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European Commission for Democracy through Law: Review of Recent Reports and Opinions Relevant to the Protection of National Minorities

In the course of the period under consideration, the European Commission for Democracy through Law (hereinafter "the Venice Commission") provided expert assessment on legislation on indigenous peoples in Ukraine[1] and national minorities in Romania.[2] Furthermore, the Venice Commission addressed the issue of electoral rules and affirmative action for national minorities' participation in decision-making process in European countries.[3]

I. Examination of Draft Legislation on National Minorities and Indigenous Peoples

At the request of the governments concerned and following similar requests by other countries in the past, the Venice Commission has provided its legal expertise on draft legislation dealing with the status of national minorities and indigenous peoples. The

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1 CDL-AD(2004)036, Opinion on the Draft Law on the Status of Indigenous Peoples of Ukraine, adopted on 8-9 October 2004, at <http://venice.coe.int/docs/2004/CDL-AD(2004)036-e.asp> (hereinafter "Opinion on the Ukrainian Draft Law").

2 CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities Living in Romania, adopted on 21-22 October 2005, at <http://venice.coe.int/docs/2005/CDL-AD(2005)026-e.asp> (hereinafter "Opinion on the Romanian Draft Law").

3 CDL-AD(2005)009, Report on Electoral Rules and Affirmative Action for National Minorities Participation in Decision-making Process in European Countries, adopted on 11-12 March 2005, at <http://venice.coe.int/docs/2005/CDL-AD(2005)009-e.asp> (hereinafter "Report on Electoral Rules and Affirmative Action").

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purpose of this contribution will not be to repeat the detailed evaluation contained in the corresponding opinions quoted in footnotes 1 and 2. It is rather to highlight the main issues of concern the Venice Commission has identified and the principles it has been relying upon to formulate its recommendations so as to improve the draft laws at issue. Three main issues raised by the legislations concerned will therefore be addressed, namely their position in the hierarchy of norms, their personal scope of application and their schemes aimed at reinforcing participation.

A. Position of the Legislation Concerned in the Hierarchy of Norms

The Venice Commission has continued to pay particular attention to the position of the draft laws it has examined in the domestic legal order, a matter of crucial importance both for their future interpretation and the judicial protection offered to the communities concerned and their members. In Ukraine and in Romania, the form of the constitutional law was not chosen by the authorities. A common feature of the Romanian and Ukrainian draft laws is that they were both conceived as *framework laws*.[4] It follows that they need to be read in conjunction with other sectoral laws—notably in the field of education, languages and media—and complemented by implementing regulations to become fully operational. Failure to properly regulate their interrelation with other sectoral legislation, in particular by properly stressing their specific nature as *lex specialis*,[5] might therefore result in future legal uncertainties and diverging interpretations.[6] Against this background, the Venice Commission recommended *inter alia* to include—in the draft law itself or in an accompanying explanatory report—precise cross-references to the relevant provisions of other laws[7] instead of vague, general references each time the drafters did not want to repeat general norms meant to remain applicable in the context of minority groups.

B. Personal Scope of Application

The scope of application of national legislation governing the protection of national minorities has been addressed in the course of the period under reference, as had been the case in a series of earlier opinions.[8] In dealing with this issue, which is often largely

4 Opinion on the Romanian Draft Law, paras. 3-4 and 10-11; Opinion on the Ukrainian Draft Law, para. 14.

5 Opinion on the Romanian Draft Law, paras. 14 and 78; Opinion on the Ukrainian Draft Law, para. 14.

6 Opinion on the Romanian Draft Law, para. 14.

7 *Ibid.*, paras. 15 and 78.

8 CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania, adopted on 29 September 2003, at <http://venice.coe.int/docs/2003/CDL-AD(2003)013-e.asp> (hereinafter "Opinion on the Lithuanian Draft Law"); CDL-AD(2004)022, Opinion on the latest version of the Draft Law amending the Law on National Minorities in Ukraine, adopted on 18-19 June 2004, at <http://venice.coe.int/docs/2004/CDL-AD(2004)022-e.asp> (hereinafter "Opinion on the latest version of the Ukrainian Draft Law); CDL-AD(2003)009, Opinion on the Constitutional

coloured with political considerations, the Venice Commission has been essentially guided by legal arguments, not least of all the need to address minority rights as part and parcel of human rights, in a coherent perspective.

