29 On the Issue of the Representation of Nationalities in the Parliament

Gábor Kurunczi[*]

29.1 Introduction

Act CCIII of 2011 on the Elections of Members of Parliament (hereinafter referred to as 'Act on the Elections of Members of Parliament'), adopted in late 2011, established – besides bringing about other changes – the institution of national minority lists. These lists compete with the national lists, in addition to providing a channel for national minority voters enrolled in the national register. The institution of minority lists seems to have received the least criticism from among the recent changes; however, circles of national minorities in Hungary raised a number of questions – e.g. difficulties inherent in representation – concerning the workability of such lists.

But did the representation of minorities in the Parliament actually amount to a veritable problem? Is it a viable concept for an MP to be elected on the basis of his minority status in a unicameral parliament? Does the new system solve the old problems? What pitfalls may the institution of separate minority lists entail? Or is there an alternative path? In my paper, I attempt to answer these questions by examining the parliamentary representation of various minorities.

It is important to point out that the paper does not seek to answer the broader question of whether the representation of minorities is necessary or not. Instead, I limit my analysis to the relevant constitutional concerns and the viable responses given to the issue of minority representation.

29.2 The Parliamentary Representation of Minorities

Before embarking upon the analysis of the current legislation, it is worth addressing the historical and international aspects of the question of minority representation.[1]

* Researcher, lecturer at the Pázmány Péter Catholic University, Faculty of Law; Legal advisor to the Hungarian Commissioner for Fundamental Rights. E-mail: kurunczi.gabor@jak.ppke.hu.

1 By the entry into force of the Fundamental Law, the previously employed term of *national and ethnic minorities* – as enshrined in the Constitution – was simply changed to *nationalities*. Since the two designations cover the same 13 ethnic groups and their members, the difference in terminology is of no significance,

Almost every European state was bound to deal with the issue of minorities arising as a central problem in the 17th-18th centuries. This was ever so vital in Hungary, where minorities had always played a significant role in the history of the country.[2] Due to the above, the evolution of the representation of national minorities over the centuries is of crucial significance.

It is generally held that countries with a homogeneous population tend to maintain a unicameral legislation, whereas those whose population is more divided along the lines of language, religion, ethnicity, etc., the bicameral system is more appropriate.[3] The latter is rooted in the English experience,[4] where the second chamber (the House of Lords) acted as a counterbalance for the representation of the people.[5] It was set out to secure the representation of the privileged orders and classes, all based upon their different and respected position within the society.[6] The legal title of members in upper houses changed in the framework of new mass democracies emerging after World War II. Membership was no more linked to privileges, but the reason for maintaining the system rested on the perception that the forum (e.g. the House of Lords) needed to be preserved so to uphold basic social conditions.[7] In this respect, it should be pointed out that the representation of minorities was established mainly in the form of a second chamber based on corporative representation (e.g. comprising representative of different occupations, corporations – as in the case of Ireland). This conforms to the observation that second chambers are normally established in countries with a large territory or population (Italy, for instance) in order to take partic-

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especially when one looks at the application of the legal principles elaborated in earlier rulings of the Constitutional Court. At this point, we have to mention Decision 14/2013 (VI.17) of the Constitutional Court, in which the Court concluded that it (ie. the Court) may refer to or cite the reasoning and the legal principles elaborated in its earlier, albeit repealed decisions, with the indication of the source, and by quoting or summarizing the content to the extent necessary for taking a constitutional position in the case in question.

2 Nationalities actually outnumbered the Hungarian population more than once during the 1000-year history of Hungary. *See* more in Gy. Bindoffer, 'Nemzetiségi politika Magyarországon Szent István korától a rendszerváltozásig (Minority Policy in Hungary from the age of St Stephen to the Transition), *in* T. Gyulavári and E. Kállai (Eds.), *A jövevényektől az államalkotó tényezőkig (Newcomers into constituent groups)*, Budapest, Office of the Parliamentary Commissioner for Civil Rights, 2010. Quoted in: A. Magicz: 'A nemzetiségi jogok új szabályozása – Jogkorlátozás vagy a realitások tudomásulvétele? (Re-Regulation of National Minority Rights – Restriction of Rights or Acknowledgement of Realities?)', in B. Hajas and M. Szabó (Eds.), *Pajzsuk a törvény – Rászoruló csoportok az ombudsmani jogvédelemben* (*Their Shield Is the Law – The Ombudsman's Protection for Vulnerable Groups*), Budapest, Office of the Commissioner for Fundamental Rights, 2013. pp. 27-31.

3 Z. Szente, *Bevezetés a parlamenti jogba* (*Introduction into Parliamentary Law*), Atlantisz, Budapest, 2010, p. 77.

4 J. Petrétei, 'A modern parlamentek – alkotmányjogi szempontból' (Present-day parliaments from the point of constitutional law), 47 *INFO – Társadalomtudomány* (1999), p. 13.

5 M. Dezső, *Képviselet és választás a parlamenti jogban (Representation and election in parliamentary law)*, Közgazdasági és Jogi Könyvkiadó, MTA Állam – és Jogtudományi Intézet, Budapest, 1998, p. 108.

