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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**VADEMECUM  
OF VENICE COMMISSION  
OPINIONS AND REPORTS  
CONCERNING THE PROTECTION OF MINORITIES<sup>1</sup>**

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<sup>1</sup> *This document will be updated regularly. This first version contains all opinions/reports adopted up to and including the Commission's 68<sup>th</sup> Plenary Session (13-14 October 2006).*

## **Introduction**

*This compendium contains quotations from selected opinions and reports adopted by the Venice Commission concerning the protection of minorities. It is based on a thematic structure which should ensure easy access to the specific issues which the Commission dealt with.*

*Since extracts may sometimes be very selective, readers are invited to refer to the whole text of the opinions/reports quoted in order to place the comments in their context. Extracts in italics reproduce comments in a summarised form.*

*This compilation will be updated regularly. This version contains all opinions/reports adopted up to and including the Commission's 68<sup>th</sup> Plenary Session (13-14 October 2006).*

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## **I. DEFINITION OF “MINORITY”**

“For the purposes of this Convention, the term “minority” shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language.”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 2; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“The definition of minorities is a delicate problem and one solution might be not to include a specific definition in the text but to rely on the usual meaning of the word. However, the drafters of the proposal preferred to define the framework within which the rights set forth should be applied. According to the definition adopted, only persons possessing the nationality of the State on whose territory they reside are protected. It was noted that the question of migrant workers had already been dealt with in a Council of Europe Convention [the European Convention on the Legal Status of Migrant Workers of 24/11/1977] and that further works could be carried out in this matter”.

**(CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 2, §§18-19; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994.)**

*The Commission expresses doubts as to the criterion of having lived in the country for a certain period of time in order for a national or ethnic group to be considered as a minority.*

**(CDL-MIN(1993)004rev, Opinion on the Hungarian Bill N° 5190 on the Rights of National and Ethnic Minorities, Point 4.)**

“There is no generally accepted definition of the concept of a “minority”. Some elements thereof have certainly been identified as, for example, the standard if not universal classification of minorities into three groups: ethnic minorities, linguistic minorities, and religious minorities; any of these three criteria may be present or, more often, they may be in part cumulative. This (in part) threefold characterisation is adopted in Article 27 of the International Covenant on Civil and Political Rights and mentioned in Section 5.1 of the General Comment (...) of 6 April 1994. (...) However, no generally accepted definition of minorities has been formulated in any international legal instruments or doctrine to date. While some authors have attempted to bear upon the question, others have preferred not to, considering either that such a definition is impossible or that it in any case serves no purpose. Thus, the CSCE High Commissioner for National Minorities acts in a pragmatic manner, and without formulating any definition, wherever he deems that a question affecting minorities exists.”

**(Report on the replies to the questionnaire on the rights of minorities, in: “The protection of minorities”, Collection Science and Technique of democracy, no. 9, p. 45, 1994.)**

“Article 1 [of Recommendation 1201/1993] gives a definition of the term “national minority”. This denotes a group of persons in a State who: resides in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity.

It follows from this definition that the persons to whom the rights included in Recommendation 1201 are guaranteed are nationals (citizens), of the State, not foreign migrants. This is further underlined by the fact that only persons belonging to “historical” minorities (having «long standing, firm and lasting ties» with the State) can enjoy them.

The expression « long standing, firm and lasting ties with that State» should be so interpreted as to include ties with the territory of a State as a component of the latter. In this way persons

belonging to a minority will not lose minority status as a result of the transfer of the territory to another State or to a new State, and Recommendation 1201 will retain its relevance in the event of such territorial transfer or of State succession – assuming, of course, that the persons concerned continue to be in a minority.”

**(CDL-INF (1996) 4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, § 3 a.)**

“Such a restriction [of the notion of minority to citizens only] departs from recent tendencies of minority protection in international law (interpretation by the Human Rights Committee (General Comment no. 23 of 6 April 1994) of Article 27 of the International Covenant on Civil and Political Rights and practice of the OSCE High Commissioner for National Minorities). Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights.”

**(CDL-INF(2001)14, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, §4;**

**see also CDL-INF (2001) 12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, prepared by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, 18 April 2001, §4.)**

*The Venice Commission can accept the citizenship requirement in certain pieces of legislation on minorities, provided that it does not purport to be a general definition of “national minority” and thus does not prevent the legislator from granting persons belonging to national minorities who are not, or not yet, citizens the rights they are entitled to under international law and in accordance with the relevant Constitution. The Commission, however, recommends the inclusion of a specific provision to this end.*

**(CDL(2001)74, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, § 4; CDL (2001) 71 rev., Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, §4.)**

“6. A teleological interpretation of the Framework Convention suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection. Numerical inferiority may thus not be a sufficient element, even though a necessary one, for a group of persons to qualify as a “minority” within the meaning of the Framework Convention.

7. In the Commission’s view, it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position.

8. A *co-dominant position* is typically found in States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations, mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups, to the extent that they are in a co-dominant position.

9. The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions.”

**(CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§6-9.)**

“ [T]he given definitions [of “national minority “] do not expressly mention the requirement of citizenship. In other words, they do not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens of the Republic of Lithuania. Such an approach is in line with the general position of the Advisory Committee on the Framework Convention, which encourages its extensive interpretation by the contracting parties, with a view to ensuring its application also to non-citizens. “

**(CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §5.)**

“The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 § 1 of the Venice Commission’s Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe’s Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages).

However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition.

In the Commission’s opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens.“

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§17-19.)**

19. “The Commission is of the opinion that most of the objective elements included in the definition of Article 3, paragraph 1, namely the numerical inferiority and the elements of a specific identity expressed by culture, language or religion, do not raise any problem, given that in particular the last three are alternative and not cumulative. The subjective element of the definition, namely the wish of a national minority to preserve, express and promote its identity, does not raise any problem either.

20. This is not so, however, in respect of another objective element featured in this provision, namely the requirement that the community must have lived on the territory of Romania from the moment the modern Romanian state was established in order to qualify as a national minority. It seems that this concept intends to refer to the moment in history at which Romania was confirmed in its current frontiers. This seems to indicate that the relevant time is 1919, although the creation of modern

Romania may be seen as a process rather than a definite event.”

**(CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania, §§19, 20.)**

“16. Both the first and the second drafts contain, in their article 1, a definition of the term “national minorities” in which reference is made to the notion of *citizenship*.

17. The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 § 1 of the Venice Commission’s Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe’s Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages).

18. However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition.

19. In the Commission's opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens."

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§16-19.)**

"10. As far as the notion of "national minorities" is concerned, the Draft maintains the citizenship requirement. The Venice Commission refers in this respect to its recent opinion on the previous draft laws amending the Law on National Minorities in Ukraine, where it is stated that, in the opinion of the Venice Commission, "Ukraine should omit the reference to citizenship in the general definition of national minorities in the draft legislation under consideration, and add it in the specific clauses relating to the rights specifically reserved to citizens, such as political rights or access to civil service" (see CDL-AD(2004)013, Opinion on two draft laws amending the law on national minorities in Ukraine, § 16-22)."

**(CDL-AD(2004)022, Opinion on the latest version of the Draft Law amending the Law on National Minorities in Ukraine §10.)**

"22. The expression "national minority" became part of international law terminology during the era of the League of Nations. One may note that though it is today generally used as a reference term to designate minorities within a state, there is no a specific requirement dictated by the international law for it to be used by a State in guaranteeing rights concerning persons belonging to minorities at a domestic level. This also appears to be the position of the Advisory Committee of the Framework Convention. Ultimately, the term chosen by a given state should reflect on the one hand the wishes of persons concerned, and on the other hand the specific understanding of such terminology in the particular circumstances of the state in question."

....

"33. The Commission has recently had the occasion to express itself on the issue of the citizenship requirement with regard to the draft law on minorities of Ukraine. While recalling that traditional international law approach is to include citizenship among the objective criteria of the definition of "minorities", the Commission also noted that "*a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition*".

34. In the same sense, the Parliamentary Assembly's Committee of Legal Affairs and Human Rights stated in its Report on Rights of National Minorities that "*It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, the more so that, as Article 27 of ICCPR is binding for all state parties to the Framework Convention*". It could also be questioned whether is it appropriate to deny the protection of traditional minority rights such as education, language and cultural rights to individuals whose status is still unresolved."

