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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON CONSTITUENCY DELINEATION AND SEAT ALLOCATION

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I. Introduction

1. The issue of the allocation of seats to constituencies and constituency delineation - including gerrymandering - in particular, is crucial in electoral law and is regularly addressed by the opinions of the Venice Commission as well as by the election observation reports of the international organisations. It has been recently debated by the Council for Democratic Elections which expressed its interest in drafting a study on this issue.

2. Ms Tanja Karakamisheva-Jovanovska, Ms Leontine Loeber (expert of the Venice Commission), as well as Lord Richard Balfe (member of the Council for Democratic Elections), Mr Richard Barrett, Ms Sarah Cleveland and Mr Oliver Kask acted as rapporteurs.

3. The present report is intended at dealing with the issue of the allocation of seats and constituency delineation in conformity with international standards, especially with the principle of equal suffrage under its aspect of equal voting power. It will address possible manipulations of the allocation of seats to constituencies¹ and their drawing, as well as the way to prevent such malapportionment.²

4. The Venice Commission has prepared a comparative table on the allocation of seats to constituencies (see [CDL\(2017\)023](#)).

5. *The present report was adopted by the Council for Democratic Elections at its ... meeting (Venice, ...) and by the Venice Commission at its ... session (Venice, ...).*

II. Framework of constituency delineation and seat allocation

A. Principles

6. The major international standard to be applied in the field of constituencies is equal voting power as defined in the Venice Commission's Code of Good Practice in Electoral Matters:³ "seats must be evenly distributed between the constituencies". **The equality of voting power is a crucial standard of the concept of electoral integrity.**⁴ It cannot be separated from representativeness and, more broadly, from other aspects of equal suffrage which may impact the allocation of seats to constituencies. Other basic features of allocation of seats in conformity with international standards are transparency and an impartial boundary authority not abusing its discretionary powers. These issues will be addressed in the next paragraphs.

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 among 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, and special constituencies may be provided for the representation of minorities like in Croatia and Slovenia.

² 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.

³ [CDL-AD\(2002\)023rev2](#), I.2.2.

⁴ Cf. Pippa Norris, Ferran Martínez i Coma, and Richard W. Frank, "Assessing the quality of elections" *Journal of Democracy* 24 (4): 124-135. 2013:

<http://aceproject.org/electoral-advice/archive/questions/replies/531723839/749446722/Assessing-the-Quality-of-Elections.pdf>, p. 127 and Pippa Norris, *Why Electoral Integrity Matters* (New York: Cambridge University Press, 2014). According to Pippa Norris, 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'.

1. Substantial guarantees

a. Representativeness

7. 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'.

8. Representativeness contains five relevant features/elements: 1. the extent of electors' participation in the election; 2. the directness of the relationship among 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; and 5. the proportion of the electorate which achieves actual representation.

9. Representativeness implies that electoral district boundaries be drawn in such a way that voters will have an opportunity to elect candidates they feel will truly 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. This will lead to addressing representation of minorities through delimitation of constituencies.

10. Equal voting power is a crucial element of parliamentary democracy. Combined with proper electoral districting, it ensures that electors' votes have equal weight. In Anglo-Saxon electoral systems this is known as the principle of equal votes of equal value.

11. 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.

12. The mechanisms for ensuring equal voting power will be developed in detail below.⁵

b. Representation of minorities⁶

13. The process of drawing the electoral boundaries should not prejudice national 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, and can be considered as a violation of the principle of non-discrimination. Electoral boundaries may be delimited in a way that ensures the representation of concentrated minorities. 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.

⁵ Chapter IV.

⁶ The present report does not address affirmative action in favour of other groups, such as women or disabled people. See for example Recommendation Rec(2003) 3 of the Committee of Ministers on balanced participation of women and men in political and public decision-making; Code, I.2.5.

14. Electoral law can go further and enshrine special measures seeking to address traditionally existing imbalances in representation. In principle, such measures – which constitute affirmative action - do not go against the principle of equal suffrage.⁷

15. 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. Thus, special measures could be inadmissible if they themselves appear discriminatory but not if they are intended at ensuring effective equality and respect the principle of proportionality.⁸

16. 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. In Poland, the Constitutional Tribunal has 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. The German Electoral Law includes a similar rule. In Romania, organisations of citizens belonging to national minorities, which fail to obtain the number of votes necessary for representation in Parliament, have the right to one seat each.⁹ Belgium and Italy have also adapted their electoral laws to provide representation for German speaking minorities.

c. Equality of opportunity

17. While the principle of equal voting power does not apply to the allocation of seats to parties, and therefore does not impose a proportional result,¹⁰ equality of opportunity has to be ensured. Manipulations intended at reducing the possible representation of a party, including through the delimitation of constituencies (gerrymandering) go against equality of opportunity and will be addressed more in detail below.

2. Procedural guarantees

a. Transparency

18. Boundary delimitation should take place in a transparent and consistent manner, established by a law that also regulates the frequency of reviewing boundaries. The delimitation process should take place at least one year before an election.¹¹ Like all crucial elements of electoral law, the delimitation of constituencies should be adopted after

⁷ See: Framework Convention for the Protection of National Minorities (ETS 157), Article 15: “Parties could promote – in the framework of their constitutional systems – inter alia the following measures: ... effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels”; UN Minorities Declaration; Code, I.2.4.b and ODIHR Guidelines to Assist National Minority Participation in the Electoral Process (Warsaw, OSCE/ODIHR, 2001) (Minority Electoral Guidelines). See also OSCE Copenhagen Document, 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 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”. See also the Report on Electoral Rules and Affirmative Action for National Minorities’ Participation in decision-making process in European countries, [CDL-AD\(2005\)009](#).

⁸ 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*, 27996/06 and 34836/06, 22.12.2009.

⁹ Article 62 of the Constitution.

¹⁰ See, for example, *ECtHR (GC) Yumak and Sadak v. Turkey*, 10226/03, 08.07.2008; *Eur. Com. HR, The Liberal Party and others v. United Kingdom*, 8765/79, Dec. 18.12.1980, D.R. 21 pp. 211 ff.

¹¹ Code of Good Practice in Electoral Matters (Code), II.2.b; Interpretative declaration on the stability of electoral law ([CDL-AD\(2005\)043](#)).

extensive public consultations with all relevant stakeholders.¹² This should make it legitimate for both stakeholders and voters.

- b. Delimitation by an independent, impartial boundary authority not abusing its discretionary powers

19. Moreover, 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 and ensure that the criteria for the allocation of seats are in accordance with the international/European standards.

20. 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.¹³ 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.¹⁴ 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; for example, in the United Kingdom, the last redistricting took place in 2000 and there is little chance a new one takes place before the next elections planned in 2022.

21. 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. If political parties are not represented in the committee, they should be provided the right to present their recommendations and objections. This means that all political parties must be given access to the process due to its political implications.

22. An important legal safeguard against arbitrariness and guarantee of the Rule of Law is the existence of legal restrictions to discretionary powers.¹⁵ A way to prevent such an abuse in the field of constituency delimitation is, where possible, to make constituency boundaries coincide with administrative boundaries, while geographical and historic criteria may be taken into account.¹⁶ Moreover, constituencies should be contiguous.

B. Types of constituencies

23. Countries can use either multi-member or single-member constituencies or a combination of both.

1. Nationwide constituencies

24. Some countries use a nationwide constituency, sometimes in combination with smaller constituencies as well. The Netherlands has a nationwide constituency of 150 seats¹⁷, Kyrgyzstan¹⁸ and Israel one of 120 seats.¹⁹ Monaco uses a constituency of 24 seats.²⁰

¹² Cf. for example, [CDL-AD\(2016\)031](#), par. 16; [CDL-AD\(2017\)012](#), par. 10.

¹³ Code, I.2.2.vii.

¹⁴ [CDL-AD\(2014\)003](#), par. 33 ; [CDL-AD\(2017\)012](#), par. 43.

¹⁵ Rule of Law Checklist, [CDL-AD\(2016\)007](#), II.C.

¹⁶ Code, I.2.2.iii and vi.

¹⁷ Article 51 of the Constitution.

¹⁸ Article 70(2) of the Constitution.

Montenegro has a nationwide constituency of 81 seats.²¹ Serbia uses one constituency consisting of 250 seats.²² San Marino²³ and Slovakia²⁴ each use one nationwide constituency.