6 Szente, 2010, p. 78.

7 Szente, 2010, p. 79.

ular (e.g. minority) interests into account to the highest possible extent in the process of legislation.[8]

The idea of a bicameral legislation in Hungary emerged following the transition exactly for the reason of establishing appropriate representation for minorities. This was also why both professional and political circles in the 1994-1998 era examined the possibility of setting up a second chamber,[9] however, the issue remained in a state of limbo for some time. To provide a few examples: a) Act XVII of 1990 – regulating the election of minority delegates by the Parliament – was first passed but then quickly annulled; b) a bill was introduced in 1993 but was never passed regarding the regulation of the direct election of minority representatives from lists (competing with the national lists) by members of the minorities, and the right to vote of Hungarians living abroad. According to another, much debated bill – introduced in 1997 then revised in early 1998 –, it would have been up to the majority of the voters to decide which minorities could delegate members in the Parliament.[10]

In some of the Central- and Eastern-European countries – mainly, but not exclusively in those that have a bicameral legislation – the idea of the representation of nationalities (minorities) did not only discussed, but also put into effect. The perception of the system is slightly different in Spain and Cyprus due to the special territorial structure in the former and the Greek-Turkish division in the latter. In Spain, autonomous communities are entitled to send 1 delegate after every million habitant to the upper house of the *Cortes*,[11] whereas in Cyprus – at least to the provisions of the constitution[12] – 70% of the representatives are elected by the Greek, and the remaining 30% by the Turkish population – separately, but at the same time.[13] Although since the territorial separation of Greenland and the Faroe-Islands, Denmark is not one of the textbook examples either, it is worth mentioning the provisions of the Danish constitution, which affords the minorities living in the above mentioned constituent countries the right to delegate two representatives to the *Folketing*.[14] In Poland, minorities have the possibility of preference at the point of the drawing up of national lists. That is to say, if any national minority draws up a list in at least five constituencies, it becomes entitled to draw up a national list.[15] Eighty-eight members are elected according to the general rules in Slovenia, and one additional representative is delegated by each of the Italian and Hungarian communities by the constituen-

8 Petrétei, 1999, p. 13.
9 Dezső, 1998, p. 115.
10 Dezső, 1998, p. 117.
11 B.D. Tóth, 'Spanyolország' (Spain), in N. Chronowski and T. Drinóczi (Eds.), *Európai kormányformák rendszertana* (*Taxonomy of European government systems)*, HVG Orac, Budapest, 2007, p. 350.
12 Since the representation of the Turkish is practically non existent.
13 M. Kocsis, 'Ciprus' (Republic of Cyprus), in Chronowski and Drinóczi, 2007, p. 409.
14 A.L. Pap, *Identitás és reprezentáció (Identity and representation*). Gondolat kiadó, Budapest, 2007, p. 198.
15 Dezső, 1998, p. 191.

cies specially constructed for this very purpose, providing that the votes cast by 30 members of the community suffice for a seat.[16] Also note that voters of Hungarian and Italian nationality may vote not just for their own representative but also for a (national) party list.[17] In Croatia, the number of votes necessary for acquiring a minority quota is very low. As a result, the Albanian, Bosnian, Macedonian, Montenegrin, Slovenian, Czech, Slovakian, Serbian, Italian and Hungarian minorities may all delegate a representative.[18] In Romania, the minorities that did not win a seat according to the general rules[19] but nevertheless attained 5% of the votes,[20] can acquire a seat according to the preferential rules. Article 100 paragraph 2 of the Serbian Constitution declares and guarantees the equality and the representation of minorities and genders in the parliament. Article 81 paragraph 2 of the act on the election states that parties or coalitions of parties of national and ethnic minorities are eligible for a mandate even if they have not reached the 5% threshold.[21] The role of the three constituent ethnic groups (Serbian, Croatian and Bosnian) in Bosnia and Herzegovina is manifested both in the composition of the elected organs (mainly with a ratio of 1/3 each) and in their election. That is to say, those belonging to the same ethnic group may vote only for candidates of the same ethnicity, excluding voters of a different (e.g. Jewish, Gypsy) ethnic affiliation.[22]

The above clearly demonstrates that many countries have found a solution to the parliamentary representation of minorities in Eastern and Central Europe. Already in 1992, the Hungarian Constitutional Court dealt with the question of the representation of (national) minorities in its Decision 35/1992 (VI.10) and found an unconstitutional omission on the side of the legislator. The Court arrived at the following conlusion: the passage of the Constitution declaring that nationalities and ethnic groups living in Hungary represent a constituent part of the state makes it of extraordinary importance that the issue be regulated by the law. Necessary representation is a prerequisite for the nationalities and

16 Dezső, 1998, p. 188.

17 www.szazadveg.hu/files/hirek/az-uj-magyar-valasztasi-rendszerSzazadveg-tanulmany130802.pdf (November 26, 2013), p. 29. It is worth mentioning here that the Slovenian Constitutional Court examined the special election rights of the nationalities and concluded that the double voting of those affiliated with the Hungarian and Italian nationality is not unconstitutional, since this is the only way for the succession of the right of nationalities for representation as guaranteed in the constitution – although moving away from the principle of equal suffrage. See more in: Report 3032/2006 of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities http://epa.oszk.hu/01200/01259/00028/pdf/belivek_46-49.pdf (November 26, 2013).