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §22, 33, 34;**

**CDL-AD(2004)036, Opinion on the Draft Law on the Status of Indigenous Peoples of Ukraine.)**

## II. **LISTS OF PROTECTED MINORITIES**

*The effects of the inclusion - in a Constitution or in a piece of legislation on minorities protection – of a list of minorities which are explicitly afforded protection should be carefully considered, as some minorities not expressly referred to in the list could be considered as excluded from several entitlements. Such list – if any – should have a clearly indicative character and should not have any legal effects on the rights granted to minorities.*

**(CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §3; CDL-INF(2001)14, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, §3;**

**CDL-INF(2001)12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, prepared by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, 18 April 2001, §4.)**

“[C]ommunities which are to be considered national minorities “in the spirit of this law”. The main problem raised by this list lies in its apparently exhaustive character. (...) Should such a list be retained, it should be explicitly construed as non-exhaustive or indicative, not least of all because over time other communities may meet the elements of the definition.”

**(CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania, §21.)**

Article 5 of the Draft Law attempts at defining “national minorities”. While such definition is very broad - in particular because the enumeration of distinctive elements is not exhaustive (“other features”) – it lacks the essential reference to the wish of the persons belonging to the group of people in question to preserve their identity: this reference should therefore be added.

Article 5 further contains an exhaustive list of minorities explicitly recognised and protected in Bosnia. As it stands, this list would cause the exclusion of non-listed minorities from the various entitlements under the law and thus violate the concept of equal protection of national minorities. Accordingly, its abolition is strongly recommended. If it were to be kept, it should be made open-ended (by adding “and others” or “such as”).

Finally, it seems more appropriate to group Articles 1 and 5 together, as they both relate to the definition of national minorities for the purpose of the application of the Draft Law.

**(CDL-INF(2001)12, Opinion on the draft Law on rights of national minorities of Bosnia and Herzegovina.)**

23. In addition to a general definition, Article 1 para. 5 lists the indigenous peoples of Ukraine: Byelorussian, Bulgarian, Armenian, Gaugauze, Greek, Jewish, Karaite, Crimean Tatar, Krymchak, Moldavian, Polish, Russian, Romanian, Slovak, Hungarian and Czech people. Here again, the draft law does not seem to follow the international standards in the field. The time element is one of the essential criteria when it comes to the definition of the term “indigenous peoples”: the latter are the original inhabitants of the land on which they have lived from time immemorial or at least from before the arrival of later settlers. A considerable number of the persons belonging to national groups listed in the draft law must have immigrated into the Ukrainian territory at a more recent moment in the past, and as such may not be considered “indigenous peoples” according to the existing international law standards.

**(CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples in Ukraine.)**

## III. **RECOGNITION OF MINORITIES**

“Any group coming within the terms of th[e] definition [in paragraph 1: see “Definition of “minority” section] shall be treated as an ethnic, religious or linguistic minority.”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 2; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“The proposal for a convention does not make enjoyment by minorities or their members of the rights set forth in the text conditional upon the obligation of previous acknowledgment.”

**(CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 2, §20; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994.)**

*The recognition of specific minority groups can be better accomplished at the moment when minorities seek to claim the exercise of a specific right than by setting out a list of recognised minorities.*

**(CDL-INF(2001)15, Note on the Amendments to the Constitution of Croatia adopted on 9 November 2000 and 28 March 2001, §2.)**

“6. A teleological interpretation of the Framework Convention suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection. Numerical inferiority may thus not be a sufficient element, even though a necessary one, for a group of persons to qualify as a “minority” within the meaning of the Framework Convention.

7. In the Commission’s view, it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position.

8. A *co-dominant position* is typically found in States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations, mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups, to the extent that they are in a co-dominant position.

9. The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions.

[...]

14. In decentralized environments there may be situations where a group that is not a minority as described in paragraph 6 above at the State level may become such a minority at a sub-State level and, by operation of the decentralized democratic mechanisms, become subject to the dominant position of another group (that could be a minority at the State level). It must be stressed in particular that the mechanisms correcting the functioning of the majority rule in favour of a co-dominant group (see para. 8 above) do not necessarily exist also at sub-State levels.”

**(CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§6-9 & 14.)**

“27. The Commission recalls that the draft proposal of the Venice Commission on a European Convention for the protection of national minorities used, in its article 2, the words “smaller in number than the rest of the population of the State”.

28. The choice of the more appropriate formula will depend on the demographic situation in Ukraine; furthermore, it has to be clarified to which territorial subdivision of the State this

criterion should apply. This question is connected with the requirement that the minority group must not be “dominant” (see “CDL-AD(2002)1, Opinion on Possible Groups to persons to which the Framework Convention for the Protection of National Minorities would be applicable in Belgium).”

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§27,28.)**

42. One of the essential features of the protection of national minorities in Romania is their guaranteed representation in Parliament [9]. This minority representation is ensured in practice through the participation of the so-called “organisations of citizens belonging to national minorities” in the election process. While persons belonging to national minorities are free to organise themselves in “associations” for the purposes of Governmental Ordinance No 26/2000, they have to meet a number of additional conditions if they want to take part in elections. These conditions are set out in Article 7 of Law No. 67/2004 on Local Elections, on which the Venice Commission adopted a critical opinion.

43. Chapter III (Articles 38 to 50) of the draft law on the statute of national minorities living in Romania is entirely devoted to the organisations of citizens belonging to national minorities. Article 49 recalls that they may take part in the local, parliamentary and presidential elections and Article 50 indicates that, in doing so, they are assimilated to political parties.

44. The organisations of citizens belonging to national minorities have so far not received public recognition in the Romanian legislation. Several representatives of national minorities contend that Governmental Ordinance No 26/2000 on associations and foundations, which is rather liberal as it sets out very few legal conditions for creating an association, has failed to acknowledge their specific function and nature, which is to help a national minority to preserve and express its cultural, linguistic and ethnic identity while ensuring, at least to an extent, its representation.

45. Notwithstanding the restrictive nature of the conditions placed on the registration of the organisations of citizens belonging to national minorities (see paragraphs 46-51, below), the Commission takes the view that the inclusion, in the draft law, of a chapter dealing with these organisations constitutes a marked improvement in that it entails public recognition of their role. This role is indeed not properly reflected in the current regulations contained in Law No. 67/2004 on Local Elections.

**(CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.)**

#### **IV. MEMBERSHIP OF A MINORITY**

“To belong to a national minority shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice.”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 2 § 3; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“It would not seem correct to deny the freedom of a private minority association to apply its own rules and requirements for admission to its membership”

**(CDL-MIN(1993)004rev, Opinion on the Hungarian Bill N° 5190 on the Rights of National and Ethnic Minorities, Point 4.)**

“It should be made clear in the Law that it is for the individual to decide how this affiliation shall be expressed and that “objective” criteria for individual minority affiliation should be excluded, whereas the core elements of minority definition should be met.

[...]

Finally, it should be made clear that this provision equally guarantees the right to change affiliation to a minority.”

**(CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §4.)**

“[W]ith reference to the need [...] to obtain proof of the national background of foreigners seeking access to the benefits provided to kin-minorities, the Commission considers that it is preferable (even if it is not required under international law) that the relevant legislation set out the exact criteria that must be employed in the assessment of the national background. [...] [The Framework Convention] while enshrining the principle of the individual’s free choice as to the affiliation to a minority, does not prevent States from requiring the fulfilment of certain criteria when it comes to granting privileges to the persons belonging to that minority. In other words, the personal choice of the individual is a necessary element, but not a sufficient one for entitlement to specific privileges.”

**(CDL-INF(2001)19, Report on the preferential treatment of national minorities by their kin-State, §Da)ii.)**

“40 A group of persons that is numerically inferior to the rest of the population, shares common ethnic, cultural, linguistic or religious features and wishes to preserve them is not to be considered as a minority in the sense of the Framework Convention if and to the extent that it finds itself in a dominant or co-dominant position.

41. In situations of decentralization of powers, the existence of a “minority” within the meaning of the Framework Convention and in particular the question of whether a group is dominant or co-dominant must be assessed both at the State and at the sub-State levels. ”

**(CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§40,41.)**

55. Article 40, paragraph 4 which determines that no more than 25% of the members of an organisation of citizens belonging to a national minority may be persons who do not belong to the minority concerned, is questionable and can prove extremely difficult to monitor in practice. Article 40, paragraph 5, which prohibits membership of two organisations belonging to the same minority, also raises questions. Both provisions amount to a strong interference with the freedom of association as guaranteed in Article 11 of the European Convention on Human Rights, and their justification is not obvious.

