



# On the dual nature of suffrage

## *Electoral systems and voting rights*<sup>1</sup>

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### Abstract

One measure of a democratic rule of law is how the state defines the framework for the exercise of representative democracy, and who it grants the right to participate in representative democracy (i.e. who it considers to belong to the people). However, this dual nature of the right to vote raises a number of questions. For example, before the 2018 Hungarian parliamentary elections and during the campaign period, critical voices were heard criticising the system used in Hungarian parliamentary elections (including the institution of winner compensation). By contrast, the fundamental nature of the right to vote, i.e. the subjective aspect, is less often the focus of attention. In this respect, the question rightly arises as to whether the importance of the right to vote as a fundamental right has not been lost. Has the role of different electoral techniques and electoral systems not become a more important issue than the definition and possible extension of the scope of the electorate? Starting from the dual nature of electoral law, the study examines the requirements that can be imposed on electoral systems and the characteristics and challenges of electoral law as a fundamental right.

### Keywords

electoral systems, right to vote, constitutional aspects, will of the voters, governability, general suffrage

### 1 Introduction

According to Article B) of the Fundamental Law of Hungary „[the] source of public power shall be the people [...] The power shall be exercised by the people through elected representatives or, in exceptional cases, directly.” Even starting from this formulation of the Fundamental Law, it can be seen that the democratic exercise of power is based on the principle of people’s sovereignty, according to which the source of power is the people. The democratic exercise

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of power (in addition to the exceptionally used means of direct exercise of power) takes place within the framework of representative democracy when state power is exercised by those representatives who were authorized by the citizens for a specified period of time during the election (Bodnár, 2016, 2). Based on this, it can be concluded that one of the measures of the democratic rule of law is how the state defines the framework for the exercise of representative democracy, i.e. the electoral system, as well as to whom it ensures participation in representative democracy, i.e. in elections (i.e. whom it considers to belong to the people, to whom it thereby provides the right to have a say in the exercise of power). However, this dual nature of suffrage raises many questions. For instance, prior to the 2018 Hungarian parliamentary elections and during the campaign period, critical voices objecting to the system used in the Hungarian parliamentary elections appeared, mainly because it leans too much towards the majority system: e.g. due to the so-called winner compensation (Kurunczi, 2022, 438–439; Badó et al., 2019, 450–454; Cserny & Téglási, 2015, 335–337). In contrast, the fundamental nature of the right to vote, i.e. the subject side, is less often the focus of interest (e.g. with regard to the possibility of the introduction of the literacy test or the fact that the right to vote is tied to domestic residence). In this regard, it is therefore correct to ask whether the importance of the right to vote as a fundamental right has not been lost today. Has the role of different election techniques and election systems not become a more significant issue compared to the definition and possible expansion of the eligible voters? In this context, in addition to the fact that, in my opinion, the task of an electoral system is not merely to reflect the will of the people in the most perfect way – but it must also ensure a stable governing majority and strive to minimize abuses –, it is important to note that the fundamental nature of the right to vote should not be lost sight of. There is no doubt that how votes are converted into mandates is an important issue for the enforcement of political equality, just as it is indisputable that individual constituencies must be formed taking into account the enforcement of the equality of the right to vote in the legal sense, and it cannot be doubted that the definition of an electoral system is also an important element of the functioning of a democratic state. However, all of these primarily belong to the issue of the instrumental approach to suffrage. Nevertheless, the fundamental right approach to the right to vote is at least as important. The definition of persons participating in the exercise of people's sovereignty can not only be seen as less important, but also as more important from the point of view of the constitutional investigation of the right to vote. After all, no matter what electoral system operates in a country, the decision will not be made by the electoral system, but by the voters. No matter how well an electoral system meets all the requirements imposed on it (e.g. sufficiently proportionate and also ensures a stable governing majority), if, at the same time, the range of eligible voters is unreasonably narrow, or certain persons are excluded from the range of eligible voters without adequate guarantees. In doing so, we will necessarily erode the electoral system itself.

In accordance with the above, this study provides a brief overview of the dual nature of the right to vote, as well as the requirements imposed on them. However, it is important to emphasize that the present study examines the issue primarily through the positions appearing in the Hungarian literature, and integrates them with the main trends in international jurisprudence on the electoral systems and the right to vote.