25. Some countries provide for the allocation of only a part of the seats to nationwide constituencies. Andorra combines a 14 seat nationwide constituency with 7 constituencies with 2 seats.²⁵ Armenia combines one nationwide constituency with 101 seats and 13 electoral multi-member constituencies, 4 in Yerevan and 9 in marzes.²⁶ Georgia uses a combination of a nationwide constituency with 77 seats and 73 single-member constituencies.²⁷ Hungary combines 106 single-member constituencies with a nationwide constituency of 93 seats.²⁸ The Republic of Korea has one constituency of 47 seats which consists of the entire country, combined with 253 single-member constituencies.²⁹ Lithuania has one 70 seat nationwide constituency and 71 single-member constituencies.³⁰ Morocco combines a nationwide constituency of 90 seats with 92 multi-member constituencies.³¹ The Russian Federation³² and Ukraine³³ both divide their 450 seats over one nationwide constituency of 225 seats and 225 single-member constituencies, while the Republic of Moldova has introduced in 2017 a system with one nationwide constituency (51 seats) and 50 one-member constituencies.³⁴ Germany, known for its system with two votes, combines 299 single-member constituencies with lists in the Länder.³⁵

2. Multi-member constituencies

26. Other countries use solely multi-member constituencies. These often coincide with existing subnational entities or administrative constituencies which are also used for other purposes. The advantage of using existing multi-member constituencies is that it reduces the need to redraw the constituencies because it is possible to reassign seats to constituencies. There are large differences in the size of the multi-member constituencies that are used.

27. A big number of countries make constituencies correspond to federated, regional or other subnational entities. For example, Albania uses 12 constituencies to elect its 140 members of parliament. The borders coincide with the administrative divisions.³⁶ Andorra uses the existing country's parishes, which are each assigned 2 seats.³⁷ Austria has 9 multi-member constituencies that range in size from 7 to 37 seats each and whose borders are the same as the country's provinces (Länder). The provinces are the constituencies³⁸. Brazil has multi-member constituencies ranging between 8 and 70 seats and corresponding to the

¹⁹ Article 3 of the Basic Law: The Knesset.

²⁰ Article 20 of the Loi n.839 du 23/02/1968 sur les élections nationales et communales telle qu'amendée au 9 avril 2002.

²¹ Article 12 of the Law on the Election of Councillors and Representatives.

²² Article 100 of the Constitution.

²³ Article 10 (1) of the Electoral Law.

²⁴ Section 44 of the Law no. 180/2014 Z. z. on conditions governing the exercise of the right to vote.

²⁵ Article 52 of the Constitution and Article 48 of the Qualified Law 28/2007 of November 22.

²⁶ Articles 77 and 78 of the Electoral Code.

²⁷ Articles 109 and 110 of the Election Code.

²⁸ Section 3 of Act CCIII of 2011 on the Election of Members of Parliament.

²⁹ Articles 20 and 21 of the Public Official Election Act (2016).

³⁰ Article 9 (1) of the Republic of Lithuania Law on Elections to the Seimas.

³¹ Article 1 of the Organic Law no. 27-11 of 14 October 2011.

³² Article 3 of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

³³ Articles 1 and 18 (1) of the Law of Ukraine on Elections of People's Deputies.

³⁴ Article 73(3) of the Electoral Code.

³⁵ Section 4 of the Federal Elections Act.

³⁶ Articles 64(1) and 64(2) of the Constitution and Article 74/1 of the Electoral Code.

³⁷ Article 52 of the Constitution and Article 48 of the Qualified Law 28/2007 of November 22.

³⁸ Article 26(2) of the Constitution.

states, territories and the federal district.³⁹ Belgium has 11 constituencies that are between 4 and 24 seats each and correspond with the provinces and the administrative district of Brussels.⁴⁰ Bulgaria divides its 240 seats over 31 constituencies. Three of the constituencies are in the Sofia City, two in the Administrative Region of Plovdiv. The rest of the constituencies coincide with the existing administrative regions.⁴¹ Costa Rica has 7 constituencies corresponding to the provinces for 57 seats.⁴² In Finland the constituencies are groups of municipalities which correspond substantially to the provinces⁴³. Liechtenstein has fixed the boundaries of the 2 constituencies and the number of seats allocated to them appears in the Constitution. The Upper Country has 15 seats and the Lower Country 10 seats.⁴⁴ In Luxembourg the constituencies correspond to four groups of cantons.⁴⁵ For its multi-member constituencies, Mexico uses administrative and geographical boundaries, in a way that each of the 5 constituencies has 40 seats.⁴⁶ Norway uses 19 multi-member constituencies, corresponding to the counties.⁴⁷ In Peru there are 130 seats, divided over 26 constituencies equal to the departments and the provinces of Lima and Callao.⁴⁸ Portugal uses the administrative constituencies as electoral constituencies when it comes to the mainland. Apart from these constituencies, there is a constituency for the Madeira Autonomous Region and a constituency for the Azores Autonomous Region. Finally, voters living outside Portugal are divided over two constituencies; one of them covers the territory of the European countries and the other one the remaining countries and Macao.⁴⁹ Romania has 41 constituencies for the departments, one for the municipality of Bucharest and one for Romanians living abroad.⁵⁰ Spain has for its Congress of Deputies 50 multi-member constituencies and 2 single-member constituencies, corresponding to the provinces plus the cities of Ceuta and Melilla;⁵¹ the constituencies for the Senate are the same, except for special rules applying to the islands.⁵² Switzerland has 20 cantonal two member constituencies and 6 single member ones for the Council of the States. For the National Council it uses 26 multi- or single member constituencies which also coincide with the 26 cantons.⁵³ Turkey uses the 85 provinces as multi-member constituencies⁵⁴.

28. Other countries provide for *ad hoc* multi-member constituencies, not corresponding automatically to administrative entities. This is unavoidable when the number of seats per constituency is fixed: for example, Macedonian law provides for 6 in-country constituencies which each elect 20 members and one constituency of 3 seats for voters living abroad.⁵⁵ Chile uses multi-member constituencies for both the Chamber of Deputies and the Senate, 28 constituencies for the Chamber and 15 for the Senate. For the Senate the existing regional division is used, the constituencies for the Chamber are designed separately.⁵⁶ Other countries where constituencies do not correspond automatically to administrative divisions include Iceland, which has 6 constituencies with 10 or 11 seats for each one,⁵⁷

³⁹ Article 45 (1) of the Constitution.

⁴⁰ Article 87, III Chapter 1 of the Electoral Code.

⁴¹ Article 246 (1) of the Election Code.

⁴² Article 106 of the Constitution.

⁴³ Section 25 of the Constitution.

⁴⁴ Article 46 (1) of the Constitution.

⁴⁵ Article 51 of the Constitution and article 117 of the electoral law of 18 February 2003.

⁴⁶ Article 53 of the Constitution and article 18(2)(d) of the General Law on Electoral Procedures.

⁴⁷ Article 57 of the Constitution.

⁴⁸ Article 21 of the Organic Law on Elections (Representation of the People Institutional Act).

⁴⁹ Article 12 (4) of the Law governing Elections to the Assembly of the Republic.

⁵⁰ Article 10 of the Regulations on the Elections to the Chamber of Deputies and the Senate.

⁵¹ Section 161 of the Representation of the People Institutional Act.

⁵² Section 165 of the Representation of the People Institutional Act.

⁵³ Articles 149 and 150 of the Constitution.

⁵⁴ Article 4 of the Parliamentary Elections Law.

⁵⁵ Article 4 (2) of the Electoral Code.

⁵⁶ Articles 47 and 49 of the Constitution and articles 179-180 of the Electoral Code.

⁵⁷ Article 8 of the Act No.24 from 16 May 2000 Concerning Parliamentary Elections to the Althing.

Malta, where the Constitution prescribes that there will be between 9 and 15 constituencies and always an odd number. The number of seats per constituency is fixed in the law.⁵⁸

29. Croatia has a specific system in which there are 10 multi-member constituencies with 14 seats each, combined with 1 multi-member constituency with 3 seats for voters living outside the country and 1 constituency with 8 seats for national minorities.⁵⁹ Denmark's law provides for 10 multi-member constituencies with 10 seats, 40 compensatory seats and 2 two-member constituencies for the Faroe Islands and Greenland.⁶⁰ Sweden divides its 310 seats over 29 constituencies. On top of that it also uses 39 adjustment seats.⁶¹ Greece has a mixture of constituencies, ranging from single-member constituencies to constituencies with 44 seats⁶².

3. Single member constituencies

30. A final option is the use of single member constituencies. Within the Venice Commission member states, there are only a handful of countries that opt for this. The most known examples of countries with single-member constituencies are probably the United Kingdom which has 650 single-member constituencies, divided over England (533), Scotland (59), Wales (40) and Northern Ireland (18)⁶³; France, where there are 577 single-member constituencies for the elections of the National Assembly;⁶⁴ and the United States which uses 435 single-member constituencies for their House of Representatives⁶⁵. Other examples are Azerbaijan, which divides the country into 125 single member constituencies;⁶⁶ the Czech Republic which uses 81 single-member constituencies for its Senate;⁶⁷ Poland which also uses single-member constituencies for the Senate (100).⁶⁸

31. The United States has a multi-member constituency system for the Senate where each State elects 2 members, leading to 100 members in total,⁶⁹ and one-member constituencies for the House of Representatives, each state being allocated at least one seat⁷⁰. Examples were already given of countries combining a proportional system in a nationwide constituency with a plurality system in one-member constituencies (Republic of Moldova, Russian Federation, Ukraine) or another combination of one and multi-member constituencies (Germany).