56. The draft law seems to imply that the organisations may consist of citizens only, since the term is explicitly contained in the expression "organizations of citizens belonging to national minorities". It is, however, difficult to understand why these organisations, which will be established to promote and protect the identity of the national minority concerned, should be prevented from extending their activities to non-citizens resident in Romania who belong to the same minority, and why those non-citizens should ex lege be barred from becoming members of these organisations. This point needs further clarification, particularly in view of the fact that the competences assigned to these organisations by far exceed electoral privileges.

57. The Commission acknowledges that it may be legitimate for the state to restrict to citizens only the right for these organisations to take part in parliamentary and presidential elections. The draft law, however, also seem to imply that only citizens belonging to these organisations may participate in local elections. This is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to foreign residents. The Commission can therefore only echo its earlier recommendation to introduce the possibility for stable resident non-citizens to take part in local elections in Romania. This could constitute a significant progress in terms of participation of those non-citizens belonging to national minorities.

**(CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.)**

## V. COLLECTIVE RIGHTS – RIGHTS EXERCISED IN COMMUNITY WITH OTHERS

“The international protection of the rights of ethnic, linguistic and religious minorities, as well as the rights of individuals belonging to those minorities ... is a fundamental component of the international protection of human rights”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 1; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“With a view to promoting and reinforcing their common features, persons belonging to a minority shall have the right to associate and to maintain contacts, in particular with other members of their group, including across national borders. This right shall include notably the right to leave freely one's country and to go back to it”.

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 5; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“[M]inorities are not only the sum of a number of individuals but represent also a system of relations among them. Without the concept of collective rights the protection of minorities would be somewhat limited.”

**(CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 1, § 15; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994.)**

“It is important however not to exaggerate the difference between these two systems of protection [of the rights of individuals belonging to the minority and of the rights of the minority as such]. In the text of the proposal most of the rights recognised concern individuals. Only one article recognises rights for groups: Article 3 (right of minorities to be protected against any activity capable of threatening their existence; right to respect, safeguard and development of their identity); moreover, two provisions place on States obligations in respect of minorities: Article 13 (obligation to refrain from forced assimilation) and Article 14 (obligation to favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them).”

**(CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 1, § 16; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994.)**

*The Commission has no doubt about the fact that linguistic rights must benefit from a collective guarantee at European level.*

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all contracting States, §1.)**

“The Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard “the value of interculturalism and multilingualism” as an “important contribution to the building of a Europe based on the principles of democracy and cultural diversity”, but always «within the framework of national sovereignty and territorial integrity» (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2)**

*The right to autonomy in Article 11 of the draft additional protocol to the ECHR appended to Recommendation 1201/93 of the Parliamentary Assembly is an individual right, albeit exercised in association with others (i.e. collectively) .*

**(CDL-INF(1996)004, Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, § 3a.)**

“[T]he Commission considers that each minority should have the right to freely choose its own self-nomination, without any interference from the authorities of the home-State. The solution adopted by the Charter and the Federal Law, providing that “*under the terms of this Law, all groups of citizens who consider or define themselves as peoples, national or ethnic communities, national or ethnic groups, nations or nationalities, and who fulfil the conditions from [paragraph 1 of this Article], will be treated as national minorities*” seems to be the most appropriate one to be followed also by the present draft law. As to the revised article 2, as well as the rest of the draft law, they should refer only to the term “national minorities”. In this respect, the Commission assumes that it is not the intention of Montenegro to introduce a hierarchy of categories within the “minorities” in Montenegro, and that whatever terminology will be used in the final draft, the legal status and the scope of the protection guaranteed to the persons concerned shall be the same.”

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §30.)**

60. Chapter V of the draft law implements what could be described as the collective dimension of the protection granted to national minorities. Indeed, the main feature of a system of cultural autonomy is that it goes beyond the mere recognition of rights to persons belonging to national minorities. This is reflected in Article 57, paragraph 1 of the draft, which defines cultural autonomy as the right of a national community to have decisional powers in matters regarding its cultural, linguistic and religious identity, through councils appointed by its members.

61. The first part of the draft, and in particular Chapter I and Chapter II, seems to favour the protection of national minorities through individual rights, although Article 20 of the draft mentions at the same time cultural guarantees for persons belonging to national minorities and the right of national minorities to public cultural institutions. This is evidenced by the frequent use of the expression “persons belonging to national minorities” when rights are stipulated. In order to strengthen its internal coherence, the draft law could make clearer - especially in its first two chapters - that it aims at combining individual protection with protection granted to the group. This second dimension is particularly prominent in Chapter V of the draft law through the binding consent that needs to be obtained from the Councils of National Minorities. The combination of both individual and group protection and their proper articulation in the draft law also need to be taken care of as concerns the judicial protection (see item F, paragraph 39, above).

62. It is true that the international principles in the matter show a clear preference for the protection of the minorities through individual rights, but they do not prohibit the adoption of means of collective protection, for example through group rights as this may also be a means to ensure minority participation in public affairs. As a matter of fact only cultural institutions can, in cooperation with the public authorities, implement the policy of promotion and preservation of the historical and present culture of national minorities. Moreover, the exercise of rights in community with others, including rights for persons belonging to national minorities, is often an emanation of the freedom of association.

**(CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.)**

## **VI. AFFIRMATIVE ACTION – POSITIVE DISCRIMINATION**

“The adoption of special measures in favour of minorities or of individuals belonging to minorities and aimed at promoting equality between them and the rest of the population or at taking due account of their specific conditions shall not be considered as an act of discrimination”.

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 4 §2; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“[T]he very nature of minorities implies that special measures should be taken in favour of persons belonging to them. Therefore, non-discrimination within the meaning of the proposal does not denote formal equality between individuals belonging to the minority and the rest of the population, but rather substantive equality.”

**(CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 4, § 24; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994.)**

“Furthermore, Article 7, paragraph 2 [*of the European Charter for Regional or Minority Languages*], the scope of which extends to the entire national territory, contains a non-discrimination clause which amounts to recognition of the admissibility of positive discrimination:

«Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it».

However, «the adoption of special measures in favour of regional or minority languages [...] is not considered to be an act of discrimination against the users of more widely used languages». This positive discrimination follows logically from the very objective of the Charter, which is to stop the decline of regional and minority languages and, where possible, promote their use in order to contribute to «the maintenance and development of Europe's cultural wealth and traditions» (cf. Preamble to the Charter)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states, §4.2.)**

“Participation of minorities in public life is primarily founded on formal recognition of the principle of equality. [...] However, merely securing the principle of equality does not ensure real participation of minorities in public life; special action on their behalf may prove necessary.”

**(CDL-MIN(1998)001rev, Summary Report on Participation of members of minorities in public life, Introduction.)**

“[T]he obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.1.)**

“[Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities. Where such measures do no more than treat the minority group on a par with the majority group, they lack «positive» force and pertain to prohibition of mediate discrimination as described in the foregoing paragraph. On the other hand, when they go further, for example by giving certain minority bodies or productions specific financial support, they are genuine positive measures.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.1.)**

“Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied – inter alia – to minorities. The situation is

different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles.” – rather pos. discrimination, under 4  
**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.)**

“When special treatment is unrelated to an intrinsic feature of the group concerned, the situation is different; it is a case of affirmative action (in the strict sense), sometimes called «positive discrimination» (improperly, since the term “discrimination” should denote unacceptable distinctions only).

[...]

Difference in treatment, far from infringing equality on the pretext of promoting it, is thus seen as founded on a morally justified criterion: the wish to make reparation to the victims of discrimination. This, however, raises a problem: these measures may benefit members of national minorities who have not suffered any unfavourable treatment without benefiting other persons who have been discriminated against.

[...]

[T]he problem of minorities is a question of mutual trust between majority and minorities. Measures on behalf of minorities can thus spell out the message of the majority to the minorities that it does not intend to oppress them by virtue of its numerical strength.”  
**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.3.)**

*Effective equality may require positive discrimination*

**(CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §6.)**

“The Commission notes with approval that Article 3.5 of the Draft Law clearly states that the implementation of the minority rights guaranteed by the Constitution, the Framework Convention, other international treaties, the Law on National Minorities and other laws, shall not be considered discriminatory. This means that, even if these rights constitute a “positive discrimination”, their exercise is allowed notwithstanding the international and domestic legal prohibition of discrimination. In this respect, it should be stressed that “positive discrimination” is legitimate only if, and to the extent that the positive action concerned is necessary in order to bring about substantive equality. The principle of proportionality should therefore be embodied here as a guiding principle for the legislature and the administration in determining necessary positive measures.”