## **2 The dual nature of the concept of suffrage**

Before examining electoral systems and the right to vote, it is important to clarify the constitutional concept of the right to vote. First of all, it is necessary to state that the right to vote has

a dual nature. On the one hand, it can be understood as the rules (Lovas, 2006, 172) that determine the way of establishing representative bodies (e.g. parliaments, local governments, etc.). This approach can be considered the substantive side of electoral law (substantive law), i.e. also a kind of instrumental approach. On the basis of the instrumental approach, we see the right to vote as a means of establishing people's representative bodies and ensuring democratic legitimacy. In order to create a body based on the principle of people's representation, it is essential that a part of the population has the right to vote (Ficzere, 2010, 289–290). In jurisprudence, this state organization approach was stronger for a long time, since the right to vote was not considered a fundamental right for many decades. This changed in the second half of the 20th century, when the view that the right to vote was more than just a privilege granted by the state and therefore not legally enforceable became common, but a subjective human right that the state is obliged to ensure for its own citizens (Halász, 2018, 715). However, on the other hand, the right to vote is a fundamental political right, which means the right to participate in power or in the conduct of public affairs, and as such we can understand the subjective side of the right to vote (i.e. who has active and passive voting rights). The two approaches above have a common basis: the principle of people representation.

### **3 On constitutional requirements for electoral systems**

In a democratic state, it is essential that the principle of people's representation is fully implemented. The principle of people's representation can be implemented both directly (e.g. by referendum) and through elected representatives. Although direct exercise of power can be considered a stronger instrument, in a modern state the representative democracy should take priority over direct democracy. Therefore, the electoral system used by a country to elect members of the various representative bodies (in particular members of parliament) is of particular importance. The electoral system, as a key element of the constitutional-institutional system, significantly influences other elements of the political system, namely party structure and the system of power and government (Fábián, 1999, 53).<sup>2</sup> Therefore, this section of the study focuses on the requirements that must be considered in the definition of electoral systems, which, in their interest, are considered constitutional and at the same time fair (and suitable for the social context in which they are used).

#### **3.1 General characteristics of electoral systems**

Before analysing the main requirements of electoral systems, it is important to review their main basic types. Election systems are primarily those systems (and the methods and techniques associated with them) that are used to distribute mandates after the end of voting, that is, they determine which of the individual candidates will get a mandate or how many will get a mandate from the lists of party (Tóth, 2016, 202). On this basis, we can distinguish three basic electoral systems: the majority system, the proportional system and the mixed system. In the case of majority systems, which may be absolute or relative majority systems, representation is based on an acquired majority. In the absolute majority systems, a candidate who obtains more than 50% of the total votes cast obtain a mandate; however, in the case of the latter, it is

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<sup>2</sup> For more on the constitutional basis of the system of government and the Hungarian public administration, see: Patyi & Téglási (2014, 203–218).

sufficient for a candidate to obtain a majority of the votes cast. The advantage of an absolute majority system is that it can result in the most stable governance as the elected candidates enjoy broad support. A serious disadvantage, however, is that it does not always produce an end result since in the event of a more even distribution of votes, none of the candidates receives an absolute majority, and the fate of the mandate remains open. In contrast, the advantage of a relative majority system is that it is practically always effective (statistically very unlikely to have exactly two of the large number of votes cast for each candidate). The disadvantage, however, is that against the will of many voters (in our example, against three-fourths of the voters), someone is elected with few votes and that even in this system, all the votes that were not cast for the winner are lost. In contrast, in proportional systems, mandates are allocated in proportion to the votes, and this system seeks to create consistency between the votes cast and the mandates. The advantage of a proportional system is that it reflects the will of the electorate more accurately so that voters who remain in the minority are also represented. Another advantage is that a single vote will certainly be successful, i.e. there will be no need to organise another round, re-mobilising huge human and material resources. However, the disadvantage is that the representative body can become too fragmented, and many parties can get a mandate, which can make decision-making very difficult; further, it takes a disproportionate amount of time and energy to reach a consensus. In mixed electoral systems, a combination of the two principles of representation is implemented, the additional element of which is provided by the institution of compensation. Of course, these electoral systems<sup>3</sup> do not always work according to their pure meaning, but they have many variants and combinations in the world.

