

## Justified Claims Or Constitutional Absurdity? Ethnic Minorities In Unicameral Parliaments

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### 1. Introductory Remarks

#### 1.1. Introduction

After 1989, the problem of ethnic minorities evolved to be among the most urgent questions of human rights and international security. Having redrawn the post-war political maps, minority-, ethnic-, and regional aspirations serve as frameworks for new identity-forming mechanisms and redefinitions of the historical, legal and political relationship between the state and its citizens. The European macropolitical system, which evolved throughout the seventeenth to nineteenth centuries, is now facing new challenges, to be solved with both internal and international legislative measures.

According to a contemporary foreign affairs and international relations analysis,<sup>1</sup> there are at least three serious obstacles opposing the codification and enforcement of global minority rights protection (and recognition) in Europe: a) the traditional ethnic concept of nation state, which is built on the idea of identifying nation and ethnicity-viewing the state as a sole representative and property of one ethnic group; b) the 19th century, a liberal idea of accepting merely individual rights and liberties as satisfactory guarantees for liberty and freedom; and c) the fear of many states that granting (collective) rights to minorities would endanger their territorial integrity.

On the other hand, there are at least three important tendencies of development that improve the climate for minority rights recognition and enforcement:

- a) the European integration process, questioning the omnipotence of nation state and requiring the enforcement of human and minority rights;
- b) the regional movements emerging both on the internal (with the overall and irreversible tendency of decentralization and devolution) and the international level of euro-regions; c) the idea of subsidiarity, which enables minority communities to participate in municipalities and local decision-making.

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<sup>1</sup> Vogel, Sandor. A kisebbségi jogok kodifikációjának lehetőségei Európában, In Kulpolitika 1996. 3-4: 186-187.

Legislators and constitutional lawyers have thus for decades been engaged with the study of how to create effective and adequate instruments to achieve more efficient and satisfying legal solutions to the problem of ethnic minority rights. The representation of ethnic minorities in unicameral Parliaments is one of the intricate issues that has been argued, rejected, and rebutted many times in political and constitutional debates.

\_ Whether to let go the demands of minority claims and elect, delegate, or co-opt <sup>2</sup> minority representatives into the dominant legislative body, which (according to parliamentary democracy models) holds the key to national sovereignty, and is the prime manifestation of popular sovereignty, is the question at stake. The aim of this paper is to bring together and outline the applicable theoretical and practical arguments for and against the attempts at implementing minority representation within a unicameral Parliamentary system. In other words, the question is whether claims for minority parliamentary representation are functioning outside the terrain of ordinary permissible political and electoral requirements, and whether they can be justified using convincing arguments within the theoretical framework of constitutionalism.

## 1.2. The Perplexity: Representation or Ethnic Balance

Scrutinizing the argumentation of scholars who oppose to the granting of any kind of *sui generis* mandates, the following initial clarification is to be made: the importance of recognizing individual and collective ethnic minority rights, as well as interest representation, is never questioned or in doubt, yet applying it to legislative techniques and instruments, in order to preserve, secure, and maintain the coherence and stability of the general constitutional framework, other methods need to be applied. According to these theorists, therefore, the *de facto* political representation of minorities can and should be secured through various other ways: e.g. the functioning of a minorities ombudsman, the local and national minority self-governments, official and effective lobbying mechanisms incorporated into parliamentary decision-making, and by those members of parliament (MP's) who were candidates of minority parties and social organizations, but had gained their mandates under "ordinary" election-laws.

In order to provide the required analytical objectivity needed for evaluating such sensitive and intricate problems, an important theoretical distinction is to be made: arguments and concepts for implementing ethnic balance refer to a quite different issue—an institutional and political ideal (having foremost relevance in federate or corporate systems), and should under no conditions be confused, identified or normatively compared with theories of representation.

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<sup>2</sup> All of these methods will entail and cover completely different types and contents of representation; some theorists even question whether co-optation is representation at all.