4. Special constituencies

32. Some countries use special constituencies for voters living abroad⁷¹. Algeria has consular or diplomatic constituencies for voters abroad. These constituencies and the number of seats awarded to them are prescribed in the Electoral Code.⁷² Croatia,⁷³

⁵⁸ Article 56 (1) of the Constitution.

⁵⁹ Articles 8, 16, 38 and 39 of the Act on the Election of the Representatives to the Croatian Parliament.

⁶⁰ Article 28 of the Constitution and articles 2.10 and 2.7 of the Parliamentary Election Act (2014).

⁶¹ Article 6, Chapter 3 of The Instrument of Government.

⁶² Cf. <http://greece.greekreporter.com/2015/01/16/the-greek-parliamentary-seats-and-preference-crosses-per-constituency/> and Article 54 of the Constitution.

⁶³ <http://www.parliament.uk/about/how/elections-and-voting/constituencies/>

⁶⁴ Article LO119 of the Code électoral.

⁶⁵ See the Apportionment Act of 1911: <http://www.legisworks.org/congress/62/publaw-5.pdf>

⁶⁶ Article 29.1 of the Election Code.

⁶⁷ Article 59 of the Parliamentary Elections Act.

⁶⁸ Articles 256 and 260 of the Election Code.

⁶⁹ Article I Section 3 (17th Amendment) of the Constitution.

⁷⁰ Article I Section 2 of the Constitution.

⁷¹ On the allocation of seats to special constituencies for out-of-country voters, see below par. 80.

⁷² Article 26 of the Electoral Code.

⁷³ Article 8 of the Act on the Election of the Representatives to the Croatian Parliament.

Portugal,⁷⁴ and “the former Yugoslav Republic of Macedonia” also use special constituencies for voters living abroad.⁷⁵ Italy has a 12 seat constituency for Italians living abroad⁷⁶, France 11 single-member constituencies.⁷⁷

33. The issue of awarding citizens living outside the territory of a member State a vote raises a number of issues, including the suitability to have specially designed constituencies. For example, the United Kingdom allows citizens resident abroad to register and vote for a number of years in the last constituency in which they lived in the United Kingdom, and thus does not provide for special constituencies. This effectively spreads the vote without creating any new seats. The issue has aroused political controversy as it is believed, with some supporting evidence that these citizens are more likely to vote for right of centre parties. Further debate is needed around the subject of whether persons who have settled abroad should still vote in their country of origin or alternately should more effort be put into giving them the vote in their new places of residence. The European Union has adopted a policy of giving EU citizens the right to vote in local and European elections in the state of current residence. This has not however been extended to national elections.⁷⁸

34. Another reason for special constituencies is the existence of specific minorities or territories. Croatia for example has a constituency for minorities⁷⁹ and Denmark awards special seats to the Faroe Islands and Greenland.⁸⁰ Slovenia uses special constituencies for the Italian and Hungarian minorities.⁸¹ In Finland one member of the Parliament is elected in a constituency for the Åland Islands.⁸² A balanced representation of communities is provided for in Bosnia and Herzegovina, where one third of the members of the Parliament is elected from the Republika Srpska.⁸³ Special constituencies may also be entitled to a non-voting MP, as it is the case in the United States House of Representative – but not the Senate -for Washington DC and the US Virgin Islands.

35. Specific problems arise when some territories are outside of the control of the government, thereby making election-activities such as the electoral campaign, and voting and counting by precinct commissions difficult to implement. The creation of constituencies in such territories should be based on clear criteria take into account feasibility issues.⁸⁴

III. Sources of the principles of electoral law applicable to the allocation of seats to constituencies

A. International law

36. Like other aspects of electoral law, the issue of the allocation of seats to constituencies is mainly dealt with by domestic law. International law just sets the general framework, which provides a minimum standard for equal representation. This report will address successively international and domestic sources.

⁷⁴ Article 12 (4) of the Constitution.

⁷⁵ Article 4 of the Electoral Code.

⁷⁶ Articles 56, 57 of the Constitution.

⁷⁷ Annexe tableau n° 1 ter du Code électoral.

⁷⁸ On the issue of out-of-country voting, see the report by the Venice Commission, [CDL-AD\(2011\)022](#).

⁷⁹ Article 16 of the Act on the Election of the Representatives to the Croatian Parliament.

⁸⁰ Article 2.7 of the Parliamentary Election Act (2014).

⁸¹ Article 20 of the National Assembly Elections Act.

⁸² Section 25 of the Constitution.

⁸³ Article IV/2 of the Constitution and article 9.1 of the Election Law.

⁸⁴ [CDL-AD\(2017\)012](#), par. 52-53; [CDL-AD\(2014\)003](#), par. 39-40 (on Transnistria, Republic of Moldova).

37. The following paragraphs will focus on the specific rules of international law on the right to free elections. However, unequal allocation of seats may also go against human rights conventional provisions guaranteeing non-discrimination and equal protection of the law.⁸⁵

1. Universal level

38. **The International Covenant on Civil and Political Rights (ICCPR) 1966, Article 25(b), addressing the right to participate in public life**, is the primary reference, which identifies five basic premises of electoral democracy: periodic and genuine elections, universal and equal suffrage, and secret voting:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:...

(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”.

39. The **authoritative interpretation of the ICCPR by the Human Rights Committee in General Comment No. 25** states that:

“21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. 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.**”⁸⁶

40. The text of the **United Nations Universal Declaration of Human Rights (UDHR) 1948,**⁸⁷ **Article 21**, already referred to these main premises:

“(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”.

41. On this basis, the UN Human Rights Committee found a violation of Article ICCPR in a case where the number of residents per ward for municipal elections varied from about 1 to 7.⁸⁸

2. European level

42. **Article 3 of the First Protocol to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR, the Convention) - Right to free elections:**

“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”,

⁸⁵ Articles 2(1) and 26 ICCPR; Article 14 ECHR; Articles 1, 24 ACHR.

⁸⁶ Hum. Rts. Comm., General Comment No. 25: The right to participate in public affairs (Art. 25), CCPR/C/21/Rev.1/Add.7, (1996).

⁸⁷ The UDHR is not a treaty, but several of its provisions are universally accepted and considered to be customary international law.

⁸⁸ Istvan Mátyus v. Slovakia, Communication No. 923/2000, U.N. Doc. A/57/40 (Vol. II) at 257 (2002).

43. The Venice Commission's Code of Good Practice on Electoral Matters (Code of Good Practice)⁸⁹ Section I.2.2.-2.4. A key guideline 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 except in special circumstances. The distribution of seats must be reviewed at least every 10 years, preferably outside election periods.⁹⁰ Moreover, the Code states 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.

44. The Copenhagen Document (1990) from the Organization for Security and Co-operation in Europe (OSCE) where the participating States recognised that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms.

45. In Paragraph 6, this 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 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. ..."

46. Paragraph 7.3 states 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".

47. References to the issue of equal allocation of seats can also be found in the Venice Commission opinions⁹¹ as well as in electoral observation reports, in particular by the Parliamentary Assembly of the Council of Europe and the OSCE/ODIHR.

48. The issue was also addressed in a few cases before the European Court of Human Rights (and previously the European Commission of Human Rights). However, up to now,

⁸⁹ [CDL-AD\(2002\)023rev2](#).

⁹⁰ **I.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.

...

I.2.4. Equality and national minorities. ... 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. ...

⁹¹ See, for example, [CDL-AD\(2011\)043](#), par. 16ff.

the Court has not found a violation of Article 3 Protocol 1 due to unequal allocation of seats.⁹²

3. American level

Article 23 of the American Convention on Human Rights (ACHR) - Right to Participate in Government

“1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives; [and]

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters;...”

B. Domestic law

49. The electoral principles (elections by universal, equal, free, direct and secret suffrage) are in general enshrined in the national constitutions.⁹³ Moreover, in a number of countries, the Constitution includes more precise provisions on the constituencies.⁹⁴

50. At any rate, more precise provisions on the division into constituencies are found in the national electoral laws.⁹⁵

⁹² ECtHR *Bompard v. France*, No. 44081/02, 04/04/2006; *Eur. Com. HR X. v. Iceland*, No. 8941/80, 08/12/1981.