Before further examining the requirements of these electoral systems, it is important to analyse the tendency of electoral systems of EU countries. The electoral systems of the EU member states can be grouped according to three major subtypes of electoral systems, according to which a proportional electoral system can be observed, e.g. in Austria (Federal Law in National Council Elections Law 471/1992. 1-2. §), Belgium (Electoral Code of Belgium), Bulgaria (Gancheva et al., 2016), Cyprus (Stumpf & László, 2018, 180), Denmark (Pap, 2007, 198), Estonia (Riigikogu Election Act) and Finland (Finnish Election Law). Among the proportional electoral systems, it is important to highlight the electoral system in Greece. Of the 300 members of the Greek parliament (Vouli), 238 are elected in single and multi-member electoral districts (based on list voting), and 12 mandates are distributed on a party list. In addition, however, 50 parliamentary mandates are automatically awarded to the party that won the most votes in the election. This is known as the principle of ‘enhanced proportionality’, by which the system responds to the main flaw in proportional electoral systems: an overly fragmented parliament (Stumpf & László, 2018, 184). Proportional electoral systems are also present in The Netherlands (Act of 28 September 1989 containing new provisions governing the franchise and elections), Ireland (Constitution of Ireland Article 16.), Latvia, Malta, Portugal, Spain, Sweden (Stumpf & László, 2018, 86–193) and Luxembourg (Loi Electorale No. 30 21 février 2003). A majority electoral system is used in, e.g. the United Kingdom (Representation of the People Act 1983) and France. In addition to proportional electoral systems, the second most commonly used method in the European Union is the mixed electoral system, which seeks to combine the advantages of a proportional and majority system while eliminating their disadvantages. Such a system can be observed in Lithuania, Germany and Italy.<sup>4</sup>

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<sup>3</sup> For more details on the nature of electoral systems, see: Cservák (2017).

<sup>4</sup> For more on the latter, see: Baraggia (2017, 272–279).

### 3.2 Constitutional considerations related to the definition of electoral systems

On the electoral systems often raise the question of what expectations can and should be set for them (in order to be constitutional and fair). Can these aspects be determined at all? Can there be an absolutely bad and absolutely good electoral system? What are the main directions of each electoral system? As can be seen from what has been written above, in the European Union is dominated by proportional electoral systems (Kurunczi & Szabó, 2020, 787–788). However, it can also be seen that, in addition to ensuring and increasing proportionality, some elements in the practice of individual countries seek to ensure stability at the same time (see, e.g., the Greek electoral system). It can also be considered as such that in several countries, smaller electoral districts are set up to strengthen the relationship between voters and members of parliament, even if more than one mandate is allocated in a given electoral district (Fábián, 1999, 60).

However, whatever system a country uses, it can be stated with great certainty that several aspects must be considered in its definition of the electoral system (Ahmed, 2022, 225–227), i.e. several aspects will affect the operation of the system. According to Dieter Nohlen the concept of the electoral system is interpreted extremely broadly in the political debate on electoral systems, encompassing almost everything that affects the electoral process (Nohlen, 1996, 7). Thus, e.g., elements that influence the electoral system are

- (1) the type of electoral system (majority-proportional-mixed),
- (2) the regulation of the process of becoming a candidate, e.g. that it is tied to a voter recommendation or just the payment of a financial deposit (see, among others: Cserny 2018, 43–64),
- (3) the process of forming electoral districts (Nohlen, 1996, 12),
- (4) the definition of mandate allocation mechanisms (Stumpf & László, 2018, 176–195) or
- (5) the electoral redress system (Temesi, 2018, 195–210) as well as
- (6) the requiring voters to participate in elections.

Some electoral models treat the exercise of the right to vote not only as a right but also as an obligation, thus sanctioning the absence of voting if there is a right to vote. Such can be observed, e.g., in Belgium (for more see: Cserny, 2018, 25). Belgium introduced compulsory voting in 1893. Art. 62 of the Belgian Constitution, providing that Belgian nationals must exercise their right to vote (Hallók, 2018, 121).

However, it is worth looking at the constitutional aspects of electoral systems from a more distant perspective, rather than at the specific elements of the system. On this regard as a hypothesis, we can state that an electoral system must ensure both the fullest representation of the will of the electorate and stable governance. In my view, the fulfillment of either condition is not in itself a sufficient condition of fair and well-functioning electoral systems.