18 www.szazadveg.hu/files/hirek/az-uj-magyar-valasztasi-rendszerSzazadveg-tanulmany130802.pdf (November 26, 2013), p. 29; in a similar manner to the system in Hungary, minorities in Croatia may vote for either the national or the minority list.

19 Dezső, 1998, p. 187.

20 www.szazadveg.hu/files/hirek/az-uj-magyar-valasztasi-rendszerSzazadveg-tanulmany130802.pdf (November 26, 2013), p. 29.

21 M. Kocsis, 'Szlovákia' (Slovak Republic), in Chronowski and Drinóczi, 2007, p. 584.

22 Kocsis, in Chronowski and Drinóczi, 2007, p. 604.

ethnic groups for fulfilling their role as constituent parts of the state. It also established that the Parliament failed to carry out the legislative duty set forth under Article 68 of the Constitution, contributing thereby to a situation of unconstitutionality. In light of the above, the Court called upon the Parliament to fulfill its obligation and pass the relevant law no later than the 1st of December 1992. Acting upon this duty, the Parliament adopted Act LXXVII of 1993 on the Rights of National and Ethnic Minorities. Article 20 paragraph 1 states that: 'minorities have the right – as determined in a separate Act – to be represented in the National Assembly'. Rules pertaining to elections however, failed to implement this commitment, resulting in a new complaint submitted to the Constitutional Court by the minorities, opposing Act XXXIV of 1989 on the Election of the Members of Parliament. In its Decision 24/1994 (V.6) the Constitutional Court rejected the petition without an examination of the merits; however, it emphasized in the reasoning that the Decision 35/1992 (VI.10) of the Constitutional Court had already established an unconstitutional omission concerning the parliamentary representation of nationalities and ethnic groups. In declaring so, the Court made it unambiguous that the legislative power must adopt the rules that regulate the parliamentary representation of minorities.[23]

Nevertheless, we shall ask if it was really the failure of the legislation that the parliamentary representation of the different minorities was left unregulated. András Jakab holds the view that the Constitutional Court in its 1992 decision mentioned only the representation of the minorities – and not the issue of parliamentary mandates –, which was actually solved by the establishment of minority municipalities.[24] By contrast, in several of its later decisions the Constitutional Court went back to the basis of its 1992 ruling, emphasizing that the problem was never solved. This was also acknowledged and further strengthened in Resolution No. 37/2010 (VI. 16) of Parliament, which put an emphasis on the adoption of a law regulating the parliamentary representation of nationalities. The resolution declared that the principles and deadlines set out in Resolution No. 20/2010 (II. 26) of the Parliament on the legislation process pertaining to the parliamentary representation of national and ethnic minorities have to be taken into consideration during the preparation of the election reform serving the reduction of the number of members of Parliament.[25]

23 Later, another petition was submitted, requesting once again the establishment of unconstitutionality by ommission. In order of the president of the Constitutional Court, the Court ruled it had no possibility to either re-establish the omission or to force the decision-makers in any other way should the legislation fail to fulfil its regulatory duty within the previously given deadline.

24 A. Jakab, 'Miért nincs szükségünk második kamarára? (Why don't we need a second chamber?)', XX(1) *Politikatudományi Szemle* (2011), p. 20.

25 B.Sz. Gerencsér, 'Gondolatok az új nemzetiségi törvényről' (Notions on the new minority law), *Pázmány Law Working Papers,* No. 2012/34, p. 4, http://plwp.jak.ppke.hu/images/files/2012/2012-34-Gerencser.pdf (November 26, 2013).

29.3 International Foundations

The question of supporting the gentilic representation appears on many levels and various provisions of international law. Therefore, it is worth highlighting those declarations, pacts and nominations, which serve the validation of nationality interest. The Council of Europe accepted the Framework Convention For The Protection of National Minorities in 1995, which foresees that the states ensure the conditions for national minority groups' structured participation in public affairs.[26] The Council agrees with the 1992 decision of the United Nations General Assembly which takes a stand for national minority groups right to take part effectively in public affairs.[27] The UN's Working Group on Minorities operating until 2006, established that the national minorities' right to take part in public affairs in the broadest possible sense is of elementary importance. It is in the interest of persons belonging to a minority to achieve an effective form of representation.[28]

A further relevant development is the establishment of the Helsinki office of the High Commissioner on National Minorities by decision of the Organization for Security and Co-operation in Europe (OSCE) in 1992. As a result of the conference organized by the OSCE High Commissioner and Office of Human's Rights the Lundi References were adopted.[29] The aimsims of the Lundi References is to encourage and to assist in the application of special measures in connection with existing tensions surrounding minorities. Therefore the Lundi's References inspire states to actively involve minorities in governance.

There is a further aim to Lundi's References. States must ensure, that minorities can truly let their voice be heard on the level of central goverment – for example through a certain number of seats reserved in one of or both of chambers of the parliament or its commissions – furthermore, the election system of states must enable the represention and participation of minorities.