⁹³ Article 45 of the Albanian Constitution, Article 7 of the Armenian Constitution, Article 26(1) of Federal Constitutional Law of Austria, Article 83 of the Constitution of Azerbaijan, Article 61 of Belgium Constitution, Article 10 of the Bulgarian Constitution, Articles 47, 49 of the Constitution of Chile, Article 72 of Croatia Constitution, Article 31 of Cyprus Constitution, Articles 18, 20 of the Czech Republic Constitution, IV Articles 31(1), (2) of the Denmark Constitution, Article 60 of the Estonian Constitution, Section 25 of the Finland Constitution, Article 24 of the French Constitution, Article 49(1) of the Georgian Constitution, Article 38(1) of the Basic Law for the Federal Republic of Germany, Article 51(3) of the Greek Constitution, Article 2 (Chapter “The State-Parliament”) of the Hungarian Fundamental Law, Article 31 of the Constitution of Iceland, Article 16(1) of the Constitution of the Republic of Ireland, Article 4 of the Basic Law: The Knesset of Israel, Articles 56, 58 of the Italian Constitution, Article 51(1), (2) of the Constitution of Kazakhstan, Article 41 of the Constitution of Republic of Korea, Section 2, Article 6 of the Latvian Constitution, Article 46(1) of the Liechtenstein Constitution, Chapter 4, Article 51(4),(5) of the Luxembourg Constitution, Article 61(1) of the Constitution of Moldova, Article 53 of the Constitution of Monaco, Articles 2, 22 of the Constitution of the Republic of Macedonia, Article 83 of the Constitution of Montenegro, Articles 62, 63 of the Constitution of Morocco, Article 62(1) of the Romanian Constitution, Article 100 of the Constitution of Serbia, Articles 68 (1), 69(2) of the Spanish Constitution, Article 149 of the Constitution of Switzerland.

⁹⁴ Article 64 of the Albanian Constitution, Article 89 of the Armenian Constitution, Articles 26(2), 34 (1)-(3), 35(1) of Federal Constitutional Law of Austria, Article 83 of the Constitution of Azerbaijan, Articles 62, 63, 67, 68 Of Belgium Constitution, Articles IV/1-IV/2 of Bosnia and Herzegovina Constitution, Articles 45, 46 of the Constitution of Brazil, Articles 63, 67(1) of the Bulgarian Constitution, Article 49 of the Constitution of Chile, Article 106 of the Costa Rica Constitution, Article 62 of Cyprus Constitution, Article 18(1), (2) of the Czech Republic Constitution, IV Articles 28, 31(3),(5) of the Denmark Constitution, Articles 4, 49(1), 50(2) of the Georgian Constitution, Article 51 of the Basic Law for the Federal Republic of Germany, Article 54(3) of the Greek Constitution, Article 31 of the Constitution of Iceland, Articles 16(2), 18 of the Constitution of the Republic of Ireland, Articles 56, 57 of the Italian Constitution, Articles 50(2), 51 of the Constitution of Kazakhstan, Article 70(2) of the Constitution of Kyrgyzstan, Section 2, Article 7 of the Latvian Constitution, Article 46 of the Liechtenstein Constitution, Chapter 4, Article 51(6) of the Luxembourg Constitution, Articles 52(1), 56 (1), 61 and 62 of the Constitution of Malta, Articles 53, 56 of the Constitution of Mexico, Article 63 of the Constitution of Morocco, Article 57 of the Constitution of Norway, Article 149 of the Constitution of Portugal, Article 62(2) of the Romanian Constitution, Article 95(2) of the Constitution of the Russian Federation, Articles 68(2),(3), 69 (1),(3)-(5) of the Spanish Constitution, Articles 149 (3), (4), 150 (2) of the Constitution of Switzerland, Article 1 section 2, section 3 of the USA Constitution.

⁹⁵ 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 the Riigikogu Election Act of Estonia,

51. The constitutional and/or legislative provisions may define the constituencies as territorial/administrative divisions.⁹⁶ They may also include rules on the reallocation of seats or the redrawing of constituencies, including on their frequency.⁹⁷

52. Constitutional jurisdiction had a number of opportunities to deal with (unequal) allocation of seats to constituencies. The most known case-law is that of the Supreme Court of the United States, since the 1962 Baker v. Carr case, where the Court interpreted the Equal Protection Clause of the 14th Amendment to the U.S. Constitution encompasses claims that electoral districts be periodically adjusted or redrawn to account for population shifts among them.⁹⁸ More recently, 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).⁹⁹

IV. Main features of the constituencies and the allocation of seats

A. Criteria for the allocation of seats to constituencies

53. The principle of equal voting power, as recognised by national constitutions and international law, implies that: seats must be evenly distributed among the constituencies. Countries with only a nationwide constituency do not use any allocation criterion. In other countries there are different ways to determine either the boundaries of the constituencies or the number of seats per constituency in case of multi-member constituencies. The Code of Good Practice in Electoral Matters¹⁰⁰ mentions four possible allocation criteria: population, number of resident nationals (including minors), number of registered voters, and the number of people actually voting. An appropriate combination of these criteria might be

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, 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.

⁹⁶ See the examples above II.B.

⁹⁷ See the examples below IV.

⁹⁸ Reynolds v. Sims, 377 U.S. 533 (1964), established the principle of "one person, one vote", and held that electoral districts for state legislatures, including state senates, must be roughly equal in population. See also, for example, Davis v. Bandemer 478 U.S. 109 (1986),

<https://supreme.justia.com/cases/federal/us/478/109/case.html>; cases before the French Constitutional Council, <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> and the Slovak Constitutional Court, quoted in CODICES SVK-1998-3-010, as well as the informative Irish Cases: O'Donovan v. Attorney General (1961) I.R. 114, Murphy & McGrath v. Minister for Environment (2007) 6 JIC 0701.

⁹⁹ This decision (Ucha Nanuashvili and Mikheil Sharashidze v. Parliament) is quoted in CODICES GEO-2016-2-007.

¹⁰⁰ Code of Good Practice in Electoral Matters I.2.2.ii.

envisaged too. While the last criterion does not appear to be applied and could be problematic, national legislation provides for the three other ones, mostly population and number of registered voters.¹⁰¹ 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.

1. Population

54. The most common criterion used for the allocation of seat to constituencies is population. Usually the number of seats per constituency is calculated by dividing the total number of inhabitants by the number of seats, giving the average number of inhabitants per seat and then awarding seats per constituency by dividing the number of inhabitants in that constituency by the average number of citizens per seat. Example of countries that use this criterion¹⁰² are Albania,¹⁰³ Austria,¹⁰⁴ Belgium,¹⁰⁵ Brazil,¹⁰⁶ Bulgaria,¹⁰⁷ Chile,¹⁰⁸ Costa Rica,¹⁰⁹ France,¹¹⁰ Georgia,¹¹¹ Germany,¹¹² Greece,¹¹³ Italy,¹¹⁴ Lithuania,¹¹⁵ Mexico,¹¹⁶ Norway,¹¹⁷ Poland,¹¹⁸ Romania,¹¹⁹ Slovenia,¹²⁰ Switzerland¹²¹ and Turkey.¹²²

2. Number of resident nationals

55. Austria appears to be the sole country of the Council of Europe where the number of resident nationals is the criterion for allocating seats. The Federal Constitutional Law on National Council Elections provides that "The Länder are represented in the Federal Council in proportion to the number of nationals in each Land".¹²³

3. Number of registered voters

56. Sometimes it is not the total number of citizens that is used, but the number of registered voters. Azerbaijan uses the average voter representation norm by dividing the total number of registered voters by the number of seats (125).¹²⁴ Latvia also uses the number of registered voters. Voters residing outside of Latvia are included among voters of

¹⁰¹ The Office for Democratic Institutions and Human Rights recommends that constituencies be designed on the basis of population numbers as opposed to the number of electors. This reflects the expectation that part of the member's role is to work with the entire population of the constituency, including those who may not be entitled to vote and will not be counted among the electors.

¹⁰² The exact mathematical formulas will not be addressed here.

¹⁰³ Article 75 (1) of the Electoral Code.

¹⁰⁴ Article 26 (2) of the Federal Constitutional Law.

¹⁰⁵ Article 63 (3) of the Constitution.

¹⁰⁶ Article 45 (1) of the Constitution.

¹⁰⁷ Election Code, Annex No 1 to Art 248, 2.

¹⁰⁸ Article 179-bis of the Electoral Code.

¹⁰⁹ Article 106 of the Constitution.

¹¹⁰ Article L. 125, Titre II Chapitre II of the Code électoral.

¹¹¹ Article 110.3 of the Election Code.

¹¹² Section 3 of the Federal Elections Act.

¹¹³ Article 54 of the Constitution.

¹¹⁴ Article 56 of the Constitution.

¹¹⁵ Article 9(1) of the Law on Elections to the Seimas..

¹¹⁶ Article 53 of the Constitution.

¹¹⁷ Article 57 of the Constitution. The size of the area concerned is also taken into account, see below par 58.

¹¹⁸ Article 202 of the Election Code.

¹¹⁹ Article 62(3) of the Constitution.

¹²⁰ Article 20 of the National Assembly Elections Act.

¹²¹ Article 16 of the Federal Law on Political Rights.

¹²² Article 4 of the Parliamentary Elections Law.