In the context of electoral systems, the requirement of proportionality should be emphasised first. The principle of people's representation will be complied with primarily by the electoral system that best reflects the will of the voter. This is because a proportional electoral system can display the election result in the composition of the elected body in the most perfect way (as mandates are allocated in proportion to the number of votes cast). However, this aspect cannot and should not be seen as overriding as no electoral system will be better or worse because it enforces proportionality less. For example, a mixed electoral system will necessarily tip to the majority or proportional side. A good example of this is the comparison of the electoral systems of Germany and Hungary, which are often compared; yet proportionality can be perfectly observed in the case of the former and the predominance of majority elements in the case of

the latter (see e.g., the so-called the institution of ‘winner-compensation’ in our country). In the context of the requirement of proportionality, the question is also whether it can be regarded as a necessary and essential condition. For example, the Hungarian Constitutional Court [Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary] took the position that, according to the Fundamental Law, the electoral system does not necessarily have to be proportionate as the Fundamental Law does not include a provision on the proportion of proportional, majority or compensation subsystems of the electoral system [Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary, Reasoning [39]]. At the same time, it can be stated that an electoral system must strive to reflect the will of the voter as much as possible.

In addition to proportionality, the second important requirement for an electoral system is that its application should ensure a stable governing majority. According to the instrumental approach to suffrage, it can also be considered a tool for concluding and renewing the social contract (the indirect exercise of power by the subjects of people’s sovereignty); thus, an electoral system that serves only proportionality and does not take the need for a stable governing majority into account will not be ideal in itself. If an electoral system results in a fragmented parliament (or other elected body), it can easily lead to government crises and thus to socio-economic crises. According to Tibor Ördögh, diverse parliaments demand the formation of coalition governments that can make the political system unstable (Ördögh, 2016, 104). Therefore, most electoral systems also include elements that help achieve stability. The Greek example, where the winning party gets an additional 50 seats to help governability, can also be considered as such, but the institution of ‘winner compensation’ appearing in the Hungarian electoral system can also serve as an example of this (see the end of the study for more details on this institution).

An additional requirement of electoral systems is that they should minimise the possibility of cheating (i.e. they should not allow manipulation). In this regard, especially the institutional elements of electoral systems must be considered – thus, e.g., the formation of electoral districts, the possibility of re-registration or voting by mobile ballot box or the ways in which votes are cast (see, e.g., the institution of voting in the letter).

As a fourth requirement, an electoral system must always be adapted to the social and cultural roots and organisation of the given country. According to Dieter Nohlen, social development and structure, political culture, power relations or even the behavioural patterns of the political elite all determine the structure of the electoral system (Nohlen, 1996, 8).

Finally, as a fifth aspect, it is important to emphasize that it is also a particularly important requirement in the context of an electoral system, whether the election system of the given country guarantees the free expression of opinion during the election campaign and the election process, and whether it ensures voters’ right to information. The purpose of an election campaign is clearly to influence the will of voters and to convince them which party they should vote for (Török, 2015, 151). And this is only possible if we adequately ensure the free flow of opinions and the fullest enforcement of the right to information. In relation to this aspect, it is worth highlighting one decision of the Slovenian and Serbian Constitutional Courts. In a 2011 decision, the Slovenian Constitutional Court [U-I-67/09, Up-316/09 | SL-0168] stated that the integrity of the elections can only be achieved if broad information prevails in the election campaign. In this decision, the Slovenian constitutional body stated that elections or referendums can only be considered fair if they express the true will of the people and if the public was widely and comprehensively informed during the campaign. Therefore, the flow of information influencing public opinion before the elections should be maintained as long as possible. In 2015, the Serbian Constitutional Court stated it in its decision no. Uz-6600/2015/SR-0167., that the

possibility of free speech must be ensured in the election campaign. The Hungarian Constitutional Court also dealt with the issue in several decisions (3107/2018. (IV. 9.) AB decision, and 3240/2019. (X. 17.) AB decision), and established that certain factual statements in the election campaign should be evaluated as political opinions (and thus there is a greater obligation of tolerance towards them), if voters can interpret them properly in the context of the election campaign and can clearly identify their underlying political message (It analyzes the practice of the Hungarian Constitutional Court in detail: Koltay & Szikora, 2022) This approach helps to obtain information on a wider scale. It is worth noting that the Hungarian Constitutional Court said (in 3240/2019. (X. 17.) AB decision), that: „the half-truths, ambiguous, or untrue statements made by the candidates in the campaigns generate a negative process whose harmful effects affect the entire society. Manifestations that ignore good morals and good taste also qualify the person who lives by such means as moral. Freedom of speech, which is protected by fundamental law, does not mean that every opportunity that is not illegal and does not entail adverse legal consequences must be taken advantage of. In addition to ethical aspects, this is also the well-understood self-interest of all involved.” However, this „moral clause” has not yet been applied by the Hungarian Constitutional Court.<sup>5</sup>

Of course, the criteria of an electoral system can be determined based on other requirements. Thus, important criteria of an electoral system are that it must

1. provide appropriate legitimacy (that is, for the various social groups to recognise the electoral system, to accept the legitimacy of the power created by it);
2. ensure political integration (do not cause political polarisation in society by the debate over the electoral system);
3. properly represent the will of the voters (do not result in a result contrary to the will of the voters); and
4. result in representative government (Nohlen, 1996, 30).