While the inclusion of a *general definition* of the groups protected in the relevant legislation is largely viewed as acceptable, it is not required by international standards. For those states that have chosen to follow this approach, the Venice Commission has stressed that such definitions must not result in arbitrary or unjustified distinctions.[9] In doing so, the states concerned should therefore draw on the objective and subjective elements that are commonly reflected in the relevant international instruments, despite the absence of a legally binding definition in international law. As regards the Ukrainian and the Romanian drafts,[10] the Venice Commission has expressed concern at the inclusion of certain criteria that were not properly matched by international standards and practice.[11]

In addition to a general definition, the Romanian and Ukrainian draft laws each set out a *list of communities* protected. Such lists may raise problems, especially if they are exhaustive and not merely indicative, as the consistency between the definition and the list may be dubious. In the case of Romania, the Venice Commission recommended deletion of the exhaustive list, leaving the interpretation and application of the general definition to the competent authorities and, ultimately, to the competent courts.[12] As regards the list contained in the Ukrainian draft, the Venice Commission pointed out the fact that many of the groups mentioned should probably not be regarded as original inhabitants of the Ukrainian territory as they have not lived there from time immemorial and, consequently, may not be considered indigenous peoples according to the existing international law standards.[13]

As concerns the *citizenship requirement* that was included in the Romanian draft, the Venice Commission has repeated that the most recent trend consists of not making, in a general way, the enjoyment of the internationally guaranteed minority rights dependent on citizenship, except for those rights whose enjoyment is traditionally restricted to citizens (certain of the political rights, access to certain public functions, right to return to one's country).[14] Consequently, the Venice Commission recommended not to make citizenship an element of the definition of the term 'national minority', but rather to

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Law on the Rights of National Minorities in Croatia, adopted on 14-15 March 2003, at <http://venice.coe.int/docs/2003/CDL-AD(2003)009-e.asp> (hereinafter "Opinion on the Croatian Constitutional Law"); CDL-AD(2004)026, Opinion on the revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro, adopted on 18-19 June 2004, at <http://venice.coe.int/docs/2004/CDL-AD(2004)026-e.asp> (hereinafter "Opinion on the Draft Law of Montenegro").

9 Opinion on the Romanian Draft Law, para. 18.

10 Opinion on the Ukrainian Draft Law; Opinion on the Romanian Draft Law, para. 20.

11 Opinion on the Ukrainian Draft Law, para. 20 for the "numerical inferiority" as regards indigenous people and Opinion on the Romanian Draft Law, paras. 20 and 23 concerning the way in which the "time factor" requirement is formulated.

12 *Ibid.*, paras. 21-23.

13 Opinion on the Ukrainian Draft Law, paras. 23 and 41.

14 Opinion on the Romanian Draft Law, para. 26.

indicate in the relevant provisions of the draft law that the enjoyment of certain rights is restricted to citizens:[15] this would avoid the undue restriction of certain cultural and linguistic rights to citizens only.[16]

In respect of the Ukrainian draft, which also contained a citizenship requirement, the Venice Commission was given the opportunity to stress that such a requirement was clearly at variance with the most widely shared approach concerning the international protection of indigenous peoples. It consequently advised the Ukrainian authorities to omit such a reference not only in the definition,[17] but also in most of the substantive rights concerned.[18]

The issue of whether it is appropriate to rely on a citizenship requirement or, instead, on a combination of other, more relevant criteria to circumscribe the exact scope of the various minority rights, measures and facilities contained in national instruments has been the object of further reflection by the Venice Commission. In 2005 and 2006, preparatory exchanges of views were organized on this topic in consultation with representatives of other international bodies dealing with minority protection in the Council of Europe, the OSCE and the United Nations. A general study on this matter is now in preparation and should be examined by the Venice Commission in one of its forthcoming plenary sessions.

C. Schemes Aimed at Reinforcing Participation

One of the main added values of general laws on national minorities, and perhaps also of general laws on indigenous peoples, often lies with the enhanced participation they create for the communities and their members. The requirement of effective participation is notably embodied in Article 15 of the Framework Convention for the Protection of National Minorities (FCNM), which crystallizes in a legally binding instrument a number of converging commitments expressed in soft law, notably under the CSCE/OSCE auspices. In recent years, a number of states have developed consultation structures and other forms of participation in the decision-making processes, as evidenced *inter alia* by the country-by-country monitoring work conducted by the supervisory mechanism of the FCNM. Experience suggests that one of the main problems encountered in this context is the lack of coordination—including overlapping of competences—between newly established structures and other institutions and authorities, a problem which may harm their smooth functioning and eventually mar efforts to improve participation.

