

Minority Rights Questions Addressed by the Venice Commission in 2008

In the course of the period under consideration, the European Commission for Democracy through Law (hereinafter the 'Venice Commission') addressed the issue of dual voting for persons belonging to minorities¹ and provided expert assessment on the (draft) Constitution of Montenegro, including the constitutional entrenchment of the rights of persons belonging to national minorities.² Moreover, the Venice Commission held a seminar on "the participation of minorities in public life".

I. DUAL VOTING FOR PERSONS BELONGING TO MINORITIES

A. Introduction

1. Background

The issue of electoral law and minorities has regularly been on the agenda of the Venice Commission, the Council of Europe body responsible for constitutional mat-

* JD. Head of the Division of Elections and Referendums of the European Commission for Democracy through Law of the Council of Europe, Strasbourg, France.

** Head of the Division of Democratic Institutions and Fundamental Rights of the Venice Commission.

The authors thank Alain Chablais, JD, Head *ad interim* of the Secretariat of the Framework Convention for the Protection of National Minorities, for his contribution (section III).

The views expressed herein are solely those of the authors and cannot be attributed to the Venice Commission of the Council of Europe.

1 See CDL-AD(2008)013, at <[http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)013-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)013-e.asp)>.

2 CDL-AD(2007)017, at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)017-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)017-e.asp)>; CDL-AD(2007)047, at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)047-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)047-e.asp)>.

ters. The Venice Commission's contribution to the 5th edition of the *Yearbook*³ summarized the study on *Electoral Law and National Minorities*,⁴ as well as the more specific report *Electoral Rules and Affirmative Action for National Minorities' Participation in the Decision-Making Process*.⁵

The first study⁶ was quite general and showed that the participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to minorities, as from the implementation of general rules of electoral law, adjusted, if need be, to increase the chances of success of the candidates from such minorities.

The second study,⁷ however, focused on specific rules applicable to national minorities, rules that exist in a number of European states and that are covered by the term 'affirmative action'. These rules include taking into consideration the major (e.g., ethnic) groups in the repartition of seats, threshold exemption, other deviations from the general rules on the allocation of seats, deviation from the normal repartition of seats between constituencies, design of electoral districts to ensure representation of national minorities and, finally, reserved seats for minorities.

In turn, reserved seats for minorities may be provided in different ways. One or more seats may be guaranteed to members of national minorities without changing the voting process; members of minorities may be offered the possibility of voting in separate colleges;⁸ and finally, they may be allowed to vote separately for mainstream parties and candidates and for candidates belonging to national minorities (dual voting).

2. The Issue of Dual Voting

Dual voting is but one of the ways of guaranteeing that persons belonging to minorities are represented in the elected body, whereas a number of other modalities of electoral legislation may in principle lead to the same result—be they of a general nature or specific to minorities.

This does not mean that the issue is not topical. It is true that in Europe dual voting is practised as such only in Slovenia, where two representatives of the Italian and Hungarian minorities elected on special lists have full status as members of parliament. However, in Cyprus, in addition to their general right to vote as members of the Greek community, the members of each of the Maronite, Armenian and Latin religious groups elect a deputy to the House of Representatives, but with a consultative

3 Alain Chablais and Pierre Garrone, "European Commission for Democracy through Law: Review of Recent Reports and Opinions Relevant to the Protection of National Minorities", 5 *EYMI* (2005/6), 305–314, at 309–314.

4 CDL-INF(2000)004, at <[http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)004-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)004-e.asp)>.

5 CDL-AD(2005)009, at <[http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)009-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)009-e.asp)>.

6 CDL-INF(2000)004.

7 CDL-AD(2005)009.

8 They could also be compelled to do so, but this would be contrary to Article 3.1 of the Framework Convention for the Protection of National Minorities (FCNM), according to which "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such".

status. Moreover, Article 15 of the Croatian Constitution provides that the law might give members of national minorities the right—besides the general voting right—to elect their representatives to parliament. Specific representation of minorities is ensured on the basis of Article 19 of the Constitutional Law on Rights of National Minorities. However, members of national minorities do not have two votes; they decide whether to vote for a party list or the minority candidates. The issue of introducing dual voting is raised from time to time. It could also be raised in other countries wishing to introduce (further) guarantees of the representation of minorities or to adapt the current provisions in this field.