Using (but not permeating) the two ideals for minority claim-reognition will be one of the elementary objectives of this paper. The paper will aim at demonstrating that those arguments which may be convincing in the theoretical framework and political concept of constructing a quasi-federate ethnic balance-based government and state structure may prove to be unacceptable in a "geopolitically unitarian" unicameral parliamentary system built upon the foundation and pillars of traditional constitutionalism. Our primary focus will be on the latter—that is, democratic unicameral parliamentarism—facing the problem of minority claims driven by the sparkling stars of collective rights and self-determination. Our starting model and key example is Hungary, where the numerical proportion of ethnic minorities will undoubtedly exclude the possibility of establishing some sort of ethnic balance based on a federation-like state model, thus the pro-and counter-arguments will be elaborated and analyzed in the terrain of parliamentary representation only.

Before evaluating the arguments, therefore, an initial question, which is more political than theoretical, is to be answered: How are ethnic groups from the constitutional theoretical (and not the political) standpoint to be seen—as constitutive elements or electoral minorities? Are we talking about ethnicity as a fundamentally distinctive and prime politically identifying force that prescribes most political divisions and is the basis of the federate state structure—or a socio-political fact that raises certain justified claims that the constitutional framework should incorporate?

It will be my argument that in countries like Hungary, ethnic balance (under my constitutional interpretation) is not a desirable goal to achieve, as the real aim should rather be to provide and secure means for functional and real parliamentary representation.

### 1.3. Key Issues, Research Methods, Theoretical and Geographical Limitations

In the following, after a brief encounter with the most widely applied forms of minority representation in legislative organs, I will attempt to collect and scrutinize thoroughly the traditional liberal arguments against the granting of sui generis ethnic minority mandates in unicameral parliaments. I will deal with problems arising in the competitive party-structure, confusion in electoral behavior, the problematic legitimacy of ethnic parties and fraction, the inevitable lack of effective veto power thereof, "technical" problems (registration, homogenization, two different contents behind an equal parliamentary membership) that this form of representation will cause, the constitutional theoretical analysis of "representation" and "minorities," and the "quasi-federate" structure that this solution would introduce. . .

Following this, I will outline the fundamental characteristics of and justifications for an ethnic balance-based state structure, as one type of solution for providing and securing de facto minority rights as opposed to formal declarations for virtual equality. . .

Thereafter having elaborated the fundamental constitutional theoretical differences between the "representation" and the "ethnic balance"—

based type of minority representation and parliamentary existence, I will summarize the positive and negative effects, and pro-and counter arguments against impletmenting such regulations.

At the end of the chapter I will attempt to crystallize the theoretical arguments and distinctions made above, and try to construct a "defensible" model for the following case studies, and maybe even a "unjversal" model for the normative evaluation of the minority-mandates issue.

In investigating the question of nlinority rights-protection and representation, I shall limit my research to the parliamentary representation of ethnic minorities within the unicameral Parliamentary system. Thus, examining non-ethnic minorities, non-parliamentary representation, or arguments considering second chambers and the bicameral system wil1 be outside the scope of this paper, and similarly, I will not discuss the issues related to autonomies, regionalism, or the legislative and electoral problems of federate states. The key concept of "parliaments," therefore, will not include sub-national, regional, federate, or local legislative assemblies. Although most of my arguments will use randomly selected examples of cases and practices juxtaposed to my conceptual starting point of the Hungarian situation evaluation, it is my submission and hope that (with due modifications, of course) the majority of my arguments may be applicable in a more general, global sense as well . Due to the spatial and conceptual limits of the paper, these modiflcations wi1l, however, not be assessed.

## 2. Theoretical Arguments and Dilemmas

### 2.1. Forms ofMinority Representation in Legislative Organs

There are numerous forms of methods for minority interest protection and representation that can be incorporated into legislative organs. The channeling of interests has three basic forms: a) second chambers, that is, a functionally independent body within the legislative organ; b) within the unicameral system through "regular" MP' s; and c) through special channels of participation in the legislature.

a) Although the question of second chambers is clearly out of the terrain of this paper, it should be noted that the integration of various forms of federal and corporative elements (among these the interest-representation of all minorities) can easily be provided through the erection of a second chamber. b) The question of securing the existence and active participation of minority MP's is our core issue.