**(CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §9.)**

“In this regard our report is focussed on the achievements of one of the latest developments of affirmative action in the sphere of electoral rules as a mechanism for participation of national minorities in the decision making processes. The participation in the decision making process of members of national minorities relates not only to the exercise of general human rights, but also to the exercise of special minority rights. That means that members of national minorities, when they appear in the politics as nationals of the state, are at the same time as nationals with special minority needs.

Affirmative action in connection with the national minorities can be defined as conferring special benefits upon individuals by virtue of their membership in a certain minority group. Viewed from the individual or from the group standpoint this principle seems of essential importance for the establishment of *de facto* not only *de jure* equality.

Yet, the principle of affirmative action is very often subjected to criticism. Usually the arguments are that measures, which are taken as an affirmative action, are leading to the discrimination of the majority. This is the reason why the action taken must be proportional to the real needs of the minority group in question and directed to providing means for achieving equal opportunities. Affirmative action must be seen as a mechanism which does not establish privileges for the minorities but effective rights that members of the majority already enjoy.“

[...]

“[F]ollowing the accepted definition on affirmative action, we could talk about affirmative action electoral rules if they go beyond the principle of non-discrimination. For an electoral rule (constitutional provision or law) to be categorised as an affirmative action electoral rule it needs to fulfil the following conditions:

- To provide national minorities (individually or collectively) with effective rights already benefiting the members of the majority;
- The preferences established by the electoral rules should only be limited to creating equal opportunity for the participation of the members of national minorities in the decision making.

In theory, such affirmative action electoral rules can be formulated for the various dimensions of the electoral system and the electoral law. In practice, various measures in the form of electoral rules are also implemented in the different European countries. 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 minorities language in the electoral process. “

[...]

“The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. In that direction the Venice Commissions' Code of good practice in electoral matters provides some of the basic principles for developing electoral affirmative action rules in accordance with the Europe's electoral heritage. Among them we will emphasise here the following principles:

- 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.

Affirmative action electoral rules, as the experience of the OSCE High Commissioner on National Minorities shows, are particularly productive when applied in local elections. Furthermore, in territories where national minorities represent a substantial part of the population, the delimitation of territorial entities (constituencies, municipalities), in such a way as to prevent dispersal of the members of a national minority, may favour the representation of minorities in the elected bodies, as underlined by Recommendation 43, on Territorial Autonomy and National Minorities, of the Congress of Local and Regional Authorities of the Council of Europe.

The above mentioned principles can provide a basis for developing common European frameworks, if not yet standards for affirmative action rules, for national minorities' participation in the decision-making.”

**(CDL-AD(2005)009, Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, §§9, 10, 11, 15, 16.)**

56. Article 15 of the Council of Europe's Framework Convention for Protection of National Minorities states that “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.”

57. The affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commission Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with European electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of national minorities, electoral thresholds should not affect the chances of national minorities to be represented, 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.

**(CDL-AD(2005)011, Report on the abolition of restrictions on the right to vote in general elections.)**

## **VII. DIRECT AND INDIRECT DISCRIMINATION**

- “[O]stensibly non-discriminatory measures nevertheless having a proportionally greater impact on members of a group (a national minority is a case in point) or being proportionally more favourable to members of another group [...] are only acceptable if they serve an overriding public interest. Otherwise, they constitute indirect discrimination.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2.)**

- “[T]o ascertain whether or not the stipulation of knowledge of the [country's] official language [in order to hold an appointment in the public administration] constitutes a form of indirect discrimination against minorities, what must be considered is first whether or not the minority language shares official language status, second the required level of command of the language, and furthermore how gradually the requirement is imposed, and the possible application of programmed measures to prevent the exclusion of members of minorities from public appointments.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2 A.)**

States are bound to respect the international agreements on human rights to which they are parties. Accordingly, in exercising their powers, they must at all times respect human rights and fundamental freedoms. Amongst these, the prohibition of discrimination, provided for, inter alia, by the UN Charter, by the Universal Declaration of Human Rights, by the International Covenant on Civil and Political rights and by the Framework Convention.

In particular, States that are parties to the European Convention on Human Rights (hereinafter “the Convention” or ECHR) must secure the non-discriminatory enjoyment of the rights enshrined therein to everyone who is within their jurisdiction. A State is held accountable under Article 1 of the Convention also for its acts with extraterritorial effects: all the individuals affected thereby, be they foreigners or nationals, may fall within the jurisdiction of that State.

The legislation and regulations that are the object of the present study aim at conferring a preferential treatment to certain individuals, i.e. foreign citizens with a specific national background. They thus create a difference in treatment (between these individuals and the citizens of the kin-State; between them and the other citizens of the home-State; between them and foreigners belonging to other minorities), which could constitute discrimination – based on essentially ethnic reasons - and be in breach of the principle of non-discrimination outlined above.

The discrimination must be invoked in relation to a right guaranteed by the Convention. Not all the benefits granted by the legislation under consideration refer, at least *prima facie*, to guaranteed rights. Some ECHR provisions could be pertinent: *in primis* Article 2 of the First Protocol; possibly, Article 8 of the Convention and Article 1 of the First Protocol.

The Strasbourg established case-law shows that different treatment of persons in similar situations is not always forbidden: this is not the case when the difference in treatment can be objectively and reasonably justified having regard to the applicable margin of appreciation. The existence of a justification must be assessed in relation to the aims pursued (which must be legitimate) and the effects that the measure in question causes, regard being had to the general principles prevailing in democratic societies (there must be a reasonable relation of proportionality between the legitimate aim pursued and the means employed to obtain it).

Article 14 prohibits discrimination between individuals based on their personal status; it contains an open-ended list of examples of banned grounds for discrimination, which includes language, religion, and national origin. As regards the basis for the difference in treatment under the laws and regulations in question, in the Commission’s opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship. The acceptability of this criterion will depend of course on the aim pursued.

In this respect, the Commission finds it appropriate to distinguish, as regards the nature of the benefits granted by the legislation in question, between those relating to education and culture and the others.

Insofar as the first are concerned, the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission’s view, for instance, the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.

In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of

maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State).

**(CDL-INF(2001)19, Report on the preferential treatment of national minorities by their kin-State D.d.)**

### **VIII. LINGUISTIC RIGHTS**

“Any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private.

Whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write in their own language to the political, administrative and judicial authorities of this region or, where appropriate, of the State. These authorities shall have a corresponding obligation”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Articles 7-8; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“The Commission suggests that when States are not in a position to provide pupils with teaching in their mother tongue, they must permit those children to attend private schools”  
**(CDL(1991)20rev, Opinion on the draft Charter for Regional or Minority Languages, §9.)**

“[T]he knowledge and possibility of employing the mother tongue constitutes the essence of cultural identity of a minority, ie with the loss of its language, a minority may well lose its identity and eventually disappear”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.)**

“The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7 , 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.)**

“In the view of the Venice Commission, the question raised is not whether linguistic rights must benefit from a collective guarantee at European level (it has no doubt about this) but whether the creation of a hard core on the basis of the provisions of the European Charter for Regional or Minority Languages is an appropriate way to ensure those rights”

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.)**

“The Commission agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area (cf. judgment of the European Court of Human Rights in the Belgian language case, judgment on the merits on 27 June 1968, Series A No. 6), the Convention does not explicitly guarantee any linguistic

freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression (Article 10; see however the «Sadik Ahmet v. Greece» case, currently pending before the Court), freedom of thought and conscience (Article 9) or Article 3 of Protocol No. 1 (cf. the «Mathieu-Mohin and Clerfayt v. Belgium» case of 2 March 1987, Series A No. 113)».

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.)**

“The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.)**

“The Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard «the value of interculturalism and multilingualism» as an «important contribution to the building of a Europe based on the principles of democracy and cultural diversity», but always «within the framework of national sovereignty and territorial integrity» (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.)**

“[T]he definition of regional or minority languages as set forth in the Charter in Article 1.a.i only covers languages which are traditionally used within the territory of a State by its nationals and are different from the official language(s) of the State, and does not include either the languages of migrants or dialects (Article 1.a.ii)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.)**

“[T]he obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally.”