This led the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities in 2006 to ask the Venice Commission for a study on the conformity of dual voting with the principles of Europe's electoral heritage. These principles are enshrined in Article 25 of the International Covenant on Civil and Political Rights (CCPR), Article 3 of the Additional Protocol to the European Convention on Human Rights (ECHR)⁹, as well as in the Code of Good Practice in Electoral Matters, which is the Council of Europe's reference document in the field of elections.¹⁰

Before being presented to the June 2008 Plenary Session of the Venice Commission, the issue was dealt with during five meetings of the Council for Democratic Elections. The Council for Democratic Elections is made up of representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe and is in charge of the detailed discussion of the draft opinions and studies in the electoral field before their submission to the Commission's Plenary Session. Representatives of the OSCE High Commissioner on National Minorities were present and provided input through the submission of documents containing the main elements for such a study.

The length of this procedure shows how controversial the issue may be, even if its reach appears limited. This also means that the Venice Commission made a thorough examination of the issue in order to come to balanced conclusions.

The essential question is to know whether dual voting for minorities runs contrary to one of the main principles of the European electoral heritage, and if so, whether such an exception may be justified, under what conditions and in what circumstances.

*B. Elements Needed for the Settlement of the Issue:
The International Legal Framework*

1. The Council of Europe

(a) Before addressing this issue, the Venice Commission's study introduces the international legal framework and, more specifically, Council of Europe standards. It refers in particular to Article 3 of the Additional Protocol to the ECHR and to the case law of the European Court of Human Rights based on this provision. It concludes that

9 Protocol to the European Convention on Human Rights and Fundamental Freedoms, entered into force on 18 May 1954, ETS No. 9.

10 CDL-AD(2002)023rev, at <[http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)>.

In brief, the way that votes are translated into seats is compatible with Article 3 of the Additional Protocol to the Convention if it is in accordance with the equal suffrage principle; exceptions, restrictions and variations are accepted if their purpose is lawful and necessary and the method chosen is proportionate to the outcome sought. According to the Court, such alternatives permit different treatment of minorities to enable them to participate effectively in public life, if reasonable.¹¹

(b) Whereas the ECHR and its additional protocols provide for rights that are not specific to persons belonging to minorities, the *Framework Convention for the Protection of National Minorities* (FCNM) is by definition a specific instrument. For our interest, the Venice Commission quotes Article 15 of the FCNM, according to which “[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them” and states that

the explanatory report underlines that the provision’s aim is ‘above all to encourage real equality between persons belonging to national minorities and those forming part of the majority’. *Inter alia* the following measures are listed to create the necessary conditions for the participation by persons belonging to national minorities: effective participation of persons belonging to national minorities in the decision making processes and elected bodies both at national level and local levels; decentralised or local forms of government.¹²

The Venice Commission’s study¹³ also quotes the reports by the Advisory Committee instituted by the FCNM. It underlines that “electoral arrangements for parliamentary representation is a domain where, from the point of view of international standards, (Article 3, Protocol 1 of the European Convention on Human Rights, and Article 15 of the Framework Convention) States enjoy a broad margin of appreciation”.¹⁴ In general, the Advisory Committee criticizes states in which parliamentary representation of minorities appears insufficient and not satisfying. More specifically, in the first cycle opinion on Slovenia (12 September 2002), the Advisory Committee welcomed in particular the dual voting right of the Hungarian and Italian minorities.

(c) The *Code of Good Practice in Electoral Matters*, drafted by the Venice Commission, and which is the reference document of the Council of Europe in this field, makes the rules of Article 3 of the Additional Protocol and Article 15 FCNM more explicit.

One of the principles enshrined in Article 3 of the Additional Protocol (possibly combined with Article 14 ECHR) is equal suffrage, which includes in particular equal voting rights (*égalité de décompte*, one person—one vote in the narrow sense). According to the Code of Good Practice in Electoral Matters, each voter has in prin-

11 CDL-AD(2008)013, para. 22.

12 *Ibid.*, para. 23 B.