Depending on the specific domestic legal system and the political atmosphere, the "regular" (meaning the MP-form of) representation in unicameral parliaments can take numerous forms: ba) candidates ofminority parties elected under ordinary election-law regulations and principles (proportional or majority);

bb) candidates of "ordinary"<sup>3</sup> parties who belong to minority organizations and are at some level officially affiliated; be) "minority seats" -that is, mandates gained under special treatment; for example, quotas, safe (or "free") seats reserved for minority MP' through delegation, co-optation, etc.

e) Additionally, there are "irregular," or special constitutional institutions and practices, which (in order to solve the contradiction that arises between the doctrine of equality of mandates and the effects of the solutions mentioned above in point "bc") secure minority influence to legislation outside the terrain of ordinary parliamentary working-mechanisms, but are equally effective. These methods are aimed at securing minority representation and the coherence of the constitutional legal system at the same time. These techniques (among others) include: minority self-governments; special rights given to minority organizations to propose Acts and other legislative actions; the powerful and prestigious specialized form of a parliamentary control-mechanism: the minority-ombudsman; moral-political agreements between parties and minority organizations in setting quotas for minority candidates,<sup>4</sup> etc.

The "bc" -type of representation can take various forms<sup>5</sup>: Romania for example reserves one seat above the number of ordinary mandates, for one (and only one) representative of all the minorities who manage to receive 5% of the votes required for an "ordinary" MP. In Slovenia, the Hungarian and Italian minority can delegate one MP each to the Assembly. In Croatia, minorities have two ways to gain parliamentary seats: those who have reached 80/0 of the population under proportional procedures, while the "rest" will be entitled to delegate five MP's-the procedures of which are carried out by special electoral committees. For minorities, the German law also provides an exceptional treatment of lowered minimal voting requirements both in the Bundestag and the Landtag.<sup>6</sup> India has two MP's (appointed by the President) to represent the British community in New Zealand I find four electoral districts reserved for the Maori natives in Columbia has a similar practice with two seats reserved for delegates of the special native Indian districts, etc.

Representation of religious minorities follow similar way: in Bhutan we see 10 seats reserved for monks, in Iran one each for religious minorities in Pakistan ten for the directly elected non Muslim-minority representative; while half of the 128-member Lebanese Parliament must be Christian, and the other 64 members are Muslim.

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<sup>3</sup> That is, non-ethnic.

<sup>4</sup> As seen in many Nordic countries, South Africa, or Britain, See Phillips, Anne. 1995. *The Politics of Presence* Oxford Clarendon Press.

<sup>5</sup> For a more detailed elaboration see Chapter II, or Zsolt Apor Mihalyi: *Kisebbségi érdekepviselet Q vilag parlamentjeiben*, In.: *Parlamentek Levelek*, 1998. februar. 4-5:51-57.

<sup>6</sup> Presuming and requiring that they receive enough votes to gain one seat.

This method is widely used to maintain the legislative existence of groups other than those of ethnic minorities as well. In Belorussia, out of the 360 mandates, 50 are reserved for mass organizations, 29 for war veterans and trade unions, and 21 for organizations for the disabled. In Malawi the President has a discretionary right to appoint some 100/0 of the MP's; while in Bangladesh and Tanzania, in order to provide fair representation, about 10% of seats are reserved for women, to be elected by the Parliament; in Zimbabwe some 10% are reserved for traditional tribe-chieftains, etc.

## 2.2. The HNormal" Representation Model Framework

In the following, I will briefly outline six theoretical and practical arguments in opposition to the granting of seats in parliaments to members of minorities outside the regular and ordinary electoral and campaign procedures. The conceptual basis behind these arguments is the conviction that classical democratic-that is, majority-based-elections and decision-making procedures, backed up by the guarantees and balancing mechanisms of constitutionalism, should be sufficient in all ethno-and geopolitical circumstances.