**(CDL-MIN(1998)1rev, Summary report on participation of members of minorities in public life, §1.1.)**

“Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness [...] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities.”

**(CDL-MIN (1998) 001rev, Summary report on participation of members of minorities in public life, §2.1.)**

“[P]ersons belonging to national minorities shall have the right to use, freely and without interference, his/her minority language, in private and in public, orally and in writing. While this right as such does not require the adoption of specific legislation, the criteria allowing the person belonging to a minority to exercise this right in its relations with the public administration are not clearly laid down. Furthermore, paragraph 1 introduces an important restriction of the

right to use the minority language by stating that it shall be granted “without prejudice to the provisions of the laws governing the use of the state language in the public life of Lithuania”. A comparable restriction (“within the rule of laws”) can also be found in the third paragraph concerning the right to display public signs and inscriptions in the minority language, as well as in Article 8.1 in relation to the setting up and management of schools (“within the rule of law”).

15. Persons belonging to national minorities shall also have the right to receive information from the public administration, in the minority language or in a language “acceptable to both parties”. Considering the importance of the right of persons belonging to national minorities to use their mother tongue in their relations with administrative authorities, this provision raises concerns as to the willingness of the state to ensure the presence of officials able to provide information in the minority language. Furthermore, the effective exercise of the right to receive information is within the discretion of civil servants who shall give the information asked for “as far as possible” in the minority language or in a language “acceptable to both parties” (Article 6.2).

16. With a view of ensuring the effective exercise of the right to use a minority language, the Commission recommends that the Draft Law and the legislation regulating the use of a minority language, in particular in relations with public administration, include provisions providing for:

- a) the precise criteria and guidelines allowing to determine “the areas inhabited by persons belonging to a national minority in *substantial numbers*” where these persons may address the public administration in their mother tongue, or display public signs or inscriptions in the minority language;
- b) an administrative procedure to be followed by persons wishing to submit applications written in the minority language; and
- c) the precise conditions for displaying public signs or inscriptions in the minority language.

17. The Commission also notes the lack of the right to display names of places in minority language in areas traditionally inhabited by minorities in substantial numbers. “

**(CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §§14-17.)**

“The right to use its own language in one’s dealings with the authorities is one of the core rights. The wording of Article 8 of the first draft law seems preferable to that of Article 16 of the second draft law. Nevertheless, the provisions in question call for a clarification. An any rate, it should be made clear that the “authorities” in question include the judiciary.

However, the quantitative requirement (“where persons belonging to national minorities form *the larger part* of the population”) seems too restrictive. It is recalled in particular that recently the Parliamentary Assembly of the Council of Europe referred to the need to pay special attention to the “free use of national minorities’ languages in geographical areas *where they live in substantial numbers*” (see recommendation 1623(2003), point 11 v.). This question needs to be regulated in detail in the relevant secondary legislation, but a precise guideline needs to be given in this law. “

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§37,38.)**

“12. The use of the mother language is restricted to dealings with and to official acts of local and authorities *in areas where the majority of the population is of a distinct national minority* (Art 20 of the Draft). This is a too narrow a criterion. Recommendation 1201 (1993) of the Parliamentary Assembly the Council of Europe speaks in Art 7 (3) about “regions in which substantial numbers of a national minority are settled” (see also Art 10 (2) of the Framework Convention).

[...]

The use of the minority language should be provided for also for the contacts with regional bodies. Of course, it will depend on the territorial – administrative assessment of the state, to which degree this idea can be realized in Ukraine. “

**(CDL-AD(2004)022, Opinion on the latest version of the Draft Law amending the Law on National Minorities in Ukraine §§12, 14.)**

The right to freely use a minority language in official communications is one of the most important rights for the preservation of the minority identity. The draft law goes beyond European standards in this field. The provision of Article 14 § 2, which provides that in municipalities where the population belonging to a national minority accounts for 5% of total inhabitants, the language of that minority shall be in official use, is to be commended. It should be noted though that the possibility to recognise, as official language, one or more minority languages is not provided by the Charter.

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro § 41.)**

38. The Commission welcomes the readiness of the Ukrainian authorities to ensure the right to education and instruction in the persons' mother tongue, the right to use the language in private and public sphere in oral and written communication, the right to establish private educational institutions (Article 13), as well as to provide for the conditions for teaching and learning the language (Article 14).

39. However, it seems unclear who the "relevant indigenous people" mentioned in Article 14 para.1 are, and to whom the rights in Article 13 will apply. The text should be amended to indicate that no inappropriate distinction is meant here.

40. The second paragraph of Article 14 deals with the use of the language of “relevant” indigenous peoples by local authorities in statute-established procedures, along with the state language. Such use however, seems to be rather restrictive. In the first place, according to the draft law, local authorities may use the language of the indigenous people but are not obliged to do so, which would mean that the provision does not offer any legal guarantee. In the second place, they are authorized to do so only if in the municipality concerned the indigenous peoples constitute the majority of the population. Compared to regulations concerning the use of the languages of national minorities in public life, the majority requirement would seem to be too severe.

**(CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples in Ukraine.)**

31. Under Chapter II of the draft law, Section 5 contains several provisions governing “the use of mother tongue”. Article 31 thus provides for the right to use minority languages for public purposes in those “administrative-territorial units where the citizens belonging to a national minority have a significant percentage, in the conditions of the Public Local Administration Law No 215/2001”.

32. The exact meaning of the term "significant percentage", which is in itself too vague a concept, is of such vital importance for the application of this and other articles (see Article 37) that the authorities and the recipients of the law need sufficient guidance to implement it. It is therefore of crucial importance that Article 31 makes an explicit reference to the Public Local Administration Law No 215/2001, which contains a 20% threshold that will be rendered applicable also in the draft law on the statute of national minorities. This will indeed represent a positive step fully in line with international standards.

33. The Commission understands the concern of the drafters who have preferred not to repeat the 20% in Article 31 of the draft law, so as to avoid reopening the political debate on this threshold. The Commission nevertheless notes that the reference to the “significant percentage” is not consistently used in Articles 31 to 38. As a logical consequence and unless otherwise specified, it seems that the articles not mentioning it, such as Article 34, paragraph 2

(right to conclude a marriage in a minority language), should not be subject to the threshold deriving from the Public Local Administration Law No 215/2001. In such cases, it may be useful to include other criteria in the draft law as it is hard to imagine that such linguistic rights will in practice be available without any limitation.

34. In the provisions of this Section 5, the draft frequently uses the expressions “in the conditions of the law” (see Article 32), “according to the law” (see Article 34, paragraph 1) or “according to the legal provisions in force” (see Article 36, paragraph 1). These references, which are not further specified, make it extremely difficult for those concerned to know which additional conditions are placed on the public use of minority languages in the various contexts at issue, such as the issuance of normative documents by the central public authorities and the use of minority languages before law courts. Some more precise references to the relevant laws should therefore be included in the text of the draft or at least in an explanatory report in order to remedy this legal uncertainty (see related comments under item C, paragraph 14, above).

35. As concerns ways and means to make the public use of minority languages effective in practice, the draft law provides for the need to ensure language training of the public officers concerned, as well as for the possibility to resort to authorised translators (Article 36, paragraph 1). The draft, however, does not indicate which solution must prevail in what circumstances: is the choice left to the discretion of the authorities? Does the choice depend on the percentage of persons belonging to national minorities living in the administrative-territorial unit concerned? Are the economic capacities of the authorities of any relevance? The Commission suggests that the draft law be completed in order to give further guidance on these important questions.

36. The Commission is of the opinion that reserving the linguistic rights listed under Section 5 to citizens only and thereby not extending them to non-citizens can hardly be justified (see related comments under item D, paragraphs 24-30, above). Non-citizens may indeed speak certain minority languages which already enjoy protection under the draft law. For example, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bond of citizenship, registration of their name and surname in the minority language would seem important (see Article 33). Similarly, a distinction between citizens and non-citizens would seem inappropriate and even problematic in practice as regards the linguistic situation of detainees (Article 35), as well as patients in sanitary institutions and centres (see Article 37). As concerns the latter provision, it would also seem strange not to take into account those residents who feel they belong to a recognised national minority, but are not yet Romanian citizens, in determining whether the requirement of a “significant percentage” is fulfilled.