¹²³ Article 34 (1).

¹²⁴ Article 29 (1) of the Election Code 2013.

the Riga constituency.¹²⁵ Russia uses registered voters as a criterion for its single-member constituencies, based on the number on the date closest to the day of the adoption of the CEC decision for consideration of the State Duma (January 1st or July 1st).¹²⁶ In Sweden the seats per constituency are calculated based on the relationship between the number of persons entitled to vote in each constituency and the total number of persons entitled to vote in the whole country.¹²⁷ Ukraine also uses the number of registered voters, based on the data of the State Voter Register and determined by the Central Election Commission.¹²⁸ In Estonia the seats per constituency are calculated based on the number of voters in civic register in the beginning of the month when elections are called.¹²⁹ Iceland also uses the number of voters to determine the boundaries of each constituency as to ensure that each constituency has more or less the same amount of seats.¹³⁰ Hungary uses the number of voters, which has to be approximately equal in all - one-member - constituencies.¹³¹

4. A combination of criteria

57. Denmark uses the number of inhabitants, the number of electors and the density of the population, which means that the territory is not taken into account.¹³² However, Greenland shall be represented by not more than two Folketing members, to prevent the results from being distorted by taking the (huge) territory's area into account.¹³³ The Constitution of Norway prescribes a combination of population and surface area. Each constituency has at least one seat. The total number of seats is determined on the basis of a calculation of the ratio between the number of inhabitants and the surface area of each constituency compared to that of the entire country. Each inhabitant counts as one point and each square kilometre as 1.8 points. This calculation is made every eight years.¹³⁴ In Morocco, the delimitation of constituencies should as much as possible tend towards a demographic balance, while taking into consideration the size of the area concerned.¹³⁵

B. Exceptions and restrictions to equal voting power; electoral geometry

58. Equal voting power does not of course mean that exactly the same number of inhabitants or the same number of registered voters should correspond to a seat whatever the constituency, which would be impossible.

59. In this regard, a distinction has to be made between exceptions and restrictions to the application of the principle of equal voting power. Exceptions are made to equal voting power when the allocation of seats does not take into account or takes only partially into account population or the number of registered voters. Restrictions imply that the principle of equal voting powers has to be applied, but that the ratio between the population or the number of voters and the number of seats is not fully proportional. The issue of the representation of minorities, as a way of ensuring real non-discrimination and not as an exception or a restriction to the principle of equality, was already addressed.¹³⁶

¹²⁵ Article 7 of the Constitution and article 8 (1) of the Election Law.

¹²⁶ Article 12 of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

¹²⁷ Chapter 3, Article 6 of The Instrument of Government combined with Chapter 4, section 3 of the Electoral Law.

¹²⁸ Article 18 (2) of the Law of Ukraine on Elections of People's Deputies.

¹²⁹ Article 7 of the Riigikogu Election Act.

¹³⁰ Article 7 of the Act No.24 from 16 May 2000 Concerning Parliamentary Elections to the Althing.

¹³¹ Section 4 (2) and (3) of the Act CCIII of 2011 On the Election of Members of Parliament.

¹³² Article 31 (3) of the Constitution and article 2.10 of the Parliamentary Election Act.

¹³³ Article 28 of the Constitution.

¹³⁴ Article 57 of the Constitution.

¹³⁵ Article 2 of the Organic Law No. 27-11 of 14 October 2011.

¹³⁶ II.A.1.b above.

1. Exceptions

60. The principle of equal voting powers does not apply to all elections. According to the Code of Good Practice in Electoral Matters, it should be applicable at least for the elections to lower houses of parliament and to regional and local councils.¹³⁷

61. While lower chambers represent the people, upper Parliament chambers often do not. They may represent the federal entities of a State, or its territorial units or districts. The allocation of seats will then be based only partially or not at all on population or the number of registered voters.¹³⁸

a. Case study: the European Parliament and the principle of degressive proportionality

62. The Treaty on the European Union (TEU), as modified by the Lisbon Treaty¹³⁹ and in particular its Article 14(2), has introduced the new principle of degressive proportionality for the allocation of the seats of the European Parliament. More specific rules can be found in Article 4 of the European Council Decision of 28 June 2013,¹⁴⁰ establishing the composition of the European Parliament (EP). Article 14(2) TEU states that “[t]he European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats”. In other words, the system, while taking proportionality into account, will make the smaller countries’ citizens substantially more represented, in proportional terms, than the others. For example, a Maltese citizen has ten times more representation, in proportional terms, than a German one.

63. The European Council Decision states that the composition of the European Parliament shall be revised with the aim of establishing a system to allocate the seats among Member States in an objective, fair, durable and transparent way. This 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 the future will make it possible, before each 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 the number and demographic trends in the member states’ population, as duly ascertained thus respecting the overall balance of the institutional system as laid down in the Treaties.¹⁴¹

¹³⁷ Code of Good Practice in Electoral Matters, I.2.2.i.

¹³⁸ For instance, the United States Senate and the Swiss Council of States consist of two members per state or canton (one member for the former half-cantons). In *Reynolds v Sims*, 377 U.S. 533 (1964), the US Supreme Court held that districts for elections to state senates must be based on proportionate representation, even though the US senate is not. 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). The Spanish Senate comprises four senators per province (with exceptions for the island provinces), far more than would correspond to the autonomous communities in proportion to their population.

¹³⁹ EU Treaty, OJ C 326, 26.10.2012. According to Art. 10 (2) of the EU Treaty, Citizens are directly represented in the EP. There is a potential ambiguity in the term “Member State” in Article 14 (2) 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.

¹⁴⁰ European Council Decision of 28 June 2013 establishing the composition of the European Parliament, OJ L 181, 29.6.2013, p. 57–58.

¹⁴¹ In the Decision it is further stipulated that: 1. Any more populous Member State shall be allocated at least as many seats as any less populous Member State. 2. The least populous Member State shall be allocated 6 seats.

64. The two proposed allocation methods¹⁴² that could satisfy the Decision requirements are the Cambridge Compromise¹⁴³ and the Power Compromise.¹⁴⁴

65. It should be stressed that there is a significant strain between the principles of direct representation and degressive representation, as they are stipulated in the EU Treaty. The principle of direct representation implies equal voting power and therefore 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 prioritising direct representation over degressivity. In contrast, the Power Compromise allows greater degressivity, but at some cost to direct representation and equal voting power.¹⁴⁵

66. 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, so introducing a slight bias in favour of the less populous Member States which reinforces the effect of degressive proportionality.

3. The most populous Member State shall be allocated 96 seats. 4. 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. The proposal of the European Parliament has not yet been adopted; it will have to take account of Brexit's consequences

¹⁴² Grimmert, 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

¹⁴³ The Cambridge Compromise states 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.” See [The Composition of the European Parliament](#), p. 6.

¹⁴⁴ The Power Compromise is a variant of the Cambridge Compromise that 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 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.” See [The Composition of the European Parliament](#), p. 7.

¹⁴⁵ 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/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

67. In contrast the Power Compromise achieves degressive proportionality by interpreting the term “citizens” in a rather broad sense. The method replaces real 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 into 175 082 population units.

68. Degressive proportionality applies only to the repartition of seats among states. Equal voting power has to be fully ensured among constituencies established inside a state.

2. Restrictions

69. Even for elections where the principle of proportional allocation of seats applies, full proportionality is not ensured. First, some restrictions to proportionality are inherent to the system. The first ones are of a mathematical character. The very definition of proportionality has been a theme for controversy for centuries. Moreover, perfect proportionality is not reachable when allocating a limited number of seats to a much larger number of inhabitants or voters.

70. Second, while the exact number of registered voters (and not of those who should be registered) is in principle always rather easy to determine, this is not the case of the number of inhabitants which evolves all the time. 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.¹⁴⁶

71. Finally, another inherent limitation of proportionality may derive from the use of administrative divisions as constituencies. The smaller and more numerous they are, the more severe this (inherent) restriction may be.

72. Limitations to proportionality are of course not always inherent and may become excessive, violating international and constitutional standards.

73. Excessive restrictions to equal voting power may result 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. This will be addressed more in detail below.

74. A distribution of constituencies causing inequalities in representation as soon as it is applied is called *active electoral geometry*, the most blatant aspect of electoral geometry.

75. The issue is to know when inadmissible electoral geometry is at play. Up to what extent is disproportionality acceptable?

76. As already outlined, national legislation may take the physical extent of the constituency into account, like in Denmark and Norway.

77. Disproportionality may be due to the allocation of a minimum number of seats to each constituent state. Mexico uses the criterion of population for its single-member constituencies. The borders separating the 300 constituencies are drawn after dividing the country’s population by the number of constituencies, taking into account the most recent census. Each state shall have at least two representatives elected within the constituencies.¹⁴⁷ The United States uses population for the House of Representative

¹⁴⁶ Cf. the summary report on voters residing *de facto* abroad, [CDL-AD\(2015\)040](#).