In our theoretical framework, "representation," built on the "one man, one vote" principle is the theoretical counterpart of "ethnic balance." Rooted in the concept of the "single political nation," in the "normal," or "first hand" representation-model, the MP will be the representative of the whole sovereign nation, where minorities may very well be entitled to special additional rights and preferential treatment under many circumstances and in many ways, but will not be distinct constitutive parts of the nation in the constitutional theoretical sense. The doctrine of the single political nation (which is not a counterpart of, nor is juxtaposed against the concept and ideal of a multiethnic state) leaves no room for ethnic self-determination. Within this framework, national or ethnic minorities will not have a *differentia specifica* in the constitutional sense, and minority self-determination can only be exercised as part of the nation. The only counterpart of or alternative to the single political nation is the federate structure.

Let us now examine a few of the most frequently cited "representation" -arguments against *sui generis* minority mandates:

### 2.2.1. The Competitive Party Structure and the Legitimacy of Ethnic Parties

As Donald Horowitz<sup>7</sup> points out: "Nowhere is the reciprocal relation between party and society more evident than in ethnic politics. Societies in which ethnic conflict is at a moderate level or in which ethnic divisions must compete for attention with other sources of tension produce party systems that sometimes foster and sometimes moderate ethnic conflicts .... The main element ethnic conflict introduces into politics is the ethnically based party. An ethnically based party derives its support overwhelmingly from an identifiable

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<sup>7</sup> Donald L. Horowitz. 1985. *Ethnic Groups in Conflict*. Berkeley: University of California Press, p.291.

ethnic group ... and serves the interests of that group ... Where ethnic Loyalties are strong, parties tend to organize along ethnic lines for much the same reason that other organizations, such as trade unions, social clubs, chambers of commerce, and neighborhood associations, tend to be ethnically exclusive. " <sup>8</sup>

With the strong, reliable, and permanent electoral support as it will be likely to possess,<sup>9</sup> an ethnic party or a primarily and exclusively minority MP does not vary much seem to fit into the regular, ordinary competitive party structure within the unicameral Parliamentary system; a political party formed to represent exclusively ethnicity and legislative problems related thereto may have difficulties justifying its presence and activity in minority-neutral matters of legislation (which actually overwhelmingly dominate parliamentary work sessions).

Ethnic parties, say "representation"-theorists, thus, are flat characters playing protagonists in the political theater-performance constructed for complicated and fully developed personalities of trained actors; they lack real legitimacy in their decisions regarding minority-neutral matters, and have gained their mandate through a discourse and campaign outside the terrain of

( ordinary political competition.

### 2.2.2. Confusion in Electoral Behavior

Another problematic issue is related to electoral behavior: Horowitz provides two possible definitions for ethnic voting: "Members of an ethnic group may vote heavily for one party over another. Alternatively, members of a given group may vote for candidates belonging to the same ethnic group, irrespective of party affiliation. Where parties are not organized along ethnic lines, ethnic voting takes either or both of these forms .... The organization of parties along ethnic lines changes this .... Ethnic voting simply means voting for the party identified with the voter's own ethnic group, no matter who the individual candidates happen to be. "<sup>10</sup>

The formation of primarily and exclusively ethnic parties thus creates a substantial confusion in electoral behavior, as members of the minority will be likely to vote for the parties "representing" them, although those may not even have a distinct program or opinion in many intricate issues of the political discourse, which would otherwise influence or direct voting decisions.

### 2.2.3. Effective Veto Power vs. Symbolic Gestures

Despite the fact that if minority parties or MP's manage to be present in assemblies, regardless of their actual size and number, they usually have all

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<sup>8</sup> Ibid. p. 293.

<sup>9</sup> A rare and atypical version thereto is the Slovakian (and to some extent the Vojvodinan) example, where the Hungarian minority actually produces several competing parties through "regular" competition.