29.4 Relevant Provisions and Criticism of the Act CCIII of 2011 on the Elections of Members of Parliament

Based on the preliminary findings of the present paper, we can arrive at the following conclusion. With the passing of the Act on the Elections of Members of Parliament, the Parliament indeed took the aspects of the long persistent problem into consideration and

26 1999, évi XXXIV. törvény az Európa Tanács Nemzeti Kisebbségek Védelméről szóló, Strasbourg, 1995. február 1-jén kelt Keretegyezményének kihirdetéséről, 64 15. cikk.

27 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly Resolution 47/135 of 18 December 1992.

28 Commentary of the working group on minorities to the United Nations Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities, E/CN.4/Sub.2/AC.5/2005/2. 35.

29 www.osce.org/hu/hcnm/30333 (5 March 2014).

regulated the issue of representation accordingly. This came to pass even though the new Fundamental Law does not incorporate the passage that was part of the former Constitution; namely, that nationalities had the right to representation. According to current legislation,[30] national minority lists may be drawn up by national self-governments. Drawing up any national minority list shall be subject to recommendation by at least 1% of voters on the electoral register as national minority voters but no more than one thousand and five hundred recommendations. A national minority list, which shall register at least three candidates, may include candidates who are on the electoral register as voters of the particular national minority. It is also worth noting that two or more national minority self-governments may not draw up a joint national minority list; only those registered as having the same nationality may vote for the given minority list. If minority lists reach one-fourth of the number of votes[31] required for acquiring a mandate on the national lists, they become eligible for the so-called preferential mandates. Any national minority which drew up a national minority list but failed to win a mandate through such list shall be represented by its national minority spokesperson in the Parliament, who shall be the candidate ranked first on the national minority list.[32] Nevertheless, the spokesperson does not have a right to vote in the Parliament.

First of all, I shall examine the process how citizens are recorded on the minority electoral registers. The contradiction lies partly in the wording of Article XXIX paragraph 1 of the Fundamental Law which stipulates that every citizen belonging to a nationality or ethnic group shall have the right to freely declare and maintain his or her identity, however, in practice this actually means the choice of national or ethnic affiliation. However, this may give rise to many forms of abuse – e.g. in the forming of national self-governments or in the course of granting subsidies – since no citizen shall be restricted in their choice of the nationalities they identify themselves with or in freely changing their previously 'declared' affiliation.[33] As a result, those who do not actually belong to the nationality in question can enrol in the electoral register of such nationality.

In connection with the regualtion of national minority lists it is worth emphasizing, that the positive discrimination rules[34] adopted (for instance relating to preferencial mandates) for the purposes of minority representation seemingly infringement the principle

30 Section 9, Subsection 2 of Section 12, Subsection 3 of Section 14, Paras. d)-e) of Section 16, Section 18, Subsection 3 of Section 20 of Act on the Elections of Members of Parliament.

31 Also worth noting that in case a minority list – excessing the required votes for the preferential mandates – receives the number of votes that would be enough to gain mandates from a national list, it can obtain further seats.

32 The institution of the spokesperson was established beside that of preferential mandates. It secures a parliamentary seat for nationalities, which, although having drawn up a list, could not even gain a preferential mandate.

33 See more in G. Kurunczi and Á. Varga, 'Identitásválasztás kontra identitásvállalás', in A. Pogácsás and P. Szilágyi (Eds.), *TehetségPONT 2011. PPKE Jog- és Államtudományi Kar*, 2011, Budapest, pp. 193-203.

34 This representation is unambiguously a mean of minority positive discrimnation.

of equal suffrage,[35] at the same time, such constitutional values can only be enforced through the self-restriction of the majority. It is important for those rules which differ from universal principles to be based on consensus.[36] According to Zoltán Szente, such a form of representation may be incompatible with the principle of universal suffrage and it is questionable, why nationality should be the criterion for gaining representation in the legislation.[37] Based on the above considerations, in old democracies minority representation tends to be ensured through party lists.[38]

In Hungary, minorty voters have two votes just as other voters, however they cannot vote for a party list if the given minority draws up a minority list. Therefore, they can only express their political preferences by voting for one candidate in any single-member district. It is important to emphasize that the minorty list can achieve a preferencial mandate if it receives 0.27% of the total number votes eligible for the national list according to the Act XXXVI of 2013 on Electoral Procedure.[39] We cannot forecast the number of votes that will be necessary to acquire a preferential mandate in the elections of members of Parliament in 2014. Nevertheless, it may be safely stated that more than 10,000 votes will be required for acquiring a preferential minority mandate.[40] In connection with this, it is important to underline that 10,000 votes assume an unrealistically low electoral activity (altogether, these votes would amount to 3,720,000 national list votes, while regional lists received 5,132,000 votes in the elections of members of Parliament in 2010).[41] Considering the data gathered from the 2010 minority elections and the 2011 census (see data listed below), it is highly probable that only the largest minorites stand a chance in winning preferential minority mandates. Seven minorites have less than eight thousand members, so even if all

35 According to Decision 809/B 1998. of the Constitutional Court, the constitutional principle of equal suffrage requires the fulfillment of two conditions by the lawmaker: On the one hand, suffrage has to be equivalent for the voters. On the other hand, votes should be similar in respect of the election of candidates. According to Decision 3/1991 (II. 7) of Constitutional Court the political will of citizens is represented in an indirect way which results in disproportion.

