**Equal voting power and allocation of seats to constituencies**

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**Introduction**

Equality of vote is one of the main pillars or cornerstones of democratic elections stipulated in the 1st protocol to the ECHR. Question of equality of the weight of the vote is the one we assess based on the transfer of votes to seats: is the number of votes required to obtain a seat equal? Among this wide range of issues one has to discuss to answer this question is the issue of constituencies.

My presentation is mainly based on the study the Council for Democratic Elections initiated based on problems and unfortunately quite numerous allegations of misconduct in delimitation of constituencies observed either by international election observation missions or while drafting opinions on electoral legislation in various countries. The study called “Report on Constituency Delineation and Seat Allocation” was adopted in December 2017 takes into account the legislation in Venice Commission Member States. More general principles of allocation of seats to constituencies are stated in the Code of Good Practice in Electoral Matters from 2002.

There are many electoral systems, e.g. based on choice of candidates’ lists or single candidates, or with candidates’ lists, either closed or open list systems with a variety between them, as there are many countries using mixed systems. There are majoritarian and proportional systems. Electoral systems differ in the aspect of the formula how to calculate votes to seats. We can also find the threshold as one of the elements of the election system. Those different aspects are discussed in many reports or opinions by the Council of Democratic Elections and the Venice Commission. Constituencies are one of the features to set up a complex of electoral system. The Code of Good Practice in Electoral Matters (II.4) provides that any electoral system may be chosen or is in line with the standards governing democratic elections in the Council of Europe if the system corresponds to the detailed guidelines covering different aspects of the electoral legislation, including equality of vote.

So, why do we need constituencies? If we intend to have a purely equal vote, constituencies would not be plausible unless the number of voters is strictly equal in different constituencies. This would be an ideal we cannot see anywhere.

Equal voting power is deeply interrelated with the more general principle of electoral representative democracy. In a positive, strict way, it requires that all citizens shall be 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 implies that electoral district boundaries be drawn in such a way that voters will have an opportunity to elect candidates they feel will in reality represent them, without neglecting the interest of the whole country since they are the representatives of the people as a whole. Very often representativeness as a principle risks colliding with different “communities of interests” of the voters and the people. For instance, communities of interests could correspond to those who share a common ethnic, lingual or religious background. Geographically defined communities within the same administrative boundaries, or physical entities such as islands, can also be considered communities of interests. Although there might be situations where these communities of interest groups are not ethnic or religious, there are areas within a country with higher or lower level of unemployment, level of urbanization, level of natural resources available, and with a variety of economic branches more or less developed in the region. There are always some sort of variety in the history or more generally culture in different regions of any mid-range or large country.

This will lead to addressing representation of different interest groups being a minority in the whole country through delimitation of constituencies.

Proportionally equal populous districts allow voters to have an equally weighted vote in the election of representatives. If, for instance, in a uninominal system, 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. In a system with multi-member constituencies, twice as populous districts should have twice as more representatives.

**Drawing of constituencies: basis criteria**

Taking into account the discussed legitimate aim of constituencies and the general requirement of equality in a broader perspective, not only with regard to fundamental electoral principles, from ancient Greece – well, we all remember the postulates of Aristotle – and from the French Revolution, we can discuss the question of how the borders of constituencies should be drawn.

The Code of Good Practice guides us in a principle that seats must be evenly distributed between the constituencies. 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. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.

Electoral boundaries may be delimited in a way that ensures the representation of concentrated minorities. For instance, dividing a geographically concentrated minority among several electoral districts so that it constitutes a minority of the voters in every single electoral district (ethnic gerrymandering) should be prohibited. However, it is also important to avoid another danger, namely drawing ethnic seats in such a way that it could lead to a form of electoral apartheid.

Does the size of the constituency matter? This is an issue which has effects on the election results, as in the larger constituencies the so-called natural threshold is lower, thus giving a greater chance for small political parties to receive seats. Thus, even smaller minorities within the constituency may have a chance to get a seat. In smaller constituencies, the number of seats is smaller and thus the chance for a small party to receive a seat is quite small. The electoral system has to be discussed in all its complexity and one has to take into account whether there is a compensating nationwide distribution of mandates in addition. But in case where there is no nationwide compensatory mechanism, in some larger constituencies the possibilities of smaller interest groups to gain a seat are larger than in other, smaller constituencies. There is no international standard on the equal size of constituencies, as the constituencies are set up to enhance the representation of communities of interest and there might be such communities of interest of different size in different parts of the country. The practice shows that the size of constituencies varies sometimes a lot, for instance Brazil has multi-member constituencies ranging between 8 and 70 seats and corresponding to the states, territories and the federal district. Belgium has 11 constituencies that are between 4 and 24 seats each and correspond with the provinces and the administrative district of Brussels. But again, if there are no specific interest groups in any of the areas of the country to be protected with greater extent, it would be advisable to draw the constituencies around the same size to provide similar chances for the smaller parties.