<sup>10</sup> Ibid. p. 319.

the rights of parliamentary factions, it is clear that very few ethnic minority parties will be likely to have real influence or veto power in any decision or issue endangering the existence and interests of the minority community, thus their parliamentary existence will remain but a symbolic gesture and a means for additional media publicity. This symbolic gesture, however, may raise serious constitutional and representation-theoretical questions. Approaching the question (which to a large extent is the aim of the paper) from the point of constitutional theory, both of the terms representation and minority need to be clarified. In my understanding, the concept of parliamentary representation can only be interpreted in regards to the whole of society and the national political community (not in the ethnic, but in the international legal sense), leaving thus no place for minority protection or interest-representation. A Member of Parliament elected under the principle of popular sovereignty is, therefore to represent every citizen, as the Latin term *pars* (meaning part), after which political parties were being named, should be understood as referring to the fact that each political party represents a particular segment of the political opinion and agenda,<sup>11</sup> and not as a justification for permitting parallel interpretations for parliamentary representation-legitimacy.

Even the very concept of party is challenged by a political organization, which is (as ethnically based parties are) ascriptive and exclusive at the same time. According to the prevailing literary definitions,<sup>12</sup> "partyness" originates from the conversion of segmental interests into public interests, thus the distinction between parties and pressure groups highlights the fundamental requirements for political parties. An ethnic party, however, identifies narrow group interests with the totality of common interest.

#### 2.2.4. "Representation" and "Minorities"-Definitions in Constitutional Theory

Following Burke's distorted remark, Friedrich asserts that "an elected body may and usually will be both a set of agents from different interests, and a representative group determining the common interest.... therefore a parliament is both, a deliberative assembly from one nation with one interest, that of the whole and a congress of ambassadors from different and hostile interests."<sup>13</sup> Parliamentary representation means, therefore, the representation of the whole citizenry, and not only the differences and divisions between its members. In other words, "the exercise of the people's influence through a smaller number acting on their behalf."<sup>14</sup> Proportional representation follows the idea of giving equal weight and adequate representation to all groups and communities in society, but "equality" should not be confused and identified

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<sup>11</sup> In our understanding, this theoretical presupposition can be upheld even in the case of the eclectic, "catch all" parties.

<sup>12</sup> Horowitz, 1985. p. 296.

<sup>13</sup> Carl L. Friedrich. 1950. *Constitutional Government and Democracy*. Ginn and Democracy. Ginn and Company, p. 263

<sup>14</sup> *Ibid.*, p. 277

with "equality,"<sup>15</sup> as affirmative actions may not be justified in all spheres of the political terrain. Following Bragyova's argument of seeing minority rights as "claims to the minimal conditions for the use of rights to which every member of the community is entitled; thus minority rights are subsidiary rights; they have a subsidiary function in the sense that they make possible to members of the community to be in the position to exercise or make use of their general rights," it can be stated that the ultimate goal of sui generis minority existence in parliaments cannot be justified from the constitutional-theoretical standpoint, as minorities (as part of the populus) are already represented there, and from this angle they do not even qualify as minorities.

#### 2.2.5. "Technical" Problems of Registration, Homogenization, and the Two Different Contents Behind an Equal Parliamentary Membership

The following problematic questions of minority representation seem at first glance merely technical ones:

a) As ethnic minorities are usually very dispersed,<sup>16</sup> they would never be able to gain adequate positions in parliaments under ordinary majority election procedures. Their representation can only be provided under (more or less) proportional rules, and even in this case a number of special reductions need to be issued from the formal administrative requirements of election-procedures, e.g. the no minimum threshold of votes or electoral recommendations, etc.

b) If not every citizen (only member belonging to the minorities) will have an additional vote<sup>17</sup> for electing their minority MP's (which is a quite reasonable supposition), the registration of minorities seems inevitable, although it raises many serious constitutional and fundamental human right-related questions, as most advanced democracies explicitly ban the involuntary and mandatory registration or classification of member of minorities.

c) From the fact of territorial dispersion and the numerical minority status, it is quite obvious that minority representation cannot thus be "proportional,"<sup>18</sup> only "representative,"<sup>19</sup> therefore each ethnic minority will appear through only one representative body in the terrain of national politics. This necessarily involves the homogenization of the minority community, which undoubtedly has its serious drawbacks.