¹⁴⁷ Article 53 of the Constitution.

constituencies, the number of seats depends of the share of the aggregate population; each state will have at least one seat.¹⁴⁸

78. Over-representation of (rural) areas with few residents is also quite widespread. For instance, in the Spanish Constitution (Article 68(2)) at least one seat is assigned to each province before the other seats are allocated.¹⁴⁹ At least one seat is also assigned to each state of the United States,¹⁵⁰ a similar approach is followed in Norway¹⁵¹ and Peru,¹⁵² for example.

79. 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. Moreover, basing the number of seats on the number of registered voters in a system of active registration could be misleading, since practical hurdles could prevent a number of people to register and/or to vote and then lead to a very low turnout.

a. Permissible departure from the norm

80. Even if departure from the norm is unavoidable, national law and - in a subsidiary way - international standards define up to what extent it is admissible.

81. A few countries address the issue at constitutional level. The Constitution of Malta allows for no more than 5% departure in order to take into account geographical vicinity, differences in density of population and other relevant factors.¹⁵³ In Kazakhstan it is a constitutional law which allows 15% departure from the average number of voters per deputy's mandate in a given administrative-territorial unit.¹⁵⁴ Constitutional limitations may be decided by constitutional courts: in the Republic of Korea, the Constitutional Court held in 2014 that the law which allowed a departure from the norm within 50% is unconstitutional and ordered its reduction to 33.3%.¹⁵⁵

82. Most countries address the issue at legislative level. For example, Azerbaijan allows a 10% departure from the norm in distant or impassable places and no more than 5% everywhere else.¹⁵⁶ Croatia allows a 5% difference between the numbers of voters in each constituency.¹⁵⁷ The Czech Republic uses a norm of 15% for the constituencies for the Senate.¹⁵⁸ Hungary allows 15-20% departure from the norm. This deviation is only permissible in consideration of geographical, ethnic, historical, religious and other local characteristics and for any migration of the population.¹⁵⁹ Ireland legislates for the number of members of Dail Eireann and the ratio thus achieved (which must be one member to between 20,000 and 30,000 of the population) is applied as equally as is practicable across the state.¹⁶⁰ Lithuania allows a deviation of 20%. The law states that the number of voters in constituencies must be from 0.8 to 1.2 of the average number of voters in all single-member

¹⁴⁸ 2 U.S. Code, par. 2a.

¹⁴⁹ Article 68(2): "the Law...assigns minimum initial representation to each constituency and allocates the remaining seats proportionally to the population".

¹⁵⁰ Article I section 2 of the Constitution.

¹⁵¹ Article 57 of the Constitution.

¹⁵² Article 21 of the Election Act.

¹⁵³ Article 61 (4) of the Constitution.

¹⁵⁴ Article 21 of the Constitutional Law on Elections.

¹⁵⁵ See the [Case on Standard for Population Disparity allowed in Division of Electoral Districts](#).

¹⁵⁶ Article 29.3.1 of the Election Code 2013.

¹⁵⁷ Article 39.1 of the Act on the Election of the Representatives to the Croatian Parliament.

¹⁵⁸ Article 59 of the Parliamentary Elections Act.

¹⁵⁹ Section 4 (4) of the Act CCIII of 2011 on the Elections of Members of Parliament.

¹⁶⁰ Article 16 (2) of the Constitution.

constituencies.¹⁶¹ In Russia, a departure of between 10 and 15% is allowed for the single-member constituencies, where 10% is the main norm and 15% is only allowed in difficult or remote areas. The list of these difficult or remote areas is established by law.¹⁶² The Macedonian legislation allows a departure between – 5% and + 5% in any constituency compared to the average number of voters in a constituency.¹⁶³ Ukraine allows a departure of 12%.¹⁶⁴ In the United Kingdom the typical size of constituencies differs among the parts of the country. The Office for National Statistics puts the median total parliamentary electorate across constituencies of about 72.400 in England, 69.000 in Scotland, 66.800 in Northern Ireland and 56.800 in Wales.

83. A distribution of seats was up to now recognised as going against international hard law only in a very specific case.¹⁶⁵ The Code of Good Practice in Electoral Matters is stricter: it provides that “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)”.¹⁶⁶ A non-demographic element can therefore be taken into account up to a certain extent. The Constitutional Court of Georgia, in its decision of 28 May 2015, referred to the Code of Good Practice in Electoral Matters to state that that allowable deviation from proportional allocation of seats may not go above 10% and in exceptional cases, 15%.¹⁶⁷

3. Gerrymandering

84. Gerrymandering, which may be defined as a negative and manipulative act of politicians to redraw the legislative/electoral district boundaries to deprive the representation that another group or party would enjoy. Partisan political gerrymandering involves a situation in which a map distributing voters for purposes of political representation is drawn to ensure that one political party wins a disproportionate number of seats. Gerrymandering includes both ‘cracking’ and ‘packing’. Cracking involves splitting the vote for a group among a number of constituencies such that the support is so divided as to limit its impact in any one constituency. Packing refers to grouping the supporters of a particular group in one constituency such that there will be a large number of votes which will foreseeably not have any impact on the election. Simply said, gerrymandering means 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. It is a refined form of electoral geometry, which owes its name to Elbridge Gerry, one of the Founding Fathers, fifth Vice-President of the United States (1813-1814).¹⁶⁸ Gerrymandering is therefore not a *manipulation* of the allocation seats to constituencies but of *constituency delineation*.

85. Gerrymandering (partisan and bipartisan)¹⁶⁹ can be considered 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

¹⁶¹ Article 9 (1) of the Republic of Lithuania Law on Elections to the Seimas.

¹⁶² Article 12.7 of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

¹⁶³ Article 4 (7) of the Electoral Code.

¹⁶⁴ Article 18 (2) of the Law of Ukraine on Elections of People’s Deputies.

¹⁶⁵ See the example given above at footnote 86.

¹⁶⁶ Code of Good Practice in Electoral Matters, I.2.2.iv.

¹⁶⁷ Decision 1/3/547, available in CODICES, <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

¹⁶⁸ More precisely, the term’s origin is a portmanteau word of his name + mander as the electoral boundaries drawn in Massachusetts while he was governor were said to be shaped like a salamander.

¹⁶⁹ A distinction exists between partisan and bipartisan gerrymandering. Bipartisan gerrymandering results in polarised 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.

partisan and bipartisan gerrymandering are extremely damaging to voters, as they deprive the electorate of a meaningful influence on who gets elected. When stating that “[t]he 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”,¹⁷⁰ General Comment No. 25 warns not only against active and passive electoral geometry, but also against gerrymandering. Gerrymandering goes against equal suffrage under its aspect of equal opportunities rather than under its aspect of equal voting power *stricto sensu*, which does not guarantee proportional representation of the parties.

86. Gerrymandering relies heavily on a winner-take-all approach. In other words, the less the system is proportional, the bigger the risk of gerrymandering. Namely, when 51% of voters earn 100% of representation, this electoral engineering can easily make some votes count to their full potential and annul the effect of other votes. Moreover, gerrymandering has become easier today due to the application of new technologies which may help draw districts more precisely to respond to partisan preferences.

a. Case study: constitutional limits on partisan political gerrymandering in the United States

87. To date, the United States Supreme Court has never struck down an election map on grounds of political gerrymandering, though the lower courts have addressed the issue to some extent. The Supreme Court has, however, struck down electoral maps on grounds of racial gerrymandering – i.e., the practice of drawing political districts in order to dilute the vote, and thus the political representation, of voters from racial minorities. And the Court has left open the possibility that some kinds of partisan political gerrymandering may be too extreme to survive constitutional scrutiny.

88. Both political and racial gerrymandering cases have raised difficulties for U.S. courts in identifying the standards that should be applied to determine whether a districting plan is constitutionally impermissible. Relevant questions have included whether there must be clear intent to discriminate against voters in the disadvantaged group, how extreme the resulting disparity in voting power must be, and what other goals districting plans resulting in unequal districts may validly serve.

89. In autumn 2017 the Supreme Court heard oral argument in *Gill v. Whitford*,¹⁷¹ a constitutional challenge to a redistricting plan for the state legislature passed in 2011 by the State of Wisconsin’s Republican-controlled legislature. In 2016, the lower federal court declared the plan unconstitutional on the grounds that its district lines were purposely drawn to favour one political party and to disadvantage the other.

90. The Wisconsin redistricting plan in *Whitford* resulted in disproportionate representation of Republicans in the State legislature. In 2012, Democrats won a majority of the popular vote (51.4%) but received only 39 seats in the state’s 99-member legislature. In the same election, Republicans won only 48.6% of the statewide vote, but gained 60 seats in the legislature. In 2014, Democrats won approximately 48% of the vote, and received only 36 seats, while Republicans received 52% of the vote, but gained 63 seats. Determining what criteria should be used in evaluating a discriminatory effect on voter representation that should be considered unconstitutional is very difficult, because no plans that divide voters into districts will ever produce perfectly proportional representation of voters from different

¹⁷⁰ ICCPR General Comment No. 25, paragraph 21.