13 *Ibid.*, para. 24 ff.

14 See the first cycle opinion on Hungary adopted on 22 September 2000.

ciple one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes.¹⁵ However, “[s]pecial rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage”.¹⁶ The issue of dual voting is not expressly mentioned.

2. The OSCE

The documents adopted by the OSCE are written along the same lines. The CSCE Copenhagen document refers in particular to the principle of equal suffrage¹⁷ and the right of persons belonging to national minorities to effective participation in public affairs.¹⁸ The Venice Commission’s report refers in this field to the “OSCE Lund Recommendations on the effective participation of national minorities in public life”¹⁹, which quote a number of arrangements of the electoral system that are able to facilitate minority representation (but these do not including dual voting).

C. Is Dual Voting Admissible?

1. The Question

It emerges from the previous paragraphs that, according to international treaties and standards, equal suffrage is a core principle in the field of elections and includes the principle of equal voting rights (i.e., one person—one vote). As recognized by the High Commissioner on National Minorities, “States enjoy less flexibility in altering the ‘one person, one vote’ principle, than in designing the methods that translate votes into seats”, and dual voting is an exception to this principle. On the other hand, the effective participation of persons belonging to national minorities in public life is in the public interest and may be fostered by dual voting. The issue is therefore whether the effective participation of persons belonging to national minorities in public life may justify such an exception to equal suffrage.

2. Elements of a Solution

(a) Such an exception would be inadmissible if the principle of ‘one person—one vote’ were of an absolute nature. This would however be a peculiarity in human rights law, if not to law in general.²⁰

Exceptions are therefore possible. They must pursue the public interest and respect the principle of proportionality.

15 CDL-AD(2002)023rev, I.2.1.

16 *Ibid.*, I.2.4.

17 Para. 7.2.

18 Para. 35.

19 Available at < http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf>.

20 CDL-AD(2008)013, para. 57.

(b) The aim to be reached—the *public interest*—is a proper representation of minorities. However, the long-term objective is inclusiveness, and this is underlined by the Venice Commission as well as by the OSCE High Commissioner on National Minorities: “[I]deally, in a well integrated society, persons belonging to minorities are members of or vote for parties which are not organized on ethnic lines, but are sensitive to the concerns of minorities”.²¹ The specific representation of minorities is in the public interest and may therefore be envisaged only if the system seems not to be inclusive enough.

(c) The principle of *proportionality* has to be respected under all its aspects; in particular, a measure is admissible only if the targeted aim cannot be reached through a less intrusive measure. Measures of a general character (not specific to minorities), such as greater proportionality of the electoral system, delimitation of constituencies or some forms of preference voting may be enough to guarantee sufficient representation of minorities, without infringing at all the equality principle. Moreover, if the aim to be pursued is inclusiveness, the best situation is when no measures are needed to ensure representation of minorities in elected bodies, since this representation results from the normal functioning of the system. In that case, no exception is made to equal voting rights and solutions that would imply such exceptions are not admissible.

When necessary, specific measures aimed at ensuring the representation of minorities may infringe upon equal suffrage, but not under its aspect of equal voting rights. Although the special design of electoral districts to ensure the representation of national minorities is no infringement of the principle of equality, other measures may appear more problematic; for example, if constituencies in which minorities are in the majority are over-represented (exception to the principle of equal voting power); if threshold exemption is ensured to minority lists; and if reserved seats are provided, be it through the—optional—vote of persons belonging to minorities for special lists or through favouring candidates belonging to the minority who would not have been elected according to the general rules on elections. Such exceptions are examples “of reverse discrimination. Therefore they have to be justified according to the principle of proportionality, which means that they do not violate the principle of equality if and as far as they are necessary to cover the gaps and difficulties which hamper the participation of minorities in public life.”²²

Dual voting, as an exception to the ‘one person—one vote’ principle, has to be generally considered a more serious infringement of the principle of equal suffrage than other measures intended to ensure a proper representation of minorities. Therefore, according to the principle of proportionality, dual voting is submitted to stricter scrutiny: it “is not justified if other measures to ensure the participation of minorities in public life exist which do not impinge, or impinge less, on other voters’ right to equal suffrage.”²³ The Venice Commission found that this is not always necessarily the case.²⁴

21 *Ibid.*, para. 6.