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<sup>15</sup> Following the interpretation given by A. Bragyova, "equality" means equality of general rights, and "egality" refers to the requirements of the same special rights for every citizen. In: Bragyova, Andras. 1994. Are There Any Minority Rights?, Archiv für Rechts-und Sozialphilosophie, p. 494.

<sup>16</sup> That is, not having a majority in any electoral district.

<sup>17</sup> Supposing of course, that they would have equal rights to vote for majority-candidates as well, and not only "their" representatives.

<sup>18</sup> That is, reflecting absolute numerical proportions.

<sup>19</sup> Meaning symbolic.

The questions raised above are far from being unimportant or technical. The posing of the question thus seems legitimate: Is it justified to ruin the coherence of present-day constitutionalism with intrusively introducing a completely different content of unicameral parliamentary representation to the sufficiently functioning system, when even the benefits thereof are highly questioned?

### 2.2.6. The Argument of "Quasi-Federation"

Finally, introducing the discussed new and alien content of representation, foes of sui generis mandates would claim, would imply the idea of ethnic balance, which would then evoke the constitutional nonsense of having a semi-federalist regime within unitarian parliamentary sovereignty, as ethnic balance would have similar effects to state power limitation as the federal structure. This quasi-federalist regime would then have all the drawbacks of a federal state,<sup>20</sup> while lacking its actual basis, that of having separate states urging unification or some sort of integration. In a non-federal state it is similarly absurd to provide additional seats in the unicameral parliament on the basis of ethnicity and outside the terrain of electoral competition as to have official rules for appointing certain positions to certain people (even if partially) due to their ethnic belonging.

### 2.3. Ethnic Balance Arguments

In the following, I will discuss arguments brought up from a completely different perspective. The jurisprudential content of collective rights entails hidden claims for representation, and the ethnic balance arguments (starting therefrom) are aimed at securing ethno-cultural balance through the instruments of constitutional group-equal (or rather group-conscious) regulatory mechanisms in a ius cogens nature. It is my submission that various "first-hand" quotas, that is, safe seats specified by electoral laws or constitutions can do so, but can only be justified by the so-called ethnic balance concept of representation or suffrage mechanisms.

In other words, in certain (ethno-political and political-cultural) situations the classical liberal, majority-based democratic arguments and state structuring methods are inadequate, and stronger, more fundamental instruments are needed to involve minorities into the decision-making procedure. This, in my constitutional interpretation, can only be justified in certain (Yugoslavia-like) multiethnic societies, where for some reason or another political and administrative decisions cannot be left to the majority alone. Under these conditions minority parliamentary existence is not aimed at view-point articulation or media-publicity insurance, but is a key to the

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<sup>20</sup> Federal government necessarily means weak government, as this weakness springs from two different causes: first, the division of powers between the central government and the States; secondly, the distribution of powers between the different members of the national government." In. A. V. Dicey. 1885. Introduction to the Study of the Law of the Constitution. Toronto: Macmillan and Co., p. 162.

peaceful functioning of the state. In these situations, according to ethnic-balance theorists, traditional liberal and democratic principles should be set aside, creating instead a legally secured "paternalistic" multiethnic society.

The underlying idea therefore is to perceive minorities (let them be ethnic or of other character) as constitutive elements of the political nation,<sup>21</sup> in other words, granting ethnicity the status of a fundamental and formally divisive element in forming the political corpus. To repeat, in my normative constitutional evaluation the only acceptable justification in providing sui generis mandates, or a fixed proportion of the legislative assembly to any group of citizens, is a strong belief in the conviction that ethnic representation should not only entail the representation of viewpoints and, opinions but a constitutionally rigid ensuring of representation of interests (that is legally provided decision-making authority).