A good example of this risk is offered by the Romanian draft, which introduces a promising, innovative system of cultural autonomies for national minorities likely to constitute a positive and useful step in terms of effective participation.[19] Although the Venice Commission emphasized that the proposed system of cultural autonomy would

15 *Ibid.*, paras. 27 and 82.

16 *Ibid.*, paras. 29-30.

17 Opinion on the Ukrainian Draft Law, paras. 19, 21 and 43.

18 *Ibid.*, paras. 25-26.

19 Opinion on the Romanian Draft Law, para. 59.

ensure real decision-making powers to the representatives of national minorities and not mere consultation rights, it drew the attention of the authorities to the numerous difficulties raised by the existing shortcomings in the envisaged relationship between institutions of cultural autonomy and other bodies. For example, it was noted that institutions of cultural autonomy would coexist with several actors partly exercising the same or at least similar competences, which made it essential to clarify in the draft law itself their respective roles in order to avoid unnecessary overlapping of competences. Furthermore, given the extensive competences—through the binding consent system—granted to the institutions of cultural autonomy in sectors where the state authorities hold the decision-making power, the Venice Commission suggested that the draft law be completed with a specific, more detailed section setting out the main principles of cooperation applicable in this regard, as well as a clearer budgetary framework.[20]

As concerns the situation of indigenous peoples, the needs for an effective participation in public affairs is probably even stronger than for national minorities, at least on issues linked to the use and management of natural resources on their traditional lands. Against this background, the Venice Commission welcomed the proposed creation of an Assembly of Indigenous Peoples in the Ukrainian draft as the existence of a body representing the interests of indigenous peoples is of particular importance for ensuring a channel of communication and coordination between the government and indigenous peoples, and between different indigenous peoples themselves. Notwithstanding this positive assessment, the Venice Commission warned against an overlapping of competences between this assembly and the existing Council of Representatives of Civic Associations of National Minorities since the former was supposed to advise also on issues related to national minorities according to the draft law.[21] Another concern identified was the absence of coordination between the Assembly of Indigenous Peoples and the corresponding structures to be established at the local level, which prompted the Venice Commission to call for a clarification of their relationship in the draft law itself.[22]

III. Electoral Law and National Minorities

Further to a request by the Parliamentary Assembly of the Council of Europe, the Venice Commission drafted a Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries, which was adopted by the Council for Democratic Elections[23] and the Venice Commission on 10-12 March 2005.[24]

20 *Ibid.*, paras. 66-72 and 79.

21 Opinion on the Ukrainian Draft Law, para. 32.

22 *Ibid.*, paras. 33 and 42.

23 The Council for Democratic Elections is a tripartite body including members of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, specialised in electoral matters; it includes observers from, *inter alia*, the OSCE/ODIHR.

24 Report on Electoral Rules and Affirmative Action, *supra* note 3.

A. The Previous Work of the Venice Commission

1. The Study on "Electoral Law and National Minorities"

The 2005 report is not the first contribution of the Venice Commission to the question of electoral law and national minorities. Already in 2000 it had adopted a detailed Study on Electoral Law and National Minorities, based on contributions from 37, mostly European, states.[25] This study did not focus on specific rules directed at the representation of national minorities in elected bodies. On the contrary, it underlined that rules specifically providing for the representation of minorities are rather rare (the most important ones exist in Croatia, Romania and Slovenia). Other systems, which facilitate the representation of minority organisations without providing for guaranteed seats, are not very common either, such as the exemption from threshold rules practised in Germany and Poland. There may also be a system establishing a balance between groups (in the case of Belgium, linguistic groups). The study found that representation of minorities is actually mostly ensured through the normal functioning of electoral systems. Therefore, the report had first to address the issue of electoral systems and their effects in general, before dealing with the specific effects on the representation of minorities. It concluded that:

> – The impact of an electoral system on the representation of minorities is felt most clearly when national minorities have their own parties.
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> [...]
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> – Although parties representing national minorities are very widely permitted, their existence is neither the rule nor indispensable to the presence of persons belonging to minorities in elected bodies.
> – The more an electoral system is proportional, the greater the chances dispersed minorities or those with few members have of being represented in the elected body. The number of seats per constituency is a decisive factor in the proportionality of the system.
> – When lists are not closed, a voter's choice may take account of whether or not the candidates belong to national minorities. Whether or not such freedom of choice is favourable or unfavourable to minorities depends on many factors, including the numerical size of the minorities.
> – Unequal representation may have an influence (positive or negative) on the representation of concentrated minorities, but the replies to the questionnaire do not indicate any concrete instances.
> – When a territory where a minority is in the majority is recognised as a constituency, this helps the minority to be represented in the elected bodies, especially if a majority system is applied.
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> To *sum up*, the participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the minori-

25 CDL-INF(2000)004, Study on Electoral Law and National Minorities, adopted on 25 January 2000, at <http://venice.coe.int/docs/2000/CDL-INF(2000)004-e.asp> (hereinafter "Study on Electoral Law and National Minorities").

ties, as from the implementation of general rules of electoral law, adjusted, if need be, to increase the chances of success of candidates from such minorities.[26]

2. *Food for Thought: Proportional Representation as the Less Controversial Aspect of 'Affirmative Action'*

It is a truism that proportional representation is aimed at a fair representation of minorities *lato sensu*, but it can hardly be said that a proportional system's essential purpose is to ensure the representation of national minorities. Therefore, it is very seldom considered as the way to ensure national minorities' representation. It is, however, the simplest way, in theory as well as practice, to ensure the representation of national minorities.

From a theoretical point of view, the following comment may actually be made: in electoral law, the distance between mere non-discrimination and equality of results is much shorter than in other fields of law. Non-discrimination implies equality of opportunity, even if the achievement of such equality of opportunity must then be defined in greater detail, for example concerning air time in the public media.[27] In education, for example, ensuring equality of opportunity may be regarded as affirmative action, or at least, goes much further than non-discrimination, e.g. through special support to pupils facing difficulties. Equality of results is not just an objective, but the core element of proportional systems—even if it may be pursued with more or less intensity depending on the particulars of the legislation (allocation method or the magnitude of constituencies, threshold). Furthermore, at least as soon as list systems are applied—as in most proportional representation methods—electoral law applies to legally defined groups, such as political parties and their constituencies, as well as to individuals. The much-discussed dichotomy between individual rights and collective rights is therefore meaningless here.[28]

Bearing that in mind, the study of affirmative action for national minorities in the electoral field is clearly not without interest. It is important, however, to keep in mind that this type of affirmative action is not the main way of ensuring minorities' participation in public life: that is, not a *petitio principii*, but a mere fact.

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26 Study on Electoral Law and National Minorities, 13-14.

27 On equality of opportunity in the electoral field, see for example the Code of Good Practice in Electoral Matters of the Venice Commission, adopted by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, and supported by the Committee of Ministers, CDL-AD(2002)023rev, I.2.3, at <http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp> (hereinafter "Code of Good Practice").

28 It could be objected that equality between political parties is still a form of individual equality, since they are (individual) legal subjects and not 'groups' of citizens. However, proportional representation systems, as other norms of electoral law, are focused on the rights of voters much more than on those of parties.

B. The Report on Electoral Rules and Affirmative Action for National Minorities' Participation in the Decision-Making Process

1. Scope of the Report

The report adopted in 2005 focuses on specific rules, intended to ensure national minorities' representation in the elected bodies. It starts by stating that "the idea of affirmative action is a very controversial one" and that "affirmative action is sometimes considered as transitional in nature".[29] Interpreting the term 'affirmative action' so restrictively would have limited the scope—and the interest—of the research too much. Affirmative action is thus understood as applying to those electoral rules that go beyond the principle of non-discrimination.[30]

The term 'minority' is also interpreted broadly, so that the scope of the study is not limited to minorities as recognized in national or international law, but refers more broadly to ethnic, linguistic or religious communities when they benefit from specific rules of electoral law.