36 Dezső, 1998, p. 183. It is important to note that in accordance with the 1040/B 1999 decision of the Constitutional Court the Parliament can pass special rules regarding the parlamentary threshold for minority parties which are more favorable to them. Furthermore, the Constitutional Court states in Decision 35/2012 (VI.10) that representation is a necessary condition for national and ethnical minorities to act as constituent elements of the state.

37 Szente, 2010, p. 96.

38 Szente, 2010, p. 96.

39 Considering that ninety-three Members of Parliament shall be elected from national lists, 1% of votes on lists (including compensational votes) are required for winning a vote, a quarter of which must be obtained from the minority list.

40 The average of valid votes (approximately 5,179,236 votes) is based on the elections held since the political change. Considering the mandate count and compensation part of Act XXXVI of 2013 on Electoral Procedure the necessary number of votes for the preferential mandate may be estimated to amount to roughly 20,884 votes.

41 In connection with this it is worth noting that there will not be a validity threshold for the election in 2014, so it may bring a much lower participation rate.

members with suffrage requested registration as minority voters, they could not cast the votes necessary for achieving the minority quota.[42] This means that the votes cast for a list by minority voters will count less.[43] A further problem is that those voters who registered as a minority voter believe that their minority organisation is in a position to win a preferential mandate due to the number of members. However, if the number of voters requesting registration[44] is not substantial enough (as demonstrated by the two tables below), their votes eligible for lists will not be counted, while at the same time, they cannot decide to vote for the national list and support a party instead.[45]

Table 29.1 The proportion of voters registered in the minority register on occasion of the minorites' elections in 2010.[46]

Roma	German	Slovak	Croatian	Romanian	Ruthenian	Polish
133 492	46 629	12 282	11 571	5 277	4 228	3 052
Serbian	**Armenian**	**Greek**	**Bulgarian**	**Ukrainian**	**Slovenian**	**All**
2 432	2 357	2 267	2 088	1 338	1 025	228 038

Table 29.2 According to the census in 2011.[47]

Roma	German	Slovak	Croatian	Romanian	Ruthenian	Polish
315 853	185 696	35 208	26 774	35 641	3 882	7 001
Serbian	**Armenian**	**Greek**	**Bulgarian**	**Ukrainian**	**Slovenian**	**All**
10 038	3 571	4 642	6 272	7 396	2 820	644 524

42 *See* in detail: Magicz, 2013, p. 96.

43 It could be said that these new rules ensure the election of minority spokespersons and not the election of Members of Parliament.

44 By 4 March 2014, the local election officies registrated 26,896 minority voters. Moreover, 15,790 voters signed that they would like to vote on their minority list in the election of Members of Parliament.

45 It is worth noting that the Hungarian Gipsy Party (MCP) announced that it shall run for election at the end of November 2013. With due consideration to the fact that the MCP will be eligible to draw up a rival list to the national party lists (in case it fulfills the necessary conditions for drawing up a national list), the question arises, whether persons belonging to the Roma nationals may, besides the minority list drawn up by the National Roma Self-Government, cast their votes for the national lista as well, without having to choose between their party preferences and their minority affiliation.

46 www.valasztasirendszer.hu/?p=1940340 (November 26, 2013).

47 www.ksh.hu/nepszamlalas/tablak_demografia, (November 26, 2013).

According to the Constitutional Court, when voters cast their votes for one part list, they take the risk that the party supported will not receive enough votes to enter the Parliament and become a parliamentary party.[48] In my opinion, the constitutional issue is not the same when a minority voter votes for a minorty list in the knowledge that her the vote will not count, as when a party list does not receive enough votes, i.e. electoral threshold set forth in the law is not crossed. The significant difference is that parties with national lists have a theoretical possibility of winning a mandate. It is concievable that these parties receive such an increased support from voters that their party list can cross the electoral threshold. By contrast, only the the members of minority organisations can request registration as minority voters in the minority register. The number of potential voters of minority organisations is given, it cannot increase.[49]

According to Act XXXVI of 2013 on Electoral Procedure if any national minorty that drew up a national minority list failed to win a mandate, the given minority shall be represented by its national minority spokesperson in the Parliament. In accordance with Act XXXVI of 2012 on the Parliament, the national minority spokesperson does not possess the most important rights of other Members of Parliament, e.g. the spokesperson does not have the right to vote in a session of the Parliament. The spokesperson is allowed to make a speech in a plenary session if – according to the Committee of the whole House – the subject is related to the minorites. Furthermore, the spokeperson cannot be a member of any of the standing committees, but is only granted consultation rights.[50] The spokespersons ensure minority representation in the Parliament though their role which is not equivalent to that of a traditional Member of Parliament.[51] Hence, there is a risk that the votes of minority voters will only be of half value. Though spokespersons have certain entitlements (for instance, right to vote in the Minority Committee, right of immunity), during the legislative procedure the right to vote is not available and limited to making a speech.