Following this line of thought (seeing ethnicity as the prime organizing force in the political interest-channeling game), the concept of reserved seats shall need to be taken to its logical extension. Mandates should thus, not only be divided on an ethnic basis, but the entire system of parliamentary representation should be based on communal and ethno-arithmetical considerations. The solutions within the Constitution of Bosnia-Herzegovina, which (an outcome of a rather peculiar constitution-making process) emerged as Annex IV of the Dayton Agreement bring a clear example for this rigid, "mini-multichamber-within-one-house" model:

"Article IV. 1. The House of Peoples shall consist of 15 Delegates, two thirds from the Federation (including five Croats and five Bosniacs) and one third from the Republika Srpska (five Serbs)...2. The House of Representatives shall comprise 42 Members. Two-thirds elected from the territory of the Federation and one third from the Republika Srpska. "

This, similarly to all communal representation models, means that each predefined ethnic community has its own electoral roll, and elects only members of its "own"<sup>22</sup> group to Parliament.

Upholding (see above parts 2.1.2. and 2.2.) that without violating the very principle of democratic legitimacy, fixed mandates can only be justified under ethnic balance schemes, and thereby conceptually accepting the ideal and political-organizational credo behind ethnic balance arguments, I now shall take a somewhat consequentialist approach, investigating the practical functioning of these instruments and institutions.

### 2.3.1. Practical Malfunctioning

As legislative historical evidence shows, "most communal-roll arrangements were abandoned after it became clear that communal electorates, while guaranteeing group representation often had the perverse effect of undermining the path of accommodation between different groups,

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<sup>21</sup> Which, it should be stressed, can conceptually only be a single one.

<sup>22</sup> The Bosnian Constitution even prescribes senators to be ethnic Serbs, Croats, Bosniacs.

since there were no incentives for political intermingling between communities"<sup>23</sup> Legislators in Pakistan, Cyprus, Zimbabwe, and India; as well as the traditionally communal representation favoring Fiji therefore searched for other methods to create ethno-political justice in electoral law<sup>24</sup>. Rigid mechanisms created "from above" proved to be unable to achieve the intended goals. As Tibor Varady points out in his comments on the Dayton Agreement, "It is quite likely that for a while political realities will yield choices which will mirror the ethnic composition ... , but there is no reason to cement this into a constitutional norm."<sup>25</sup> In other words, such types of mandate-distribution could be justified from the constitutional-theoretical standpoint, its effect and practical functioning, however, failed to bring the desired solutions, as seat-bargaining did not bring ease to the underlying tensions.

### 2.3.2. De Facto Rights vs. Formal Declarations for Virtual Equality-The Real Meaning and Demand Behind Balance-Theories

The conceptual and practical evaluation of the above-tated could easily lead us to the deceptive conclusion that all attempts aimed at providing ethno-cultural justice and group-configuration regulation are doomed to failure, and the traditional liberal solutions will serve as adequate tools for providing cultural and political pluralism, as well as stability and multicultural peace between various ethnic groups. The bitter ethno-political reality and the historical lessons taught by member states of the former Communist block shows us, however, that in fragile and ensible situations of multiethnic tensions "access to decision-making cannot be safeguarded by the "one man one vote" principle; and that issues, such as the question of official languages, must not be decided by majority vote."<sup>26</sup>

Our argument is not that ethnicity-conscious constitutional settings should (or could) be avoided, but the mere (or through the portioning-technique of electoral arithmetics) mirroring of ethnicity regarding the composition of a (unicameral) legislative assembly is not the solution. A real

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<sup>23</sup> Reynolds, Andrew et al. 1997. The International Institute for Democracy and Electoral Assistance (IDEA) Handbook of Electoral System Design. Handbook Series I, p. 99.

<sup>24</sup> The only predominant example of a communal-roll system left among contemporary democracies is the optional separate roll for Maori voters in New Zealand. Maori electors can choose to be on either the national electoral roll or a specific Maori roll, which elects five Maori MPs to Parliament. The results ... could, however, be said to have weakened the rationale for the communal system: twice as many Maori MPs were elected from the general rolls as from the specific Maori roll"

Ibid. p. 100.

<sup>25</sup> Varady, Tibor. 1998. "On the Chances of Ethno-cultural Justice in Central-Eastern Europe-with Comments on the Dayton Agreement." Law and Ethnicity, Central European University, Nationalism Studies. Fall, p. 157.