**(CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.)**

## **IX. RIGHT TO LOCAL OR AUTONOMOUS REPRESENTATION**

Article 11 of the draft additional protocol to the ECHR appended to Recommendation 1201/93 of the Parliamentary Assembly provides as follows: “In the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the State.”

“The drafters of the proposal for a Convention preferred not to include an obligation for the State to ensure proportional parliamentary representation of minorities since this principle seemed difficult to implement.

However, they decided to set forth the obligation for the State to favour the effective participation of minorities in decisions affecting the regions where they live or in the matters affecting them.

Moreover, it is necessary for the State to take account of the presence of one or more minorities on their territory when dividing the territory into political and administrative subdivisions, as well as into constituencies”

**(CDL(1991)008, Explanatory report on the proposal for a European Convention for the Protection of Minorities, § 42; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 24, 1994; last paragraph cited in CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3.b.)**

“Concentrated minorities, for which territorial solutions are possible, should be clearly distinguished from dispersed minorities, for which such solutions are evidently excluded.”

**(CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, I.)**

“Federalism - or indeed regionalism - is undoubtedly a system which enables minorities to obtain a degree of autonomy within the framework of the existing State structure.”

**(CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, III.)**

“When a minority is itself in the majority in a federated State or region, it indirectly benefits from such competences and from such participation in central government.”

**(CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, Conclusion.)**

“The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities.

[...]

The Framework Convention for the Protection of National Minorities did not borrow from Article 11 of the Parliamentary Assembly's proposal the idea of granting to persons belonging to minorities in the regions where they are a majority “the right to have at their disposal appropriate local or autonomous authorities or to have a special status” [...] From the standpoint of the Framework Convention, participation in public affairs is above all a question of personal autonomy, not of local autonomy.

Nor has the case-law of the European Convention on Human Rights implied that some provisions of this Convention could be used for the purpose of claiming a right to a special status

[...]

It follows from the foregoing that international law cannot in principle impose on States any territorial solutions to the problem of minorities and that States are not in principle required to introduce any form of decentralisation for minorities.”

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2b.)**

“Holders of the right provided for in Article 11 are «the persons belonging to a national minority», not the minorities as such, although, in the Commission's view, despite this formulation, the right to autonomy is conceivable only as a right exercised in association with others. Therefore, the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a component of the people or the nation, a concept which might affect any unitarity of the State. The presentation of the minority phenomenon in Article 11 is no different from that in the other provisions of the text proposed in Recommendation 1201: it is indirect and based on recognition of individual rights, albeit exercised in association with others (ie. collectively) [...]”.

**(CDL-INF(1996)4, Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3a.)**

“A minority must constitute a majority in a «region» for Article 11 to be applicable.

[...]

[T]he term [region] should be construed in its geographical, not administrative or political, sense. But it also has a historical dimension which is not unconnected with the settlement of various groups in a particular territory.

[...]

[T]he phrase [«in a majority»] should be understood not as denoting a mere numerical relationship but as implying that the minority has settled and is concentrated in the region concerned.”

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3b.)**

*The Commission's work and a study of national systems for protecting minorities do not reveal the existence of any common practice in the matter of territorial autonomy, even in general terms.*

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3c.)**

*What is important, though, is that the State offers the minorities the possibility to appropriate local or autonomous administrations or at least the minimum requirements of a special status, which means that:*

“The institutions which make up this special status should be capable of representing the minorities and ensuring that persons belonging to the minorities:

- will be consulted whenever the Parties are contemplating legislative or administrative measures liable to affect them directly;
- will be involved in the preparation, evaluation and implementation of national and regional development plans and programmes liable to affect them directly;
- will effectively participate in the decision-making process and elected bodies at both national and local level, particularly in the fields of culture, education, religion, information and social affairs.”

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3c.)**

“Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them [...] the Rapporteurs stress that this revision (of the

Constitutional Law of 1991) should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime.

[...]

In the opinion of the Rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations”.

**(CDL(1996)026, Report on the implementation of the Constitutional law on Human Rights and Freedoms and on the Rights of Ethnic Communities and Minorities in the Republic of Croatia, §§20-22.)**

“[A]lthough a number of constitutions guarantee the right to self-determination, the concept excludes secession. What is often being referred to is a state's external self-determination. Where self-determination is envisaged within a state, it is construed in ways compatible with territorial integrity” .

**(CDL-INF(2000)016, A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe, §I.A.)**

“The idea that a conflict can best be solved through division into a number of separate states is not consistent with the real shape of things at the dawn of the 21st century. Today power is increasingly distributed among various tiers of authority - at state level and the levels below and above states - to the point where it may be a question of shared sovereignty. In these circumstances the dichotomy between full sovereignty and total lack of power - if ever there may have been any basis for it - is in any case no longer relevant. The solutions to conflicts lie far more in co-operation between tiers of authority, which can be organised in as many ways as there are different situations”.

**(CDL-INF(2000)016, A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe, §I.A.)**

”47. The participation of persons belonging to national minorities in the legislative and the administrative fields concerning minority questions, in particular, at the regional and the local level, is very important. Here, Article 18 of the first draft law and Articles 15 and 28-30 of the second draft law follow different ways.

48. The powers of the consultative bodies referred to in Article 18 of the first draft are rather vague and must be duly co-ordinated with those of the “central executive body with special powers” referred to in the same provision.

49. The creation of a body of the kind of the “minority council” which – following a suggestion made by the Venice Commission – has been introduced in the Croatian constitutional law on the rights of national minorities, and which turned out to be a valuable instrument, could be envisaged.”

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§47,48.)**

44. Participation of persons belonging to national minorities in all aspects of public life is an important condition for their integration into the society of which they are part. Furthermore, the possibility to actively participate in the decision-making processes which govern the protection of minority rights appears necessary to ensure the effective enjoyment of guaranteed rights as well as the prevention of discrimination of minorities.

45. Specific procedures, institutions and arrangements are often established, through which minorities can influence decisions that concern them. Participation may include the ability of minorities to bring relevant facts to decision-makers, defend their views and positions before

them, veto legislative or administrative proposals, and establish and manage their own institutions in specified areas.”

[...]

“Independent advisory bodies comprising representatives of minorities and advising the state authorities in the field of minority policies may have an important role in ensuring better protection of their interests.”

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §§44,45,58.)**

## **X. RELATIONS WITH ADMINISTRATIVE AUTHORITIES AND PARTICIPATION IN PUBLIC AFFAIRS**

“Any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private.

Whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write in their own language to the political, administrative and judicial authorities of this region or, where appropriate, of the State. These authorities shall have a corresponding obligation”

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Articles 7-8; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them”.

**(CDL(1991)007, Proposal for a European Convention for the Protection of Minorities, Article 14 §1; reproduced in “The protection of minorities”, Collection Science and Technique of Democracy, no. 9, p. 10, 1994.)**

“The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7 , 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.)**

“The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14)”.

**(CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.)**

“The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities. Article 14 paragraph 1 of the Commission's proposal provides that «States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them»”.

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2.b.)**

“In the Vienna Declaration of Heads of State and Government of the member States of the Council of Europe, of 9 October 1993, it is recognised that the creation of a climate of tolerance and dialogue is necessary for participation by everyone in public life. An important contribution to this can be made by local and regional authorities”.

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2.b.)**

“Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them [...] the Rapporteurs stress that this revision (of the Constitutional Law of 1991) should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime. [...]

In the opinion of the Rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations”.

**(CDL(1996)026, Report on the implementation of the Constitutional law on Human Rights and Freedoms and on the Rights of Ethnic Communities and Minorities in the Republic of Croatia, §§20-22.)**

“Participation of minorities in public life is primarily founded on formal recognition of the principle of equality”

**(CDL-MIN(1998)001rev, Summary Report on Participation of Members of Minorities in Public Life, Introduction.)**

“[T]he obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally.”

**(CDL-MIN(1998)1rev, Summary report on participation of members of minorities in public life, §1.1.)**

“(T)o ascertain whether or not the stipulation of knowledge of the [country's] official language [in order to hold an appointment in the public administration] constitutes a form of indirect discrimination against minorities, what must be considered is first whether or not the minority language shares official language status, second the required level of command of the language, and furthermore how gradually the requirement is imposed, and the possible application of programmed measures to prevent the exclusion of members of minorities from public appointments.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2 A.)**

“Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness [...] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities.”