The study of the Venice Commission shows that there are many countries where only some seats are distributed in constituencies while others are given nationwide. The voters may in some cases have more than one vote as one of the votes is given nationwide and the other one in the constituency. Of course, the constituencies may be single-mandate, i.e. majoritarian or multiple mandate, i.e. representing proportional system.

Speaking of the grounds for drawing constituencies, there are, as referred earlier to the Code of Good Practice, different legitimate criteria to draw the borders of the constituencies: administrative borders applicable for multiple seat constituencies and in addition to that, population, number of resident nationals (including minors), number of registered voters, and the number of people actually voting.

The choice of the allocation criterion may be very relevant: the representation of constituencies with large number of foreign population (mainly urban centres) will be much higher if the population criterion rather than the number of registered voters is applied, while using the number of resident nationals will favour constituencies with a younger population.

The most common criterion used for the allocation of seats to constituencies is population.

Sometimes it is not the total number of citizens that is used, but the number of registered voters. Other aspects, such as the size of the territory, especially in sparsely populated areas, can be taken on board.

By the CoGP, it is possible to base the borders of the constituencies on factual participation in the elections. This criterion is somewhat doubtful. Should there be a higher level of representation in the area where there are many people who are not interested in politics? First of all, one has in this case to find out the reasons for low participation. The case of low participation might be due to a special case, not a long-lasting problem; thus, it should be problematic to have effects of one case to be prolonged further. In addition, I find that by this criterion there is a high risk of unbalancing the representation of local interests. But, from the other side, with non-voters, it might be possible to give a higher representation to other votes in the region.

In addition, in many countries, special constituencies are provided for the diaspora, thus based on the territory, even if for domestic voting, the basis for drawing constituencies might be different.

So, different aspects like transport facilities, geographic features, existing patterns of human settlement, position of schools, kindergartens and work places have to be taken into account. But the legislation should be precise and give clear criteria. If the list of criteria is left widely open, the decision might be in accordance with the legislation but still politically biased.

**Permissible departure**

In principle, the number of votes required to obtain a seat should be equal. It means that a seat should be allocated to the same number of votes in any constituency. There are cases of exceptions and restrictions to this principle.

**Exceptions.** Electoral law can enshrine special measures seeking to address traditionally existing imbalances in representation. 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 to other guaranteed human rights. In some states, minimum representation is secured to national minorities, such as in Slovenia where the Hungarian and Italian ethnic communities are entitled to one MP each at the National Assembly. Belgium and Italy have also adapted their electoral laws to provide representation for German speaking minorities.

Overrepresentation is permissible and even recommendable in areas where the number of minority voters is just in the middle of the formula, i.e. there should be e.g. one and half seats based on the number of voters.

Among exceptions are the cases of sparsely inhabited areas, where some overrepresentation is commonly acceptable, too.

With regard to the deviation from equality due to **restrictions**, it has to be noted first that there will always be a discrepancy between the available data and the demographic reality – not to mention inaccuracies in the evaluation of the population number, and problems about persons temporarily or *de facto* abroad, whose number may be very high. Another inherent limitation of proportionality may derive from the use of administrative divisions as constituencies.

Limitations to proportionality may become excessive, violating international and constitutional standards.

These limitations may stem from passive electoral geometry. The inequality arises from protracted retention of an unaltered territorial distribution of seats and of constituencies. To avert this situation, two methods may be used. The first is regular reallocation of seats to the constituencies, and the second entails regular redrawing of the constituencies themselves.

Another reason for the inequality, active electoral geometry is a result of most blatant electoral geometry where the inequality of representation evolves immediately after drawing or redrawing the constituencies.

The Code of Good Practice provides that the permissible departure 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). In many countries, either constitution of electoral legislation stipulates similar limitations. Usually, the legislation is a bit softer, allowing inequality to a larger extent.

When redrawing, the competent authority has to take into account that the more districts are designed to be homogeneous, the more likely they are to be safe for one party; the more districts are designed to be competitive, the more likely the overall representation of the parties will be distorted.