¹⁷¹ No. 16-1161, U.S. (2017).

parties in the legislature, and considerations such as geographic concentration of voters in cities may further distort voter representation.¹⁷²

91. The plaintiffs argued that the state legislature intentionally diluted Democratic votes across the state through two methods: separating supporters of one party among different districts, so that they do not form a majority in any of them (known as “cracking”); and grouping large numbers of a party’s supporters in relatively few districts, where they win by large margins (known as “packing”).

92. The plaintiffs claimed that the Wisconsin redistricting map violates the Equal Protection Clause of the U.S. Constitution, by discriminating against voters of the disadvantaged political party, preventing their ballots from resulting in “fair and effective representation” (*Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)). They also contended that the plan violates the freedom of expression provisions of the First Amendment by constituting unconstitutional viewpoint discrimination, since the map penalizes citizens by diluting their electoral influence as a result of their association with a political party or their expression of their political views.

93. In a previous gerrymandering case in 2003, *Vieth v. Jubelirer*, the Court divided five to four and declined to review Pennsylvania’s redistricting plan. In that case, four justices took the position that courts should never review gerrymandering claims, because it is too hard to establish a manageable test for courts to apply, while four other justices would have allowed courts to review gerrymandering claims. Justice Anthony Kennedy, the fifth vote, took a middle position, agreeing that the Court should not get involved in that case, but leaving open the door for judicial review of gerrymandering cases if a workable standard could be identified in the future.

94. The *Gill v. Whitford* case therefore has focused on what the appropriate legal standard should be for measuring whether a redistricting plan has been the result of partisan political gerrymandering.

95. As in the *Vieth* case, the Court seems divided on the merits, and the case is likely to be close.

V. How to ensure respect for international standards: measures against electoral geometry

96. *Active electoral geometry* should be avoided through an independent and impartial (boundary) commission respecting the principle of equal voting power and acting in a transparent manner.

97. In order to avoid *passive electoral geometry*, the allocation of seats and/or the constituencies cannot be static. The changes in population have to be reflected either through the reallocation of seats or through redistricting, which has on its turn to be done in conformity with the above-mentioned principles.

¹⁷² For example, Wisconsin officials say that the lopsided representation of Republicans in the State Legislature results from the fact that Democrats live primarily in cities, effectively diluting their voting power, while Republicans are more evenly distributed across states. In addition, a prior redistricting plan that had been ordered by a federal court in 2002 had resulted in Republicans winning 53.5% of the statewide vote and receiving 60 seats in the legislature. On the other hand, the plaintiffs in *Whitford* claim that the redistricting map they are challenging “splits more counties than any other map in Wisconsin’s history” and that its districts are “less compact, on average, than those of any other Wisconsin map for which data is available.” The lower court agreed that the concentration of Democrats in cities explained some part of the voting gap in Wisconsin, giving “the Republican Party a natural, but modest, advantage in the districting process,” but found that it did not explain the severity of the discrepancy between Republican and Democratic voting power.

98. Reallocation is, however, 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,¹⁷³ to match a standard MP-population/voters ratio (principle of redistricting).

99. In principle, equality of voting power may be achieved in multi-member constituencies either by redrawing constituency boundaries or reallocating mandates to the constituencies. While the choice to reallocate mandates can be done by a technical formula without political motivation, it may lead to a disparity among the constituencies, where the number of mandates allocated may differ a lot. This kind of disparity has effect on the natural threshold, leading to differences for smaller candidates' lists.¹⁷⁴ When the constituencies do not correspond to federated, regional or other subnational entities with a long history, it is thus important to find a balance between the two options in the long run.

A. Reallocation or redrawing?

1. Reallocation

100. Most countries using multi-member constituencies provide for reallocation. For example, in Albania, the Central Electoral Commission reallocates the seats for each electoral zone based on the total number of citizens and the number of citizens for each region based on the National Civil Status Register. The proposal for reallocation has to be approved by the Assembly, no later than 6 months before the end of its mandate. In case of early elections there is no reallocation procedure.¹⁷⁵ Austria determines the number of seats per constituency after every census.¹⁷⁶ In Belgium the number of inhabitants in each electoral constituency is established every 10 years by a census or other means defined by law. The King publishes these results within six months. Within three months, he has to assign each constituency a number of seats proportional to its population.¹⁷⁷ In Costa Rica the Supreme Electoral Tribunal reallocates the seats to the constituencies after each general population census.¹⁷⁸ Spain provides for reallocation because of population changes.¹⁷⁹ Switzerland provides for reallocation after each census.¹⁸⁰ Turkey also reallocates the seats after each census.¹⁸¹ Reallocation takes place *inter alia* also in Chile, Costa Rica, Iceland, Latvia, Norway and Sweden.

101. As already noted, a number of countries define sub-national entities or administrative divisions as constituencies. Especially when they are defined in the Constitution, this is a strong safeguard against *gerrymandering*. That is why 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.¹⁸²

¹⁷³ Code of Good Practice in Electoral Matters (explanatory report), par. 17.

¹⁷⁴ See [CDL-AD\(2008\)037](#), par. 15.

¹⁷⁵ Article 76 of the Electoral Code.

¹⁷⁶ Par. 5 of the Federal Law on National Council Elections.

¹⁷⁷ Article 63 (3) of the Constitution.

¹⁷⁸ Article 106 of the Constitution.

¹⁷⁹ Section 162 of the Representation of the People Institutional Act.

¹⁸⁰ Article 16 of Federal Law on Political Rights.

¹⁸¹ Article 5 of the Parliamentary Elections Law.

¹⁸² Code of Good Practice in Electoral Matters, I.2.2. See also OSCE, Inventory of OSCE Commitments and Other Principles for Democratic Elections, <http://www.osce.org/odihr/elections/13956?download=true>, 3.2.

2. Redrawing

102. As already said, redrawing is the only way to reallocate seats in one-member constituencies. In Azerbaijan, the Central Electoral Commission forms the 125 constituencies every 5 years, based on the number of voters permanently residing and registered in the relevant territorial units.¹⁸³ In the United Kingdom, Parliament redraws the boundaries of the constituencies in each part of the country on the basis of reports by the Boundary Commissions for England, Scotland, Wales and Northern Ireland. In Georgia the Central Electoral Commission defines the borders of the constituencies no later than June 1st of the year of regular parliamentary elections and not earlier than December 1st of the previous year.¹⁸⁴ In France, constituency boundaries are revised according to demographic changes after the second general census of the population following the last delimitation.¹⁸⁵ In Hungary, Parliament can amend the boundaries of the constituencies, but not during the period between the first day of the year preceding the general election of Members of Parliament and the day on which the general election of Members of Parliament is held, with the exception of any election held due to the voluntary or mandatory dissolution of Parliament.¹⁸⁶ In the Republic of Korea, the National Assembly redraws the constituencies one year before the elections.¹⁸⁷ The Central Electoral Commission of the Russian Federation develops a new scheme of single-mandate electoral districts and their graphic representation and presents it in the prescribed manner to the State Duma no later than 80 days prior to the expiration of the term for which the previous scheme of single-mandate electoral constituencies was approved.¹⁸⁸

103. 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. This is the case in Germany, where boundaries are redrawn where the deviation is greater than 25%;¹⁸⁹ and in Hungary, where they are redrawn when the deviation exceeds 20%.¹⁹⁰ In the United Kingdom, the Boundary Commissions for England, Scotland, Wales and Northern Ireland are responsible for reporting to Parliament regularly on necessary changes to constituency boundaries, but the law does not provide for the time of redrawing.

104. When redrawing, the 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.

105. Concerning multi-member constituencies, the Macedonian legislation provides for redrawing them in a way that each constituency will have 20 seats, based on the number of voters.¹⁹¹ The Parliament of Ireland revises the boundaries of the constituencies at least once in every twelve years. Changes they make do not take effect during the remaining time of the Parliament.¹⁹² In Malta, the Electoral Commission reviews the boundaries of the constituencies at intervals of not less than 2 nor more than 5 years. Parliament can then

¹⁸³ Article 29.1 of the Election Code 2013.

¹⁸⁴ Article 110.4-5 of the Election Code.

¹⁸⁵ Article L-125 of the Code électoral.

¹⁸⁶ Section 4 of Act CCIII 2011 On the Elections of Members of Parliament.

¹⁸⁷ Article 24-2 of the Public Official Election Act (2016).

¹⁸⁸ Article 12 (10) of the Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation.

¹⁸⁹ Federal Elections Act, Section 3(1)(3).

¹⁹⁰ Act CCIII of 2011 On the Elections of Members of Parliament, Section 4(6).