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.1.)**

“Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied – inter alia – to minorities. The situation is different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles.” – rather pos. discrimination, under 4

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.)**

“The involvement of members of minorities in the various aspects of life in society is an important factor in their integration and in the prevention of conflicts. This applies especially to what is commonly called public life, that is to say participation in state bodies”.

**(CDL-INF(2000)4, Electoral law and national minorities, Introduction.)**

“It is conceivable that indirect participation of the entities in the decision-making process might take place not only in the legislature, but also in the executive and the judiciary”.

**(CDL-INF(2000)16, A general legal reference Framework to facilitate the settlement of ethno-political conflicts in Europe, §II.B.2.)**

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*The restriction of the right to take part in the conduct of public affairs and of access to the public services to citizens does not conflict with international standards provided that it does not prevent non-citizens from holding lower-level posts attached to the civil service.*

**(CDL-INF(2001)14, Opinion on the constitutional law on the rights of national minorities in Croatia, §4.)**

“The involvement of persons belonging to minorities in the various aspects of life in society is an important factor in their integration; this applies in particular, to what is commonly called public life, i.e. participation in state bodies. Although in most cases the representation of minorities in a state's elected bodies is achieved through the application of the general rules of electoral law, a certain number of countries dispose of specific rules of electoral law providing for special representation of minorities in state bodies. Article 55 of the Lithuanian Constitution provides that members of the Seimas shall be elected on the basis of “universal, equal and direct suffrage”. It further provides that the electoral procedure shall be established by law.

24. The Commission regrets that the Draft Law does not contain specific provision on the representation of national minorities in state bodies (national parliament and local councils, governmental bodies and judiciary). A specific guarantee of proportional representation is of the utmost importance, also for an effective enjoyment of other minority rights. The Draft Law should therefore at least include the reference to this important issue.“

**(CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §§23,24.)**

“The participation of persons belonging to national minorities in the legislative and the administrative fields concerning minority questions, in particular, at the regional and the local level, is very important. Here, Article 18 of the first draft law and Articles 15 and 28-30 of the second draft law follow different ways.

The powers of the consultative bodies referred to in Article 18 of the first draft are rather vague and must be duly co-ordinated with those of the “central executive body with special powers” referred to in the same provision. “

**(CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§47,48.)**

“The procedure ensuring representation of national minorities in “*public authorities, public institutions and local authorities*” (Article 29) does not seem to be adequate. It results from the current drafting of the article that the political level “looks after” the representation of the minorities in these institutions. The involvement of the political level in appointing such representatives is to be avoided especially when it comes to the representation within the judiciary. The Commission is of the opinion that an appropriate solution would be to set forth that persons belonging to national minorities shall be able to work in public institutions in conditions of equality with the others, and according to their own individual merits.”

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §56.)**

29. Pursuant to the draft law, a “specially authorised central executive authority” shall be set up with the aim to develop and implement the state policy in the field of indigenous peoples and national minorities. “Corresponding structures” shall also be established within the municipal executive bodies (Article 3).

30. The establishment of specialized bodies responsible for the implementation of the state policy in the field of indigenous peoples is to be welcomed. There is however no guarantee in the draft law as to the representation of indigenous peoples in the mentioned bodies.

31. Furthermore, the draft law is silent on the relations of the new central governmental body with the existing State Committee for Nationalities and Migration, which is the main state executive institution in the sphere of ethnic policy.

#### The Assembly of Indigenous Peoples

32. Article 4 provides for the creation of the Assembly of Indigenous Peoples, as an advisory body to the central government in the field of protection of the rights and freedoms of the indigenous peoples and national minorities of Ukraine. This provision is to be welcomed. The existence of a body representing the interests of indigenous peoples of Ukraine is of particular importance for ensuring a channel of communication and co-ordination between the government and indigenous peoples, and between different indigenous peoples themselves. However, it is not clear why such an Assembly of Indigenous Peoples should also advise on issues related to national minorities, when a specialised body – the Council of Representatives of Civic Associations of National Minorities, attached to the State Committee on Nationalities and Migration - already exists.

33. The draft law should also clarify the relationship between the Assembly and the corresponding structures to be established at the local level (see *supra*, para. 28).

35. Article 8 of the draft Law provides for the right of access to legislative, executive and judicial bodies, other public functions and enterprises, institutions and organisations. It is the Commission’s understanding that the last three categories are meant to be public “enterprises, institutions and organisations”. At any rate, the Constitution of Ukraine guarantees the equal electoral (passive and active) rights to all its citizens (Article 38). From that perspective, if Article 8 is meant to reaffirm the above mentioned constitutional provisions it should be written in a non-restrictive manner.

36. In addition, the Venice Commission points out that there is today a growing tendency in Europe to extend the right to vote for, and to be elected as a member of representative bodies

at the local level to non-citizens who have had residence in the country for a certain period of time.

38. The Commission welcomes the readiness of the Ukrainian authorities to ensure the right to education and instruction in the persons' mother tongue, the right to use the language in private and public sphere in oral and written communication, the right to establish private educational institutions (Article 13), as well as to provide for the conditions for teaching and learning the language (Article 14).

39. However, it seems unclear who the "relevant indigenous people" mentioned in Article 14 para.1 are, and to whom the rights in Article 13 will apply. The text should be amended to indicate that no inappropriate distinction is meant here.

40. The second paragraph of Article 14 deals with the use of the language of "relevant" indigenous peoples by local authorities in statute-established procedures, along with the state language. Such use however, seems to be rather restrictive. In the first place, according to the draft law, local authorities may use the language of the indigenous people but are not obliged to do so, which would mean that the provision does not offer any legal guarantee. In the second place, they are authorized to do so only if in the municipality concerned the indigenous peoples constitute the majority of the population. Compared to regulations concerning the use of the languages of national minorities in public life, the majority requirement would seem to be too severe.

**(CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples of Ukraine, §§29-33, 35-36, 38-40.)**

31. Under Chapter II of the draft law, Section 5 contains several provisions governing "the use of mother tongue". Article 31 thus provides for the right to use minority languages for public purposes in those "administrative-territorial units where the citizens belonging to a national minority have a significant percentage, in the conditions of the Public Local Administration Law No 215/2001".

32. The exact meaning of the term "significant percentage", which is in itself too vague a concept, is of such vital importance for the application of this and other articles (see Article 37) that the authorities and the recipients of the law need sufficient guidance to implement it. It is therefore of crucial importance that Article 31 makes an explicit reference to the Public Local Administration Law No 215/2001, which contains a 20% threshold that will be rendered applicable also in the draft law on the statute of national minorities. This will indeed represent a positive step fully in line with international standards.

33. The Commission understands the concern of the drafters who have preferred not to repeat the 20% in Article 31 of the draft law, so as to avoid reopening the political debate on this threshold. The Commission nevertheless notes that the reference to the "significant percentage" is not consistently used in Articles 31 to 38. As a logical consequence and unless otherwise specified, it seems that the articles not mentioning it, such as Article 34, paragraph 2 (right to conclude a marriage in a minority language), should not be subject to the threshold deriving from the Public Local Administration Law No 215/2001. In such cases, it may be useful to include other criteria in the draft law as it is hard to imagine that such linguistic rights will in practice be available without any limitation.

34. In the provisions of this Section 5, the draft frequently uses the expressions "in the conditions of the law" (see Article 32), "according to the law" (see Article 34, paragraph 1) or "according to the legal provisions in force" (see Article 36, paragraph 1). These references, which are not further specified, make it extremely difficult for those concerned to know which additional conditions are placed on the public use of minority languages in the various contexts at issue, such as the issuance of normative documents by the central public authorities and the use of minority languages before law courts. Some more precise references to the relevant

laws should therefore be included in the text of the draft or at least in an explanatory report in order to remedy this legal uncertainty (see related comments under item C, paragraph 14, above).

35. As concerns ways and means to make the public use of minority languages effective in practice, the draft law provides for the need to ensure language training of the public officers concerned, as well as for the possibility to resort to authorised translators (Article 36, paragraph 1). The draft, however, does not indicate which solution must prevail in what circumstances: is the choice left to the discretion of the authorities? Does the choice depend on the percentage of persons belonging to national minorities living in the administrative-territorial unit concerned? Are the economic capacities of the authorities of any relevance? The Commission suggests that the draft law be completed in order to give further guidance on these important questions.