It is therefore important to emphasise that the criteria of electoral systems can be determined on the basis of any aspect [which, in addition to the above, can also be influenced by the size, traditions or even political considerations of a country (Szoboszlai, 1999, 261–299)]; in any case, only the creation of a complex, multi-faceted system (which displays all the above requirements) will serve the fullest realisation of the principle of people’s representation (on this topic, see: Kolodny, 2014). For this reason, we can also state that the definition of an electoral system is one of the most national issues in the formation of constitutional order.

#### **4 General characteristics of the right to vote - challenges in regulating the subjective side of the right to vote**

After reviewing the requirements for electoral systems, let us examine the subject side of the right to vote. In connection with this, it is first necessary to say a few thoughts about the fundamental nature of the right to vote.

As I mentioned above, the right to vote – in addition to the instrumental approach – can also be approached from the fundamental law’s point of view, in which case we mean the subject side of the right to vote, i.e. the definition of the range of eligible voters. The right to vote is therefore equally linked to fundamental rights and state organization rules. The right to vote is, on the one hand, a basic right to participate in the conduct of public affairs, and on the other

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<sup>5</sup> See also in this context: Téglási (2015, 33); Téglási (2018).

hand, it is a means of establishing a representative legislative body (in this regard, Benjamin Constant states, that „only direct election can lend real power to national representation and ensure that this representation is deeply rooted in public opinion. A representative appointed in any other way will find nowhere a voice that acknowledges him or her. [...]” (Constant, 1997, 100) and a guarantee of legitimacy (Dezső, 1995, 172). This is confirmed by the practice of the European Court of Human Rights (hereafter: ECtHR), according to which passive behavior is not enough for the state, it must actively contribute to ensuring the right to vote as a fundamental right [Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, no. 9267/81], and by the decision no. 1/2013. (I. 7.) AB of the Hungarian Constitutional Court as well, according to which the right to vote is a fundamental right with a dual function: on the one hand, it ensures the right to participate in public affairs, i.e. the indirect form of public decision-making, on the other hand, it also serves as a means of establishing and legitimizing the representative body [decision no. 1/2013. (I. 7.) AB, Reasoning [54]].

Regarding the historical aspect of the right to vote as a fundamental right, it is important to point out as a starting point that between the time of the demand that arose during the civil revolutions and its actual recognition, it functioned as the right of those with „political ability”, which the state allows for a specific group of citizens (Dezső, 1998, 21). By the second half of the 20th century, however, a new view became common, according to which suffrage is not only a constitutional state task that cannot be constitutionally enforced by the individual, rather, it is a human right that the state is obliged to ensure, and if it does not comply with this obligation, it can be enforced by all rights holders became common (Domahidi, 2009, 2474). This can clearly be traced back to the idea, that a democratic state can only exist if its power comes directly or indirectly from the people.

Before examining any further questions, it is necessary to determine where the right to vote, as a fundamental right, can be placed in the system of fundamental rights. According to Eszter Bodnár, three steps led to the recognition of the right to vote as a fundamental right: 1. gradual extension of suffrage, 2. the conceptual set of legal positivism based on civil rights, 3. inclusion in the fundamental rights catalog of international human rights documents (Bodnár, 2014, 30). First of all, it is important to note that the right to vote can be considered a first-generation political freedom (cf. Bodnár, 2014, 30 – according to her point of view, in the 18th and 19th centuries we could not yet talk about democratic, universal and equal suffrage, since at that time racial, gender and wealth censuses were still decisive), since already in the 18th century, both personal and political freedoms appeared among the classic fundamental rights (Foster, 2003, 9). However, the right to vote cannot be classified as a freedom in the classical sense, but as a participation right. Because as long as freedoms „give an answer to the question to what extent public power can intervene in people’s lives, and what people should and should not do, until then, participation rights determine where public authority decisions come from, that is, who or what is the source of the power intervention that dictates to people what they can and cannot do” (Halmai & Tóth, 2003, 81–107). At the same time, the right to vote, as a fundamental right, can also be interpreted as one of the strongest means of limiting the exercise of power, because the people are able to deprive the exercisers of power who can restrict other fundamental rights of their power (Bodnár, 2014, 35). Therefore, the right to vote can also be considered a political freedom, and thus can be interpreted together with freedom of expression, freedom of information, the right to association, the right to assemble, the right to petition, and the right to participate in public affairs (Balogh & Schanda, 2014, 23–25). The right to vote can also be determined based on the division according to the Hungarian Constitutional Court (28/1994. (V. 20.) AB decision), according to this, it should be classified as a classic fundamental right,