22 *Ibid.*, para. 48.

23 *Ibid.*, para. 61.

24 *Ibid.*, para. 56ff.

It stated that, “[i]nstead of taking an abstract stand on the admissibility of a dual voting system, the specific circumstances of each case have to be examined. It can only be justified in the framework of the Constitution and has to respect the principle of proportionality.”²⁵ Moreover,

[d]ual voting may only be justified on a temporary basis, in view of a better integration of minorities into the political system in the future. If after a certain time this aim can be pursued by other less restrictive measures which do not infringe upon equal voting rights, the system of dual voting is no longer justified. Only small-sized minorities need to be represented through dual voting. Larger minorities may actually be represented by adjusting the electoral system, for example through specific constituencies, a more proportional electoral system or exemption from the threshold for minority lists.²⁶

D. Conclusion

In conclusion, the Venice Commission considers

The long-term interests of minorities and of societies as a whole are in principle better served by representation under the “ordinary electoral system” which guarantees equal rights to citizens, irrespective of the group to which they are initially affiliated. However, this does not exclude specific measures of a transitional nature when needed in order to ensure the proper representation of minorities. These solutions include *inter alia* exceptions to the rules on threshold, reserved seats and over-representation of districts in which the minority is in a majority.²⁷

Dual voting is an exceptional measure, which has to be within the framework of the Constitution, and may be admitted if it respects the principle of proportionality under its various aspects. This implies that it can only be justified if:

- it is impossible to reach the aim pursued through other less restrictive measures which do not infringe upon equal voting rights;
- it has a transitional character;
- it concerns only a small minority.²⁸

The study on dual voting was a good opportunity to enhance the cooperation in the field of protection of minorities between the OSCE and the Council of Europe, and more particularly between the OSCE High Commissioner on National Minorities and the Venice Commission. The conclusions reached by the Venice Commission were welcomed by the High Commissioner, who attended the session of the commission at which the report was adopted. Like the Venice Commission’s previous work on

25 ECommHR, Appl. No. 20317/92, *Hewitt and Harman v. the United Kingdom*, decision of 1 September 1993.

26 CDL-AD(2008)013, para. 63–64.

27 *Ibid.*, para. 66.

28 *Ibid.*, para. 71.

the participation of minorities in public life,²⁹ the conclusions remind that specific rules—including dual voting—aimed at ensuring the presence of members of minorities in elected bodies, even if suitable in certain circumstances, are not the main means of reaching such a goal. The inclusion of members of minorities in mainstream parties receptive to the problems of minorities appears, in the long term, to be the best solution.

II. THE CONSTITUTIONAL ENTRENCHMENT OF THE RIGHTS OF PERSONS BELONGING TO NATIONAL MINORITIES IN THE NEW INDEPENDENT STATE OF MONTENEGRO.

In 2006 and 2007, the Venice Commission assisted the authorities of Montenegro in preparing a constitution that would be in line with the standards of the Council of Europe.

Montenegro declared its independence from the State Union of Serbia and Montenegro on 3 June 2006, after a referendum “on the Status of Montenegro” was held on 21 May 2006, in which, with a turnout exceeding 86%, the proportion of votes in favour of independence was 56.4%.

Newly independent Montenegro needed a new constitution and sought the assistance of the Venice Commission in preparing it. In the process of accession to the Council of Europe (which eventually happened on 11 May 2007), Montenegro committed itself to respecting certain principles in the new constitution to be adopted, notably the following one:

the efficient constitutional protection of human rights must be ensured. The Constitution should provide for the direct applicability of the human and minority rights, as was recognised in the Charter on Human and Minority rights of Serbia and Montenegro.³⁰ The constitutional reform therefore needs to provide for at least the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter, including the rights of minorities.