It is important to emphasize that the main goal of minority representation is the nationwide representation of the minority interest and opinion. As I mentioned earlier, minority representation is typical in the system of bicameral parliaments. If it appears in a unicameral parliament, it is essential that this representation remain unburdened by political charge. Of course, nowadays political diversification is present in the bigger national self-goverments of national minorities (primarily in the roma minority) as well. Nevertheless, the drawing up of a national minority list and awarding preferential minority mandates cannot have a political nature, since the Members of Parliament obtaining a mandate from the minority list should represent the interest of the minority in question. At the same time, several issues are discussed by the Parliament which are unrelated to

48 Decision 3/991 (II. 7) of the Constitutional Court. In this case supported party means minortity lists as well.
49 Magicz, 2013, p. 96.
50 Section 58 of the Act XXXVI of 2012 on Parliament.
51 Magicz, 2013, p. 96.

the minorites. Therefore, there is a danger that following the election of minority Members of Parliament, such representatives will join a political side and work on a political basis, and not in the primary interest of minorites.[52] This is confirmed by the fact, that minority parliamentarians have the same entitlements as other Members of Parliament, which means that by virtue of their free mandate – disconnected from the given minorities' interest – they can carry out their activities on purely political grounds. It is also woth noting that pursuant to Decision 27/1998 (VI. 16) of the Constitutional Court, there shall be no discrimination between the Members of Parliament on the basis of how they gained the mandates, therefore, the activity of those parliamentarians who won a preferential mandate cannot be constitutionally objected to.

In connection with this it is worth highlighting an example which is in the extreme, yet interesting from a political point of view. This example shows how minority Members of Parliament can be political committed to a particular party. According to Act XXXVI of 2013 on Electoral Procedure the preferential mandate reduces the mandates obtainable from the national list. In order to provide a vivid example let us assume that only one minority wins a preferential mandate, while the remaining 198 mandates are divided evenly between the two political sides, (assuming a political coalition between the parties located on the two opposing sides of the political spectrum).[53] As a result, in such an extreme case, the delegate becoming a Member of Parliament by prefential mandate, will decide upon the formation of the government.[54]

29.5 Possible Solutions

Before considering the possible solutions, it is worth examining whether there is a constitutional possibility for the minority voter to cast her vote on three representatives (elected in single-member constituencies, from a party list or a national minority list), while a non-minority voter could only support two representatives in the elections.[55] Decision 22/2005 (VI. 17) of the Constitutional Court stated that

52 According to H/13253 suggestion on parliamentary law Section 1 (3) Para. c) point those Members of Parliament have to be considered belonging to one party whom joining request was accepted by the faction excluding the minority and independent member of the Parliament.

53 It is important to stress that owing to the predominance of the majority party in the new election system, equality is almost impossible.

54 From a contitutional perspective it is not necessarily objectionable, but from a political viewpoint this could result in a political fight between minority self-goverments for joining one political wing with the member of the parliament who won the preferential mandate.

55 *See also* the decision of the Constitutional Court of Slovenia (3032/2006, announcment of the Parliamentary Comissioner of National and Ethnic Rights), http://epa.oszk.hu/01200/01259/00028/pdf/belivek_46-49.pdf (November 26, 2013).

> the principle of 'one person – one vote' created the basis of the self-government system of the members of the political community, implementing the right to equal participation in democratic procedures. […] In the view of the Constitutional Court, this criterion is absolute: In this way, the enforcement of the principle of 'one person – one vote' – stemming from the Fundamental Law – may not be restricted for any grounds.

According to the practice of the Constitutional Court, the state can only restrict a fundamental right, if another fundamental right, the protection of freedom or the safeguard of another constitutional value cannot be reached through other means, i.e. the restriction is absolutely necessary to achieve the legitimate purpose. It must be underlined that under the procedure regarding the preferential acquisition of minority mandates the principle of 'one person – one vote' also prevails. This is because in case the national voter would have a two-list vote this would be absolutely injurious to the principle of equal vote. Due to the above, it may be stated, that the exclusion of minority voters' multiple vote can be accepted as a legitimate purpose for restricting fundamental rights.

However, for the constitutionality of the restriction of a fundamental right in itself it is not enough, that it is applied in the interest of a fundamental right, the protection of freedom or any other constitutional purpose. The restriction has to meet the criteria of proportionality, i.e. it must be proportionate to the objective pursued. Moreover, the extent of harm caused to the other fundamental right must also be proportionate to the necessity of the objective pursued. In the course of the restriction the legislative power shall apply the most moderate method to reach the desired purpose. It is important to underline, that voters are entered into the minority register upon their request. According to the rules in force, they have to decide whether they want to proclaim their national identity protected by the Fundamental Law or they want to express their political opinion – which is also constitutionally protected – during the election procedure. The possibility to choose between the two alternatives renders the restriction of fundamental rights proportionate.

Nevertheless, it is worth noting that even if the Act on Electoral Procedure would allow the possibility of voting for the national list for voters who vote on the minority list, the problems inherent in the current regulation ensuring the representation of minorities would not be solved.

As demonstrated above, the current regulation of the Act on Electoral Procedure raises many problems. At the same time, if we do not agree with the current solution, we should ask the question: What alternative possibilities may be conceived? In this respect, three different directions should be examined. Firstly, within the confines of the current regulation, what other solutions are available? Secondly, what completely different concepts can be implemented? Last but not least, we should examine the direction that absolutely rejects minorities' representation in the Parliament.