since it also has a subject legal character, it can be enforced against the state by legal means and by judicial means. In addition to the above, the right to vote can also be classified as a citizen's right, for it may be exercised by the members of the political community, which – in accordance with what was written in the previous points – usually includes the citizens of the state (Sári & Somody, 2008, 32).

The role and importance of the right to vote therefore go beyond the creation of the people's representative bodies. The right to vote is also one of the (indirect) forms of participation in public affairs. Thus, it will be of particular importance who in a society has active suffrage rights, i.e. how the subjective side of suffrage is defined. In this regard, it can be stated as a basic requirement that persons belonging to the political nation, i.e. the people, have the right to participate in the election of the members of the people's representative body. We can also say that a citizen in the political community of which he or she is a member has the right to choose who will exercise power over him or her. According to Eszter Bodnár – in this respect – the right to vote can be approached as a kind of right to self-determination, and thus it can ultimately be traced back to human dignity – which is why the general fundamental right limitation rules must be applied when examining it. Regarding the right to human dignity, it is important to emphasize that it is not only a fundamental right, but also a principle that permeates and determines the content of all fundamental rights, including the right to vote. The German Constitutional Court went even further in this regard in connection with the relationship between the right to vote and human dignity, and stated that the right to democratic participation is an expression of individual responsibility and human dignity, and thus the right to vote is one of the guarantees of human dignity (Bodnár, 2014, 130–131). It directly follows from this that everyone whose decision will affect their life can take part in the elections, therefore, it is only exceptionally possible to exclude certain persons from the circle of eligible voters (Bodnár, 2014, 33). However, it is also necessary to add to what has been written above that by exercising our right to vote, we are actually not only deciding our own fate, but also the fate of the entire community, that is, the entire nation. And this statement is correct even if it goes without saying that not everyone's vote will be worth the same amount in reality, because the political community is usually so large that a single vote has little effect on the outcome of the elections or the composition of the people's representative body. Nevertheless, it is very important that everyone among the members of the people has the opportunity to cast their vote. Because although the vote of each person may have a small direct influence on the final result of the vote, overall, it will still have an impact on the total number of votes. There are two reasons for this: on the one hand, his or her vote must, in principle, be suitable to result in representation, on the other hand, even if his or her vote is worth „nothing” in the end (because, for example, he or she votes for the losing candidate), it is still important that he or she was able to cast their vote as a member of the people. That is why, in each case, the legislator and the law enforcer must use the individual limitation and exclusion options in a self-limiting manner and apply them only in the most justified cases. The enforcement of this is important if only because the right to vote is closely linked to human dignity through the right to self-determination. It follows directly from this that no distinction can be made between persons of equal dignity in such a way that their vote will have less or more weight than that of the other members of the political community – considering that all community members must be given equal opportunities to participate in community decision-making (Bodnár, 2014, 34). It follows from all of this that the fundamental content of the right to vote (without which we cannot speak of a democratic right to vote) is the right to decide (cf. Bodnár, 2016, [17]). According to this, the voter can freely decide whether he or she wants to participate in the elections and, if so, for whom he or she will cast his or her vote. In

this context, it is particularly important to emphasize that the right to make a decision does not include the effectiveness of the decision (i.e. that the vote will necessarily result in a mandate), only that the vote has the same chance compared to other votes to result in representation.

#### 4.1 The concept of general suffrage

With regard to the fundamental law examination of the right to vote, it is also necessary to briefly review the concept of the generality of the right to vote.