According to this study, the most frequently used affirmative action electoral rules are found in the following areas:

- the electoral system in general (proportional or mixed system)
- the voting right (dual voting right and special voters lists)
- the numerical threshold
- the electoral districts (their size, form and magnitude)
- reserved seats
- representation (over-representation)
- use of the national minority's language in the electoral process.[31]

2. Case Study

The report mentions 13 European countries where affirmative action in favour of minorities as defined above can be identified. They may be classified as follows:

(a) The Major (e.g. Ethnic) Groups are Taken into Account in the Repartitioning of Seats.

In Bosnia and Herzegovina, seats are divided among ethnic groups at local, entities and national level. In Belgium, a number of provisions deal with the quasi-parity of both codominant (Dutch-speaking and French-speaking) language communities at the federal level, as well as in the region of the capital, Brussels. Other, more specific provisions deal for example with the representation of voters from a district with linguistic facilities. In Switzerland, language groups or regions must be adequately represented in the executive and judicial branches of government.

(b) Reserved Seats for Minorities.

Croatia and Slovenia provide for a special election to seats reserved to national minorities at national level. In Slovenia, such a rule applies also at local level, whereas in

29 Report on Electoral Rules and Affirmative Action, para. 5.

30 *Ibid.*, para. 15.

31 *Ibid.*, para. 16.

Croatia, at local and regional level, specific rules only apply if the application of the general rules of electoral law do not provide for a minimal number of representatives of minorities. In Switzerland, a minimal number of seats is guaranteed to the French-speaking minority in the canton of Berne, and one seat in the executive branch of government of this canton. In Bosnia and Herzegovina, proper national minorities (to be distinguished from the constituent people) are guaranteed at least one seat in municipal councils/assemblies. In Cyprus, a representative of each of the Maronite, Armenian and Latin religious groups is elected to the House of Representatives, albeit with a consultative status.

(c) Threshold Exemption.
In Germany and Poland, organizations of national minorities are exempted from the 5% threshold requirement.

(d) Other Types of Deviation from the General Rules on Allocation of Seats.
In Romania, organizations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in parliament, have the right to a deputy if they have obtained, throughout the country, at least 5% of the average number of validly expressed votes necessary for the election of a deputy. Special rules apply to candidatures by organizations of national minorities for local elections. In Italy, for European elections, lists of candidates proposed by three national minorities are allowed to join another list of candidates of the same constituency. Every voter has the right to express three individual preferences—including one for a candidate of the minority list. The seats obtained by the joined lists are allocated according to the candidates' number of preferences. However, when no candidate of the minority list is elected, the one with most preferences is proclaimed elected instead of a candidate of the other list if he or she obtains at least 50,000 preferences. In Hungary on the contrary, it is at local level that such exceptional rules apply, allowing minorities not represented in a municipal council to obtain a seat if one of their candidates receives more than half the votes obtained by the elected candidate with fewer votes.

(e) Deviation from the Normal Repartitioning of Seats between Constituencies.
Provisions of some subjects of the Russian Federation (Carelia, Daghestan) help minorities to be represented in the elected bodies through deviations from the rule of equal representation of the population in the legislative bodies.

(f) Design of Electoral Districts in order to Ensure the Representation of National Minorities.
This is the case in 'the Former Yugoslav Republic of Macedonia', including through the design of municipalities.

III. Conclusions

On the basis of this comparative study, the report remarks that specific rules that may be considered as providing an affirmative action mechanism are generally introduced

as isolated elements, while in a few countries, they are introduced in a more systematic way.

> In general, the electoral rules that favour affirmative action have limited range. The number of beneficiaries of such electoral rules is clearly and sharply determined either by the Constitution or the Law or by other accompanying legislative acts. For example, the number of parliamentary seats guaranteed to minorities is almost always lower than the number of minorities present in the country. Affirmative action may apply only at national, regional, local or even European level, and/or only in a part of the country. This means that the original inspiration for such electoral rules is not purely legally based, but probably political.[32]

The study furthermore emphasizes that affirmative action electoral rules are particularly efficient when applied in local elections.[33]

In conclusion, the study affirms the following principles, which may be found, either explicitly or implicitly, in the Code of Good Practice in Electoral Matters of the Venice Commission,[34] which is the reference document of the Council of Europe in the electoral field:

a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
d. Electoral thresholds should not affect the chances of national minorities to be represented.
e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.[35]

32 *Ibid.*, para. 66.

33 *Ibid.*, para. 69.

34 Code of Good Practice, see in particular point I.2.4.

35 Report on Electoral Rules and Affirmative Action, para. 68.