The first draft constitution, which was submitted to the Venice Commission for assessment on 16 April 2007,³¹ only contained two provisions directly relevant to minority protection: a general clause on non-discrimination (“Any, direct or indirect, form of

29 CDL-INF(2000)004, CDL-AD(2005)009 (*supra* notes 4 and 5).

30 The Charter on Human and Minority Rights and Civil Freedoms formed an integral part of the Constitutional Charter of the State Union of Serbia and Montenegro and between 2003 and 3 June 2006 complemented the 1992 Constitution of Montenegro insofar as the protection of human rights and fundamental freedoms was concerned. This charter had been assessed by the Venice Commission and recognized to be of excellent quality and to represent great progress in the constitutional protection of human and minority rights (see CDL(2003)010, Comments on the draft Charter on Human and Minority Rights and Fundamental Freedoms of Serbia and Montenegro, at <[http://www.venice.coe.int/docs/2003/CDL\(2003\)010-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)010-e.asp)>).

31 See CDL(2007)053, at <[http://www.venice.coe.int/docs/2007/CDL\(2007\)053-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)053-e.asp)>.

discrimination on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing and any other personal feature shall be prohibited”) and a provision on “minority rights” whereby

Montenegro guarantees to the members of minority nations and other minority, national and ethnic communities the right to express, preserve and openly manifest their national and religious identity. These rights shall be exercised in accordance with the generally accepted international conventions and rules for the protection of human and minority rights.³²

In its interim opinion on the draft constitution of Montenegro,³³ the Venice Commission did not criticize as such the choice not to regulate in detail the rights of persons belonging to minorities at the level of the constitution (although it pointed out that an explicit reference to the law regulating minority rights was needed in the relevant constitutional provision). Whether or not to regulate minority rights at the constitutional level is a choice the legislator may legitimately make.

The commission however thought this choice had to be examined against the background of the commitment undertaken by Montenegro not to lower the level of protection of minority rights in respect of what was provided for in the 2002 Human and Minority Rights Charter of Serbia and Montenegro.

The charter in fact listed the minority rights in a specific chapter. In addition, “special rights of National and Ethnic Groups” were provided in detail by the Constitution of the Republic of Montenegro of 1992. Minority rights under the previous system thus did have a constitutional entrenchment, both at the federal and at the state level.

The commission noted that other constitutional provisions provided for the need for the law to be in conformity with international agreements and for the supremacy of international treaties over national law in cases of conflict. It could therefore be argued that, in the absence of an explicit formulation of minority rights in the constitution, the international conventions would be directly applicable.

The commission underlined nevertheless that not all the minority rights contained in the FCNM are formulated as self-executing, and consequently, not all of them are capable of being enforced without a measure of implementation at the domestic level. Although the Montenegrin Law on National Minorities of 2006 partly did that, it seemed desirable that a stronger incorporation of the minority rights be contained in the constitution itself.

The commission took the view, therefore, that it was appropriate for the Montenegrin Constitution to set out minority rights in detail.

The commission further made a number of technical remarks on the draft provision as it stood, notably that it failed to guarantee the right of persons belonging to national minorities not only to express, preserve and openly manifest, but also to

32 Two parties, the Serbian list and the Croatian Civic Initiative, had submitted an alternative option, consisting of inserting into the section of the constitution on “protection of national and cultural heritage” a chapter of nine articles setting out minority rights.

33 CDL-AD(2007)017, at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)017-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)017-e.asp)>.

“develop” their national and religious and their “cultural, ethnic and linguistic” identity. Finally, the commission pointed out that it was necessary to provide that “minority rights in general” (not only “these rights”) were to be exercised in accordance with the generally accepted international treaties and rules for the protection of human and minority rights and that “the protection of the rights of persons belonging to national and ethnic minorities forms an integral part of human rights”.

In respect of the general non-discrimination clause, the commission expressed a preference for putting it into a separate, specific provision on non-discrimination containing also the principle of equality before the law and the principle of equal legal protection (which were contained in two other provisions). It also pointed out the need to add the explicit possibility of introducing positive measures in order to promote full and effective equality of persons or groups of persons in unequal position (corresponding, insofar as national minorities are concerned, to Article 4 § 2 FCNM). Once again, the commission referred to the 2002 Charter on Human and Minority Rights of Serbia and Montenegro as a good example.