In the scope of minorities' parliamentary representation, the current legislation commits itself to a unicameral parliamentary system comprised of elected representatives. As I have mentioned above, minority voters following their registration – who may only decide to vote for the national list and express their political preference if their minority self-government does not set a minority list – are potentially faced with the fact that because the number of minorities registered does not suffice, they cannot elect full representatives to the Parliament. This problem could be solved if national voters still had the possibility on the day of the elections to choose to express their political preference instead of representing their national identity. In my view this could be implemented in two possible ways. One of the solutions could be that when the minority voters receive the ballot papers with the list of single candidates, they would also get a ballot paper containing all parties on the national list as well as the national voters' respective minority lists.[56] This method would not increase the costs of the election – since the same amount of ballot papers would be needed –, but it would nevertheless ensure the possibility for the minority voters to decide, even at the time of entering the polling station, to cast their vote for a minority or a political list. However, this possibility may easily injure the principle of the secrecy of voting. Namely, in polling districts where there is only one voter who avows herself to be a member of a minority – and she is the only person belonging to that exact minority in the polling district – if she did not vote on the national minority list, the polling station committee would know her political preference. This may amount to an infringement of the principle of the secrecy of voting. Therefore, a more efficient solution would be if minority voters could decide even on the day of election – according to the Act on Electoral Procedure, i.e. the 15th day preceding the elections –, that instead of the previously registered minority identity they would choose to express their political preference. For that very reason minority voters who had previously registered as voters of a national minority should have the possibility to request on election day their deletion from the national minority's register and their concurrent entry into the national electoral registry in order to vote for the national list. This method would not be completely new to Hungarian law, since earlier, all voters had the possibility – for e.g. those not entered in a polling district by mistake – to request their entry into the register even on the day of election. On the one hand, this would result in only a minimal increase of costs – since two different types of ballot papers would be produced for the national voters –, on the other hand, the above mentioned problem could be solved without breaching the principles of voting. At the same time it must be pointed out that applying this procedure would not help solve the problem, that – in case the national minority list does not receive the number of votes

56 It is important to underline, that only his or her own nationality's minority list would be on the subtended ballot paper.

necessary for the preferential quota – a national minority's spokesperson without a voting right is 'delegated' to the Parliament by election.[57]

Ensuring the national minorities' representation in the Parliament – as demonstrated by the national examples – is not only possible in the currently stipulated framework of the Act of Electoral Procedure. The mutual interpretation of election and representation suggests that these are two coherent notions presupposing each other, namely, that representation can only be achieved through election. However, not every election results in representation and vica versa, election is not a necessary condition for achieving representation (e.g. representation may be achieved through appointment, delegation or even ex officio).[58] The definition of representation and its content differ depending on the era and from country to country. From a theoretical perspective, where the representative acts on behalf of and in the name of her mandator, the representative acts as a delegate or 'agent'. Another apprach claims that representation comes into existence through elected representatives (this is the classical form of representation). Last but not least, there is a theory according to which the aim of representation is to represent the features of certain groups in a statistically sound manner (this is the basis of proportionate representation).[59] According to Péter Tölgyessy in the case of interest organizations it should suffice to ensure them the right to express their opinions in the Parliament.[60]

Several decisions of the Constitutional Court declared that the constitutional condition of practicing state power is the existence of democratic legitimacy. In a system built on popular representation the branches of powers can be self-legitimating, in case they are established through direct election or through the contribution of another branch of power – yet, the power has to originate from the sovereign population. As such, democratic legitimacy is given even if state power is exercised by bodies and people elected or appointed by directly elected organizations. Democratic legitimacy cannot be called into question in case the chain of elections and appointments between the voters to the bodies or officials exercizing state power is continuous.[61] On this basis, Decision 34/2005 (IX.29) of the Constitutional Court declared the statute adopted in 2005 – but not signed by the President of Hungary – unconstitutional, referring to the lack of democratic legitimacy. This statute would have enabled elected members of local minority self-governments – in case of

57 An other obstacle of this solution could be that minority self-governments are given campaign support in proportion with the number of voters registered. Although, in case if national voters can decide to choose voting on the national list on the election day, the minority self-governments could easily turn against the system of support by creating fictive registrations.

58 Dezső, 1998, p. 18.

59 The certain views can be seen in Dezső, 1998, p. 19.

60 P. Tölgyessy, 'Országgyűlés és választójog' (Parliament and suffrage), in G. Kilényi (Ed.), *Alkotmányjogi Füzetek 4. (Parliament, suffrage)*, EXPRINT, Pécs, 1989, p. 28.

61 *See* further: 38/1993 (VI. 11) decision of the Constitutional Court.

achieving a determined number of votes and making a statement – to become members of the local election commission.[62]

The national spokesperson elected according to the rules of the Act on Electoral Procedure has a similar function in the Parliament as the national minority spokesperson had in the local-government according to the former regulation.[63] The powers of the spokesperson were exercized by the president of the minority self-government between the period of 25 November 2005 and 1 January 2012. Thus, the minority spokesperson could participate in the local-government's decision-making procedure with consultation rights even though she did not receive a mandate in the local-government elections.