We can define the concept of the generality of suffrage by quoting the definitions of several authors. Győző Concha – in a 1906 writing – puts it like „[...] *the nation itself has the greatest interest in not only making more of its members participate in the creation of its will, but also giving it the right to vote*” (Concha, 1906). And according to Jenő Gönczi „[t]he right to vote is considered general if, in addition to citizenship, a certain age and possibly a permanent home (domicile) in the same village or electoral district for a specified period of time, [...] you also have other special requirements [...]” (Gönczi, 1918). With regard to the „modern” definition of the generality of suffrage, it is also worth highlighting several definitions. According to József Petrétei for example „an important condition for democratic elections is that the subject circle of those entitled to vote is defined as broadly as possible. [...] To this end, the basic principle of the generality of the right to vote requires that basically every citizen has the right to vote and can be elected” (Petrétei, 2009, 224). In their writings, Károly Tóth (Tóth, 2016, 204) and István Kukorelli (Kukorelli, 2003, 712) similarly define the concept of the generality of the right to vote. According to this, „the meaning of the generality of the right to vote is that except for the absolutely necessary and justified, so-called natural exclusionary reasons, all Hungarian citizens of legal age should have the right to vote.” Márta Dezső also puts it in a similar way, according to her „the principle of the generality of the right to vote means that all citizens of legal age have the right to vote - except for the so-called natural exclusionary reasons” (Dezső, 2002, 173). When defining the generality of the right to vote, it is necessary to examine each element of the relevant practice of the ECtHR and the Hungarian Constitutional Court. The ECtHR, among others in the case of *Sukhovetsky v. Ukraine*, found that the right to vote in a democratic state is not a privilege after the suffrage was gradually extended during the historical development [*Sukhovetsky v. Ukraine*, Judgment of 28 March 2006, no. 13716]. According to the ECtHR any deviation from the principle of general suffrage carries the risk of undermining the democratic legitimacy of the elected legislative body [*Aziz v. Cyprus*, Judgment of 22 June 2004, no. 69949/01., and *Matthews v. United Kingdom*, Judgment of 18 February 1999, no. 24833/94]. The primary obligation of the state here is therefore not to refrain from violating the fundamental right (in this case, the right to vote), but rather that the state adopt positive measures in order to be able to hold democratic elections. In this context, it is worth mentioning the judgment *Baker v. Carr* from the practice of the Supreme Court of the United States of America. In this case, some citizens filed a lawsuit because the legislator did not change the assignment of electoral districts in such a way that it took into account the population density of certain parts of the state and the changes that occurred in it (Molnár, 2017, 50). Based on this logic, the ECtHR reached the concept of „general suffrage” from the „institutional” right to hold free elections [*Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, no. 9267/81. és *Yumak and Sadak v. Turkey*, Judgment of 8 July 2008, no. 10226/03].

In several decisions of the Hungarian Constitutional Court, it dealt with the principle of the generality of the right to vote. In a 1991 decision (6/1991. (II. 28.) AB decision), the Constitutional Court stated, for example, that neither referring to convenience aspects, nor to technical

difficulties that can be overcome, nor to the goal of making the election results public in the shortest possible time, can serve as a basis for limiting the principle of generality. Nevertheless, Paragraph (5) of Article XXIII of the Fundamental Law has excluded the possibility of voting away from the place of residence in relation to local government elections. The basis for this was a decision of the Constitutional Court (783/E/2002. AB decision) in which the panel stated that the necessity of creating a rule that would enable the possibility of voting away from the place of residence on the day of municipal elections cannot be deduced from the constitutional rules of the right to vote. However, the dissenting opinions attached to this decision by Miklós Lévay and András Bragyova said that the legislator does not have the constitutional possibility to link the actual exercise of the right to vote to a narrower geographical area compared to the territory of the country. Eszter Bodnár also agrees with this idea, according to whom there would be no obstacles to the implementation of the above given today's technical conditions (Bodnár, 2014, 104). In a 2008 decision (54/2008. (IV. 24.) AB decision), the Constitutional Court also stated that the obstacles to the generality of the right to vote cannot be expanded by additional objective limitations beyond the constitutional limitations (this is of particular importance because – as the Constitutional Court in 16/1994. (III. 25.) AB decision also stated – the constitutional limits of the right to vote can only be defined in the right to vote clause of the constitution), however, the legislature may bind the exercise of the right to vote to procedural conditions. In terms of the generality of the right to vote, the final document of the 1990 Copenhagen meeting of the Conference on Security and Cooperation in Europe (CSCE) is also of outstanding importance, in which the participating states declared that they would hold free elections at reasonable intervals and that they would be held on the basis of general and equal suffrage.