The Venice Commission’s interim opinion, which was adopted on 1–2 June 2007, was promptly submitted to the authorities of Montenegro and was discussed with them by representatives of the commission on several occasions. On 19 October 2007, Montenegro adopted its new constitution³⁴ and submitted it again to the Venice Commission for a final assessment.

The commission was rather satisfied with the provisions on minority rights in the newly adopted constitution.³⁵

Two specific articles had indeed been added, which set out in detail the main minority rights as contained in the Framework Convention (Article 79 on protection of identity and Article 80 on the prohibition of assimilation³⁶).

The commission noted that the constitution now provided for the right of persons belonging to national minorities to *proportionate* representation in public services, state

34 CDL(2007)105, at <[http://www.venice.coe.int/docs/2007/CDL\(2007\)105-e.asp](http://www.venice.coe.int/docs/2007/CDL(2007)105-e.asp)>. Although Montenegro was given one year by the Parliamentary Assembly to adopt a new constitution (See PACE Opinion No. 261 (2007) on “Accession of the Republic of Montenegro to the Council of Europe”), it was eager to do so and to become a member of the Council of Europe as soon as possible.

35 CDL-AD(2007)047, adopted on 14–15 December 2007, at <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)047-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)047-e.asp)>.

36 Protection of identity, Article 79:

Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they can exercise individually or collectively with others, as follows:

- 1) the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities;
- 2) the right to choose, use and publicly post national symbols and to celebrate national holidays;
- 3) the right to use their own language and alphabet in private, public and official use;
- 4) the right to education in their own language and alphabet in public institutions and the right to have included in the curricula the history and culture of the persons belonging to minority nations and other minority national communities;

authorities and local self-government bodies, and considered that it would have been preferable to use the term 'fair' or 'adequate'.

In respect to the general clause on non-discrimination, the commission welcomed that it now explicitly provided for the possibility of taking special measures such as those foreseen in Article 4 of the FCNM.³⁷

As a consequence of the cooperation between the Montenegrin parliament and the Council of Europe, notably the Venice Commission, minority rights finally got an adequate constitutional entrenchment, which is a prerequisite for minority protection in Montenegro.

An issue remains to be addressed. The Constitution of Montenegro does not contain a definition of 'national minority'. This is actually not unusual, because it is the case for many other European constitutions. In Montenegro, however, there exists a definition in the Law on National Minorities of 2006, and this definition contains a citizenship requirement. This citizenship requirement had already been criticized by the Venice Commission in the Montenegrin context when the said law was in

-
- 5) the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in the language of minority nations and other minority national communities;
 - 6) the right to establish educational, cultural and religious associations, with the material support of the state;
 - 7) the right to write and use their own name and surname also in their own language and alphabet in the official documents;
 - 8) the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in the language of minority nations and other minority national communities;
 - 9) the right to authentic representation in the parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action;
 - 10) the right to proportionate representation in public services, state authorities and local self-government bodies;
 - 11) the right to information in their own language;
 - 12) the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs;
 - 13) the right to establish councils for the protection and improvement of special rights.
- Prohibition of assimilation, Article 80:
Forceful assimilation of the persons belonging to minority nations and other minority national communities shall be prohibited.
The state shall protect the persons belonging to minority nations and other minority national communities from all forms of forceful assimilation.

37 Prohibition of discrimination, Article 8:

Direct or indirect discrimination on any grounds shall be prohibited.

Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.

preparation, because it amounts to depriving non-nationals not only of certain political participatory rights (such as the right to vote and stand for office) that are legitimately only reserved for citizens (together with the right to return to one's country), but also of other rights that could and indeed should be granted to non-citizens also subject to other legal requirements such as a long-standing residence in the country. In the context of the dissolution of former Yugoslavia, and of the Kosovo conflict, the rights to education, language and cultural rights appear particularly relevant in this respect.³⁸

In the absence of a definition of 'national minority' in the constitution, the definition contained in the 2006 law is fully applicable. In the commission's view, this is a missed opportunity; the commission therefore renewed its recommendation that the definition in the 2006 law be amended.

In 2006, in the context of the Montenegrin law on national minorities, the Venice Commission had noted that the possibility of lodging a complaint for breaches of minority rights before the constitutional court was there "if no other judicial protection is provided". This wording was unclear and created the impression that the right to a constitutional complaint was restricted to cases in which no kind of judicial protection is provided.