According to the draft of the new statute on national minorities submitted for social consultation on 9 November 2011, the national minority spokesperson would have been elected by the national minority self-government (then delegated to the Parliament) by secret ballot and qualified majority.

Under the reconciliation of the motion of the statute it was not clear whether the spokesperson will have full rights. The motion of the statute adopted by the Parliament connected the spokesperson's mandate – who only possessed certain rights of representation – to the votes cast for the national minority list instead of applying delegation. In my view, however, the current system – due to the fact that the national minority spokesperson is elected in the framework of the election of Members of Parliament – raises several problems of constitutionality.

On the one hand, it is important to underline that there is no validity threshold for the election of a national minority spokesperson. This rule seems to correspond with the fact that a candidate of a single-member constituency also acquires a mandate with the majority of the valid votes cast, which may even be a single vote. An important difference is that while in case of single-member constituencies there is no real danger that only an insubstantial number of voters will participate in the elections, in the case of national minority spokespersons it is to be feared that as compared to Members of Parliament they may be elected with a relatively low number of votes.[64] Entry into the minority register requires submitting an application, which is a filter that can have a deterrent effect, since minority voters are expelled from voting for party lists based on the Act on Electoral Procedure.

62 G. Kilényi, 'A nemzeti és etnikai kisebbségek jogai' (The national and ethnical minorities' rigths), in B. Hajas and G. Kilényi (Eds.), *Fejezetek az alkotmányjog köréből*, Rejtjel Kiadó, Budapest, 2005. p. 295.

63 *See further*: 1990. LXV, Act of the Local-governments, Section 12 § (7).

64 It is important to underline, that according to the current regulation, a situtation can easily occur, where a national spokesperson – even if elected with a minimal number (or for instance only with only one vote) of votes – is representing a nationality in the Parliament, that has a national minority self-government – that was elected by a greater number of voters related to obtaining preferential quota, this way having greater legitimacy –, even if that minority list was set by the national minority self-government.

As a substantive point it should be mentioned, that according to the Act on Electoral Procedure in order to acquire the mandate of spokesperson, the national minority self-governments must set up a list competing with party lists. Minority self-governments operate on the basis of different principles than parties, for instance, they are not founded on the basis of the freedom of assembly and do not have a registered membership. Another important difference is that parties use a separate part of their income for election campaigns, while the national minority self-governments' financial resources are employed for primarily cultural aims. In the majority of minority self-governments, participation in the elections has no real 'stake', because the list can only yield a mandate for a spokesperson, who, in turn, may be elected by a single vote.

Based on the above, I believe that it would be more efficient to solve the parliamentary representation of minorities that did not achieve the number of votes necessary for acquiring a preferential mandate through the delegation of a representative delegated by the national minority self-government, instead of insisting on the minority spokesperson elected in some cases by only a handful of voters.[65]

With respect to the delegation of the minority spokesperson it is worth recalling Decision 27/1998 (VI.16) of the Constitutional Court which declared that the characteristics of a free mandate are expressed in the principle, according to which the representatives' legal position is equal – as stipulated by the Act on Elections –, namely, they have equal rights and obligations. In view of the rights necessary to fulfill the tasks of representatives, distinctions cannot be made on the basis of how representatives acquired their mandates.

In the course of the elaboration of the Fundamental Law the possibility of a bicameral parliament emerged, yet the constitution finally retained the unicameral system. This had significant repercussions for the parliamentary representation of national minorities, since several states resolved such representation in the framework of a corporative second chamber. In contrast to our neighbouring countries, a varied and relatively small number of national minorities live in Hungary spread throughout the country's territory. According to Márta Dezső, under such conditions the optimal solution would be a second chamber for the proper representation of minorities. This way, minorities could elect their own representatives (1-1) in the Senate,[66] solving all the problems related to their parliamentary representation (e.g. the question of the spokesperson without a voting right or losing minority votes for lack of a sufficient number of registrations, etc.). At the same time, Dezső claims, a second chamber would also be more efficient in ensuring the parliamentary representation of Hungarians living abroad, while providing a suitable forum for interest-groups to participate in the legislative procedure.

65 This regulation could be used if the delegation of the spokesperson would occur if under the national minorities' election the certain minority list would not reach the number of votes needed for obtaining a preferential mandate. In this case this solution could be combined with the solution that I mentioned earlier.

66 Dezső, 1998, p. 118.

Finally, it is worth mentioning a third possible solution, according to which there is no need for the parliamentary representation of national minorities, since the system of minority self-governments already solved the problem of representation. At the same time, according to the consistent practice of the Constitutional Court, the parliamentary representation of minorities must be ensured.

29.6 Summary

In every country – including Hungary –, where minorities coexist with the majority population, the implementation of national minorities' parliamentary representation and the regulation of suffrage appears as a central question. There are several methods for ensuring the parliamentary representation of minorities and there is no one suitable and efficient method that could be chosen above the other unequivocally. The crucial aim of any system must be to ensure the most comprehensive representation possible. Considering the elements of the current system, the provisions on minority representatives in the Act of Electoral Procedure much rather served the election of parliamentary spokespersons than the veritable political representation of minorities. The operability of the system created by the Act of Electoral Procedure will be tested in the 2014 elections, but until that time, it is already worth considering alternative ways forms of ensuring the representation of minorities.