

Equal voting power does not apply to all elections, but primarily to elections of lower houses of parliaments as well as to regional and local elections. In particular, the rules applying to second chambers may aim to ensure equality among federated entities or territorial units, rather than among inhabitants or voters.

Degressive proportionality applicable to the election of the European Parliament is a compromise between these two aspects of the principle of equality. At any rate, perfect proportionality is not reachable. National legislation should define the permissible departure from the norm, which, in conformity with the Code of Good Practice in Electoral Matters, should not be more than 10%, and should certainly not exceed 15% except in special circumstances.

order to provide for adequate representation of any strata of the country’s population, in particular of national minorities and ethnic groups, which actually is, due to political, economic, religious, social, historical and cultural conditions, deprived of the possibility to avail itself of an equal standing in respect of political and election rights and freedoms as the rest of the population”

³⁶ See: Venice Commission 2002: Guidelines, sections I.2.4.b, I.2.5.

³⁷ This can be exemplified by the ruling of the European Court of Human Rights in the case of Sejdić and Finci v. Bosnia and Herzegovina of 22 December 2009.

Within those limits, territorial aspects may be taken into account and a minimum number of seats may be allocated to each constituency.

The most blatant threat to equal voting power is active electoral geometry, namely a distribution of seats causing inequalities as soon as it is applied. Challenges to equal suffrage in the field may also result from more insidious mechanisms. One is passive electoral geometry, a protracted retention of an unaltered territorial distribution of seats and constituencies, whatever the demographic evolution. A real challenge for equal suffrage is gerrymandering, that is a delimitation of constituencies intended at favoring one or several parties at the expense of another party (or several other parties) or population group. More precisely, this practice goes against equal suffrage under its aspect of equal opportunity.

While the holding of elections in nationwide constituencies is the simplest way to avoid electoral geometry, it has its own drawbacks – in particular the absence of territorial representation – which makes it exceptional from a comparative perspective. More precisely, a number of countries use such a system, but most of them combine it with the allocation of part of the seats in one- or multi-member constituencies.

Reallocation of seats to constituencies or redistricting should take place at least every ten years, preferably outside election periods and on the basis of the results of a census, and reallocation is preferable to redistricting – which is however unavoidable in uninominal systems. Multi-member constituencies should, where possible, coincide with administrative boundaries. This is a safeguard against gerrymandering and it ensures administrative boundaries can be maintained.