¹⁹¹ Article 4 (7) of the Electoral Code.

¹⁹² Article 16.2.4 of the Constitution.

decide to alter the boundaries.¹⁹³ In Bosnia and Herzegovina, the constituencies and the number of seats allocated to each constituency are reviewed every four years by the Parliamentary Assembly of Bosnia and Herzegovina to ensure that they are drawn, bearing in mind geographical constraints, in a manner that complies with democratic principles notably proportionality between the number of seats and the number of registered voters.¹⁹⁴ In Bulgaria, the President of the Republic determines the constituencies no later than 56 days in advance of polling day.¹⁹⁵ The Central Electoral Commission then determines the number of seats for each multi-member constituency based on a single standard representation for the entire country depending on the size of population provided by the National Statistical Institute, using the last census results, no later than 55 days in advance of polling day. No district will have less than 4 seats.¹⁹⁶

106. The *criteria for redrawing* are not only respect for equal voting power *stricto sensu* through the design of constituencies with a similar number of inhabitants, resident nationals or registered voters per seat. 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. For example, Hungary specifies that constituencies cannot cross county boundaries nor the boundaries of Budapest; constituencies must form contiguous areas.¹⁹⁷ In Iceland too, constituencies should form a contiguous whole as much as possible.¹⁹⁸ In Ireland, a breach of county boundaries should be avoided, constituencies will be contiguous and there will be regard to geographic considerations.¹⁹⁹ These principles are reflected in the Code of Good practice in Electoral Matters.²⁰⁰

3. Combination

107. In the United States, for the elections of the House of Representatives a combination of redrawing and reallocation is used. Every 10 years on the first day, or within one week thereafter, of the first regular session of the eighty-second Congress and of each fifth Congress thereafter, the President sends a statement to the Congress which shows the number of persons in each State, excluding Indians who don't pay taxes as determined by a census that is held every 10 years. This statement also shows the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method of equal proportions, with the guarantee that each State receives at least one Member.²⁰¹ After this process of reallocation of Members to each State, the States then redraw the constituencies within their State.

108. Both approaches can also be seen in the countries which combine proportional representation in multi-member constituencies and a majoritarian part of the elections in one-member constituencies, like Germany, where one set of seats is redistributed periodically among provinces (Länder), while another set is filled from single-member constituencies whose boundaries are revised as necessary.

¹⁹³ Article 61 of the Constitution.

¹⁹⁴ Article 9(11) of the Election Law.

¹⁹⁵ Article 249 (2) of the Election Code.

¹⁹⁶ Articles 247 and 250 of the Election Code.

¹⁹⁷ Section 4 (2) and (3) of the Act CCIII of 2011 On the Election of Members of Parliament.

¹⁹⁸ Article 7 of the Act No.24 from 16 May 2000 Concerning Parliamentary Elections to the Althing.

¹⁹⁹ Article 16 (2) of the Constitution.

²⁰⁰ Code of Good Practice in Electoral Matters, I.2.2.iii and vi: constituency boundaries should coincide with administrative boundaries, while geographical and historic criteria may be taken into account.

²⁰¹ 2 U.S. Code par. 2a.

109. The reallocation of seats or redrawing of constituencies is very often based on the results of the preceding census which inform the competent body of population changes which have occurred and which can then be addressed by redrawing boundaries or reallocating seats to restore equal voting power. Countries like Belgium, Bulgaria, Costa Rica, Denmark, France, Greece, Italy, Ireland, Switzerland, Turkey and the United States all opt for this system. Notably, these changes are made at different time intervals and with some variations among countries. Substantively, however, all changes are based on census results.

110. 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).

C. Competent authority and procedure

1. Reallocation

111. If the law provides for a clear mathematical method for the allocation of seats to constituencies as well as for regular reallocation, the authority which will take the formal decision will have no discretionary power and the risk of political manipulation will be very limited. The design of the competent authority will therefore not be crucial. For example, in Albania, the Central Electoral Commission (CEC) and the Assembly work together in order to reallocate the seats to each constituency.²⁰² In Latvia, the CEC reallocates the seats per constituency four months before Election Day based on data provided by the Population Register. The CEC of Portugal reallocates seats before each election.²⁰³ In Iceland, Latvia, and Turkey, *inter alia*, reallocation is also done by an independent electoral management body. In Austria it is the Federal Minister of Internal Affairs who is responsible for the allocation of seats to the constituencies.²⁰⁴ Also in Norway the Ministry is responsible for allocation of seats.²⁰⁵ In Denmark the Minister for Economic Affairs and the Interior reallocates seats to constituencies.²⁰⁶ In Costa Rica, the Supreme Electoral Tribunal provides for reallocation of seats to constituencies.²⁰⁷

2. Redrawing

112. On the contrary, the intervention of an independent and impartial authority in boundary delimitation is crucial in order to avoid political manipulation, even if it is not inadmissible for the legislator or an electoral management body to take the final decision. 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.²⁰⁸ National legislation and practice could be reconsidered in this regard.

113. Many countries vest the power to redraw constituencies in an Electoral Commission/Authority which deals with elections. The CEC of Azerbaijan is responsible for the redrawing of constituencies. Malta also has made the CEC responsible for the redrawing of constituencies.²⁰⁹ The same applies to Ukraine.²¹⁰ In Mexico, it is the National Electoral

²⁰² Article 76 of the Electoral Code.

²⁰³ Article 13 of the Law governing Elections to the Assembly of the Republic.

²⁰⁴ Par. 5 of the Federal Law on National Council Elections.

²⁰⁵ Article 57 of the Constitution.

²⁰⁶ Part 2, section 10 of the Parliamentary Election Act.

²⁰⁷ Article 106 of the Constitution.

²⁰⁸ See above II.A.2.b.

²⁰⁹ Article 61 of the Constitution.

²¹⁰ Article 18 (2) of the Law of Ukraine on Elections of People's Deputies.

Institute who does the redrawing.²¹¹ In Kazakhstan, Lithuania, the Russian Federation and Turkey, redrawing is also done by the electoral management body.

114. In some countries there is a role of political bodies, particularly Parliament. In the Czech Republic, an Act of Parliament is necessary for the redrawing of the constituencies for the Senate, since their boundaries are fixed in legislation. Both Chambers of Parliament have to agree to the amendment. The practice is that the Czech Statistical Office provides the number of inhabitants per constituency to the Ministry of the Interior. The Ministry then prepares an amendment to the Parliamentary Elections Act, consults it with the regions and then proposes it to the Parliament.²¹² Peru and Sweden²¹³ also have a system where Parliament has to approve the redrawing of constituencies.

115. In Bulgaria, the President has the power to redraw the constituencies and the Central Electoral Commission allocates them the seats.²¹⁴

116. Other countries, however, opt for an Independent Commission which deals solely with constituency boundaries. For instance, Article 25 of the French Constitution requires the establishment of an independent Commission in charge of this task. Section 3 of the German Federal Elections Act also specifies that a Constituency Commission is responsible for boundary alterations. Germany has a Constituency Commission that reports changes in the population and presents a proposal on which changes should be made to constituency boundaries.²¹⁵ In the United Kingdom, the different Boundary Commissions are responsible for reporting to Parliament regularly on necessary changes to constituency boundaries; and Parliament deals with all four reports together.²¹⁶ In the United States, the States differ in the body that is in charge of the redrawing of constituencies.

117. At any rate, the final decision on the delimitation of constituencies should be appealable to a court of law, to prevent any abuse of power.

VI. Conclusion

118. The principle of equal suffrage, as recognised in national constitutional law as well as in international law, imposes allocation of seats to constituencies on the basis of equality of representation. Such equal allocation is an essential feature of democratic elections. Equal suffrage means here, above all, equal voting power: there must be an equal number of inhabitants, of resident nationals or of registered voters per seat.

119. 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.

120. 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

²¹¹ Article 32 of the General Law on Electoral Institutions and Procedures of Mexico.

²¹² Article 59 (2) of the Parliamentary Elections Act combined with Attachment No. 3 to the Parliamentary Elections Act.

²¹³ Section 2, chapter 4 of the Electoral Law.

²¹⁴ Article 249-250 of the Election Code.

²¹⁵ Section 3 of the Federal Elections Act.

²¹⁶ Guide to Parliamentary Constituencies in the UK (March 2015).

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

121. 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.

122. 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.

123. Another challenge for equal suffrage is gerrymandering, that is a delimitation of constituencies intended at favouring 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.

124. 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.

125. 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.

126. Impartiality of the body in charge of boundary delimitation is crucial to avoid any form of electoral geometry, and in particular of gerrymandering. While it is not inadmissible for the legislator or an electoral management body to take the decision, there should exist an appeal procedure to a judicial body to avoid this power to be abused. The decision should take account of the opinion of a committee the majority of whose members are independent. As already recommended by the Venice Commission, this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if appropriate, representatives of national minorities.