<sup>26</sup> Ibid., p. 153.

and functioning system of ethnic balance-based state structure may be a workable, in some cases. (like ex-Yugoslavia) unavoidable, ingredient for social and political stability, but that requires a complex and intricate mechanism (of quotas, preferential policies, specialized institutions, etc.), where the introduction of parliamentary mandates (and thus decision-making authority) is the outcome and effect of the orderly functioning of the democratic political system, and not a rigid and artificial barrier therein. The description, or even sketching, of such a mechanism is outside the scope and limits of this paper, or my capacity, therefore I only wish to point out, that as long as the existing balance-based solutions are only focused on a narrow electoral-rule creating mechanism, the outcome can only be a malfunctioning, unrepresentative assembly where instead of interest representation, merely the representation of viewpoints will be assessed.

### 3. Conclusion

The aim of the paper was not to decide or adjudicate which of the two models can be justified as a universally valid and applicable solution to remedy all minority grievances, but rather to distinguish between the two substantially different theoretical frameworks and thereby create a conceptually sterile environment to analyze and evaluate the utilization of specific institutions and practices. Our argument was merely the following: 1.) "ethnic balance" -models, justified as they are under specific conditions, had failed to erect a complex and adequate system of political structure. Rigid parliamentary seat-bargaining in its existing forms are both incapable of solving the designated tasks, and remain only empty declarations of de facto equality, while unable to provide ethno-political justice. We could therefore only accept prescribed quotas in legislative assemblies under these constructions, if they had been the outcome and not the prime and only tool implementing it. 2) "representation" -models, on the other hand, carry a need to secure effective minority protection, and thus and not remain mere declarations of formal, content-free equality, which in practice mean majority domination. Due to being alien to the structure of representation-legitimacy however, minority seats should not be reserved in these types of Parliaments either, but rather the various other diverse techniques (as provided by constitutionalism) should be applied.

Although the outcome (that is the composition of the House) will be pretty much the same, I recommend other, theoretically more system-conforming methods to provide minority presence in Parliaments. Formalized or acquiescental quota systems (statutory,<sup>27</sup> optional,<sup>28</sup> or informal<sup>29</sup>) within the candidate nominations seem to work quite smoothly in the case of women as a group longing for preferential/balanced representation. As the IDEA

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<sup>27</sup> In Italy women must make up 50% of the PR ballot, while in Argentina the percentage is 30%. Reynolds et. al. 1997, p. 97.

<sup>28</sup> In Belgium, Namibia, Nepal, for example., Ibid.

<sup>29</sup> In South Africa, Bolivia, Mexico, the UK, and throughout Scandinavia, Ibid, p. 98.

Handbook of Electoral System Design reads<sup>30</sup>: "While it is often deemed to be a normative good to represent small communities of interest, it has been argued that it is a better strategy to design structures which give rise to a representative parliament naturally, rather than through legal obligation. Quota seats may breed resentment on the behalf of majority populations and shore up mistrust between various cultural groups. Instead of formally reserved seats, regions can be over-represented to facilitate the increased representation of minority groups."<sup>31</sup> Another workable possibility is the "best loser" (block vote) system used in Mauritius, in which some of the highest-polling losing candidates from a particular ethnic group are awarded parliamentary seats in order to balance overall ethnic representation,<sup>32</sup> or one may use electoral boundaries-manipulation to serve this purpose.<sup>33</sup>

The question, of course, remains the same: how can ethnic identity be preserved without the utilization of the instruments of ethnic politics, especially if majority-(party) politics is also created along ethnic lines, where citizens act merely as members of ethnic groups, not as citizens with different professional, economic, cultural, moral, etc., interests, values and aspirations.

Tampering with electoral systems and parliamentary seats, however, is hazardous and rarely uncontroversial.

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<sup>30</sup> Ibid.

<sup>31</sup> See the United Kingdom with Scotland and Wales, or the mountain regions in Nepal. In all cases, more MPs are elected than would be the case if population size were the only criteria. Ibid., p. 99.

<sup>32</sup> Ibid.

<sup>33</sup> See the American practice creating Black, Latino, or Asian-American districts, Ibid.

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