This issue arose again in the context of the constitutional reform, because it turned out that this same wording which was contained in the 1992 constitution with reference to the jurisdiction of the constitutional court,³⁹ had prevented that court from dealing with nearly all the complaints received, because it does not unequivocally provide for the constitutional court to review decisions made by other courts, nor does it allow the court to consider whether a legal remedy that may be prescribed by legislation is in practice available and likely to be effective.⁴⁰

This problem was solved in the new constitution, because Article 149 stipulates that the constitutional court shall decide "a constitutional appeal due to the violation

38 CDL-AD(2004)026, at <[http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)026-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)026-e.asp)>, § 31–36; see Dubravka Bojic and Simona Granata-Menghini, "The protection of Minority Rights in the Works of the European Commission for Democracy through Law: July 2003– June 2004", 3 EYMI (2003/2004), 423–428.

39 "The Constitutional Court shall decide on constitutional complaints for violation, by individual enactments or deeds, of the freedoms the rights of man and citizen as prescribed by the Constitution [...] whenever some other legal remedy is not prescribed."

40 The Eminent Lawyers which were requested by the Parliamentary Assembly, in the context of the Montenegrin access to the Council of Europe, to carry out an assessment of the compatibility of the legal system of Montenegro with the standards of the Council of Europe recommended in fact that "Under the new Constitution, the possibility of lodging a constitutional complaint should be made dependent on the previous exhaustion of other legal remedies that are available and effective. Dealing with individual complaints, the constitutional court should have jurisdiction to annul unconstitutional legislation (together with judicial decisions based on it) as well as judicial decisions which constitute an unconstitutional application of constitutional legislation." See Eminent Lawyers report, § 85; the conclusions of this report may be found at <<http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11204.htm>>.

of human rights and liberties granted by the Constitution, *after all other efficient legal remedies have been exhausted*".⁴¹

III. PARTICIPATION OF MINORITIES IN PUBLIC LIFE

Drawing on its long experience in organizing high-level scientific conferences within the so-called programme of UniDem (Universities for Democracy) Seminars, the Venice Commission held a seminar on "the participation of minorities in public life" in Zagreb on 18 and 19 May 2007 in cooperation with the Croatian Ministry of Foreign Affairs and European Integration, the constitutional court of Croatia, Zagreb University and Glasgow University. The reports presented during the seminar have been published in the *Science and Technique of Democracy* collection.

The seminar, which was attended by academics, representatives of international organizations, the political world and civil society and public officials, was divided into three thematic sessions. The first session focused on the impact that different constitutional models, in particular unitary and federal or regionalist states, have with regard to the opportunities minorities have to make their voice heard in the domestic decision-making process. The aim of the second session was to take stock of the substantial development, in terms of both quantity and quality, of international standards that foster minority participation and to assess their impact on states' national policies. Finally, the third session focused on the historical origins and current relevance of an old model of minority participation, i.e., non-territorial cultural autonomy.

The numerous reports presented during the seminar provided very useful input for the discussion on the three above-mentioned themes. The debates revealed that, even in the context of constitutional models that were the most impervious to the concept of national minorities and their constitutional recognition, positive developments could take place in both legislation and policy, taking into account the growing diversity of society and the ensuing need to ensure real and effective quality for the most vulnerable groups as well as efficient protection against discrimination. The discussions also highlighted the need for federal or regionalist states to respond in a dynamic and progressive fashion to the many aspirations of minority groups, of whom insufficient account was taken in existing territorial arrangements.

Developments in relevant international standards provide valuable guidelines for national policies despite the difficulty in identifying concrete obligations for states. This difficulty results, to a large extent, from the diversity of situations and the impossibility of imposing a single model.

Finally, it became obvious during the seminar that cultural autonomy still offered a great deal of potential and that it could significantly improve minority participation. This, however, can only be achieved if the governments address the numerous challenges with regard to guaranteeing genuine representativeness of the elected bodies of cultural autonomy and to ensuring that there is no overlapping of powers and responsibilities of the national authorities.

41 Emphasis added. Aee CDL-AD(2007)047, § 117.