Georgia Constitutional Court: On 28 May 2015, the Constitutional Court of the Republic of Georgia cancelled provisions of the electoral code whose effect was that, in the 2012 parliamentary elections, the number of voters per single-mandate constituency was extremely different (the variation going up to 1 to 22).

In the case law in the USA, equality clause is applicable and foresees a requirement to reassess and redraw the borders if needed.

When special constituencies are created for citizens abroad, states should be given a broad margin of appreciation concerning their design and the allocation of seats. This is justified by the difficulty to quantify the number of citizens abroad as well as the limited links or disinterest in political life of a number of residents abroad.

**Procedural guarantees for the decision-making**

How to ensure that all those principles discussed are taken into account? How to avoid malpractice? There are some procedural guarantees I would discuss, namely, decision-making by an **independent** institution, **transparency**, requirement for **periodic** review and limitation on the **time** of the decision-making. One-by one.

The less problematic is the issue of clear mathematical method for the allocation of seats to constituencies as well as for regular reallocation. In this case, the risk of politically biased decision-making is rather limited. In case of redrawing of the constituencies, the case is different and sometimes very problematic.

While it is not inadmissible for the legislator or an electoral management body to take the final decision, it should take account of the opinion of a committee the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and have a balanced representation of the parties and, if necessary, representatives of national minorities. Making an electoral management body fully responsible for boundary delimitation creates a double risk: a risk of politicisation for the Central Electoral Commission, as well as the risk of overloading it. Giving such a power to Parliament would lead to political decisions. When it acts on the basis of the opinion of an independent committee, there is a risk that it delays any decision due to some MPs fearing to lose their seat in redistribution.

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 political balance, if representatives of political parties are members of the committee. All political parties must be given access to the process due to its political implications.

The decision-making on the constituency boundaries might not be based on discretion, as the boundaries may coincide with the administrative boundaries. Once again, in that case, the delimitation of administrative boundaries might be politically affiliated and same problems might arise.

Boundary delimitation should take place in a transparent and consistent manner, established by a law that also regulates the frequency of reviewing boundaries. Like all crucial elements of electoral law, the delimitation of constituencies should be adopted after extensive public consultations with all relevant stakeholders, including political parties and civil society. An open academic discussion would enhance the procedural legitimacy of the decision.

In majority or plurality systems, gerrymandering has to be prevented and it is therefore suitable that legislation provide for rules intended at avoiding such manipulation (even if they cannot prevent it completely by themselves), such as the requirements of contiguity in the shape of constituencies and of respect of administrative boundaries.

Reallocation is only possible among multi-member constituencies (principle of reapportionment). Regular reallocation avoids electoral geometry, including gerrymandering. On the contrary, where a uninominal method of voting is used, constituency boundaries need to be redrawn to ensure proportionality is restored.

The delimitation process should take place **at least** **one year before** an election, for all the stakeholders to be clear where and how to start campaigning, what are the main circumstances of the electoral situation; but not too long time beforehand, as in that case the decision is not based on accurate demographic situation in the country.

The Code of Good Practice in Electoral Matters encourages proceeding to reallocation rather than redistricting, **at least every ten years**, preferably outside election periods, and states that constituency boundaries should, where possible, coincide with administrative boundaries, by taking where appropriate into account other geographical or historical criteria.

It is recommendable to foresee a **specific** **time-limit** to decide on reallocation or delimitation issues, but in case of specific demographic circumstances leading to inequalities, the decisions should not be postponed due to rigid legislation In some countries the redrawing of constituencies takes place *ad hoc*, without clearly stipulated time-limits, based on demographic changes where the reallocation of seats does lead to overly large differences between the number of mandates distributed in constituencies.

**Judicial control**

Judicial control is a condition for describing elections in any country to be governed by the rule of law. A judicial remedy guarantees that the legislation is implemented correctly and in accordance with international standards. Although the decisions on constituency delineation and seat allocation should be in principle judicially controllable, we have to take into account that there is a wide margin of appreciation on the decision on borders of the constituencies. Is there a political basis for the drawing? Are there many reasons, among them a political party affiliation or preference? As the practice shows, there are not many successful court cases on this topic. Usually we do not see the constituencies with awkward borders even if the borders are based not on objective criteria but on political reasons. It is possible to manipulate the constituency borders with sophisticated knowledge on the public opinion polls of preferences showed e.g. in Facebook in a more hidden manner of gerrymander the borders in a lesser extent of at least partly rational criteria. Thus, judicial control on the decisions of constituency delineation is thus rather limited and can set aside only the most blatant cases.