In accordance with the above, according to the Fundamental Law, based on the generality of the right to vote, Hungarian citizens of legal age,<sup>6</sup> who do not fall under any disqualifying reason have both active and passive voting rights. So based on the generality of the right to vote (for a definition, see also: G. Karácsony & Smuk, 2014, 165–166), everyone has the right to vote if the conditions related to its exercise are met (Dworkin, 1997, 19) – i.e. no one can be arbitrarily excluded from it (Bodnár, 2014, 102). However, the concept of the generality of the right to vote can also be defined in such a way that it actually means that the right to vote must extend to as many members of the people as possible, and those who are subject to it can actually exercise their right to vote (i.e. neither administrative nor other restrictions are possible). Namely, in the event that the person with the right to vote cannot exercise his or her right to vote (because e.g. the state does not ensure its conditions as part of its obligation to protect institutions), the principle of the generality of suffrage cannot apply either.

## 4.2 The challenges of general suffrage

Based on the above-clarified aspects of the principle of general suffrage, it is important to emphasize that its principle (and scope of subjects) has been interpreted differently in different eras. In this context, András Jakab stated in his presentation at a conference,<sup>7</sup> that after World

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<sup>6</sup> It is important to note that the range of eligible voters is defined differently in the election of members of parliament, the election of local government representatives and mayors, and the election of representatives of the European Parliament in Hungary, i.e. neither for active voting rights nor for passive voting rights can be given a 'general' all-encompassing definition.

<sup>7</sup> <https://aceceo.org/hu/projektjeink/2014-valasztasok-eve>

War I, the right to vote could not be revoked from surviving soldiers who returned home from the front (because they risked their lives for their country), thus, they received active voting rights in the majority of states. The merits gained in the war appeared as an easing rule in the suffrage of the time. In Hungary, the Prime Minister's Decree of 1919<sup>8</sup> already ensured the right to vote, regardless of age, to those who had been assigned to front-line service for at least twelve weeks during the First World War (Hollósi, 2015). However, among these soldiers, there were also many persons who were confronted with the ideas of the Communist Manifesto at the front, so it was feared that parties professing Communist views would gain strength in Western countries as well. In order to counterbalance this, the affected states extended the right to vote to persons (mainly women) who survived the war in the hinterland, and who did not have it before, in order to maintain the political balance. If we look at the current challenges to the principle of universal suffrage from time to time [e.g. the requirement of domestic residence, the question of right to vote of people with intellectual disabilities, the suffrage of those sentenced to imprisonment, the dilemma of children's suffrage (Kurunczi, 2020), or the question of nationalities' parliamentary representation (Kurunczi, 2014)] then we can see that, in the majority of cases, behind the expansion of the circle of those who have the right to vote, there is some political profit-making intention or other political goal. A detailed analysis of these challenges is not the purpose of this study, however, it is important to emphasize that defining the right to vote and ensuring it as widely as possible is considered essential in order to strengthen democratic legitimacy.

## 5 Conclusions

In my study, I primarily looked for the answer to the question of what the two natures of the right to vote mean: i.e. what criteria an election system must meet in order to be considered constitutional and fair, and who can be included in the circle of eligible voters. Answering these questions is also crucial, as we can best determine the completeness of the implementation of popular representation by examining these areas from the approach of the instrumental and fundamental right to suffrage. In connection with electoral systems, it can be stated that an electoral system can be considered constitutional if it embodies the will of the electorate, and at the same time, it ensures a stable governing majority and adapts to the social system, minimizes the possibility of abuses and provides appropriate legitimacy to the exerciser of power. István Kukorelli puts it this way regarding the requirements for electoral systems: a constitutional and fair electoral system aims to provide the legislature with unquestionable legitimacy. With that said, however, an election system that meets the above criteria cannot be considered sufficient for popular representation to prevail, for that, it is also necessary to define the range of eligible voters as broadly as possible. Based on the historical development trends, we can see that until the 19th century and the beginning of the 20th century, the right to vote was seen as a kind of privilege. Today, however, we have now reached the „everyone except who...” principle, on the basis of which the possibility of active participation in elections is becoming increasingly widespread in all societies, even if we can still encounter many challenges in connection with the generality of the right to vote, which foreshadow further opportunities for the expansion of the right to vote.

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<sup>8</sup> Decree No. 5.985 of the Hungarian Government of 1919 on the right to vote in the National Assembly, the Legislative Assembly and the Municipalities.

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