36. The Commission is of the opinion that reserving the linguistic rights listed under Section 5 to citizens only and thereby not extending them to non-citizens can hardly be justified (see related comments under item D, paragraphs 24-30, above). Non-citizens may indeed speak certain minority languages which already enjoy protection under the draft law. For example, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bond of citizenship, registration of their name and surname in the minority language would seem important (see Article 33). Similarly, a distinction between citizens and non-citizens would seem inappropriate and even problematic in practice as regards the linguistic situation of detainees (Article 35), as well as patients in sanitary institutions and centres (see Article 37). As concerns the latter provision, it would also seem strange not to take into account those residents who feel they belong to a recognised national minority, but are not yet Romanian citizens, in determining whether the requirement of a "significant percentage" is fulfilled.

40. The overall question as to whether persons belonging to national minorities living in Romania are ensured an effective participation in cultural, social and economic life and in public affairs, in particular those affecting them, is not easy to answer. Minority participation is promoted through a range of measures and special structures within the executive branch. Furthermore, there are important institutional elements of participation in Romania such as minority representation in Parliament, the Council of National Minorities and the newly envisaged system of cultural autonomy.

41. The Commission is not in a position to assess whether or not this institutional framework actually results in an effective participation of persons belonging to national minorities in public life. This would require an in-depth monitoring of the situation, including on how the existing system is implemented in practice. Such a monitoring is periodically conducted under the Framework Convention, where the latest evaluation *inter alia* strongly welcomed the constitutionally guaranteed representation in Parliament, but at the same time stressed certain shortcomings in the consultation of the Council of National Minorities. The Commission can therefore not exclude that it may ultimately prove necessary to reinforce the participation of representatives of national minorities in the decision-making process.

**(CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.)**

## **XI. ELECTORAL MATTERS**

“According to paragraph 19 of the Bill minorities will have the right to parliamentary representation. This, in the opinion of the Commission, is one of the most important rights in a democratic society. This raises the question, whether the right is not too important to leave its elaboration to other legislation. “

**(CDL-MIN(1993)4rev, Opinion on the Hungarian bill n° 5190 on the Rights of National and Ethnic Minorities §12.)**

“[I]t was necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies.”

**(CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3.b.)**

“Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied – inter alia – to minorities. The situation is different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles.” – rather pos. discrimination, under 4

**(CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.)**

“[I]t is highly unusual, in practice, for political parties representing national minorities to be prohibited. As this would be a restriction upon the freedom of association, which is a fundamental part of the common constitutional heritage across the continent, it can be justified only in very special and individual cases, and not in a general manner. The principle of proportionality must always be fully respected. It should be noted that the prohibition on using «minority» arguments in an electoral campaign can lead, in fact, to a prohibition on participating in parliamentary life, even if minority parties as such are not formally prohibited”.

**(CDL-INF(2000)4, Electoral law and national minorities, III.A.b.)**

“The more proportional an electoral system, the more it allows minorities, even dispersed ones, to be represented in the elected body”.

**(CDL-INF(2000)4, Electoral law and national minorities, III.B.1.)**

“Indeed, the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body. Other elements also have a bearing, such as the choice of candidates by the political parties and, obviously, voters' choices, which are only partly dependent on the electoral system. The concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society, and, above all, its numerical size”.

**(CDL-INF(2000)4, Electoral law and national minorities, Conclusion.)**

“[T]he participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the 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.”

**(CDL-INF(2000)4, Electoral law and national minorities, Conclusion.)**

“The existence of a second chamber representing the entities does not necessarily entail their equal representation”.

**(CDL-INF(2000)016, A general legal reference Framework to facilitate the settlement of ethno-political conflicts in Europe, §II.B.2.)**

[I]f the requirement of citizenship is abolished so that the application of the Draft Law is not restricted to citizens only [...] those entitlements which require specific qualifications such as citizenship or residence or the existence of a genuine link with Bosnia and Herzegovina should be regulated separately. In particular, the right to vote and to stand for office would be regulated in the relevant laws on elections and the Draft Law would merely set out the principle of an

adequate representation of citizens (or, where relevant, residents) belonging to national minorities at the levels of the State, entities, cantons, cities and municipalities.”

**(CDL-INF(2001)12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, §4a.)**

In Bosnia and Herzegovina, State powers are divided by ethnic lines and the constituent peoples are given a clear advantage (for example, on the State level : the House of Peoples; the Chair and Deputy Chairs of the House of Representatives; the Presidency - see Articles IV and V of the BiH Constitution). Citizens not belonging to these constituent peoples risk being excluded from representation in the decision-making process. Provisions on the political representation of national minorities in the legislative and executive bodies at all levels are therefore of the utmost importance. Representation of minorities in the judicial bodies is also important, in order to ensure their appearance of impartiality.

The Draft Law, in its Articles 19 to 22, contains the principles of (a) the proportional representation at the State, entities, cantons, cities and municipalities level, of the numerically most significant national minorities and (b) of a given number of representatives for the other minorities. The manner of election of the representatives is to be set out in the relevant election laws.

The Draft Law should, however, specify:

- a) whether the right to elect special representatives of the minorities is coupled with the right of persons belonging to national minorities to be elected as such;
- b) whether members of national minorities are granted the right to elect special representatives in addition to the general and equal right to vote for the members of the relevant bodies of authority (double vote system: which however would be contrary to the principle of “one man one vote”);
- c) (if the system of the double vote is accepted) the impact of the outcome of the elections on the fixed number of seats to be allocated to persons belonging to national minorities (in particular, what if a candidate belonging to a national minority gets the number of votes required for a seat, but the allocation of a seat to him or her would exceed the number of seats proportionally allocated to the minority concerned?)

**(CDL-INF(2001)12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, §17.)**

"29. If the seats for representatives of national minorities are indeed additional seats, fixed on the basis of the outcome of *universal and equal* suffrage, this would lead to a system of double vote for members of national minorities. In that context, the Commission recalls that the Guidelines on Elections of the Venice Commission state in Principle 2.a. that "each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes". According to Principle 2.d.bb., "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities do not in principle run counter to equal suffrage".

30. Under what circumstances the needs of minority protection may justify a derogation from the principle “one man, one vote” is a complex question which deserves careful consideration (see the Code of good practice in electoral matters, Guidelines and Explanatory report, CDL-AD (2002) 23, § 23). To the extent that this question appears to have been shifted to the Law on Elections, at present under revision, the Commission is at the disposal of the Croatian authorities for a co-operation on this issue.

31. If, on the contrary, the minority seats are not additional but are part of the "regular" number of seats, the question arises of how the number of seats to which the persons

belonging to minorities are entitled is guaranteed and what procedure will be followed if the outcome of the elections shows that insufficient minority candidates have been elected.

32. An additional point of concern is the fact that any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of a census). Persons belonging to certain minorities may be reluctant to do so out of fear for discriminatory treatment and other forms of harassment. Principle 2.d.cc. of the Guidelines on Elections of the Venice Commission states: "Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority". The same observation is valid for the census provided in Article 21 of the draft. In this context it should be recalled that there are many possibilities to secure the confidentiality of the information provided (see, for instance, the regulations in force in South Tyrol). The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it. "

**(CDL-AD(2002)030, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia §§29-32.)**

"The Commission recalls that the election law still has to solve several important issues, such as the issue of double vote for members of national minorities and the issue of additional seats in Parliament in derogation of the number of seats fixed in the Constitution. Moreover, any electoral system guaranteeing proportional representation of national minorities will make the identification of voters as belonging to a national minority necessary. As the Commission had stressed before, this may require a certain safeguards of confidentiality for those persons belonging to national minorities for whom this identification may create a certain risk. "

**(CDL-AD(2003)009, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia §22.)**

46. Article 40 sets out the conditions organisations of citizens belonging to national minorities have to meet in order to be registered as such. Paragraph 2 of this provision stipulates that "the number of members of a minority organization may not be smaller than 10% of the total number of citizens who declared their affiliation to the respective minority at the last census". This represents a lower threshold than the 15% contained in the Law on Local Elections. While acknowledging this as an improvement, the Commission is still of the opinion that a 10% threshold of this type would be too restrictive a condition. This is especially the case for those organisations which operate at the local level in administrative units where there is a concentration of members of the minority concerned, but which cannot meet the requirement of 10% at the national level.

47. The same holds true for the requirement in Article 40, paragraph 3, which states: "in case 10% in the last census is equal to or surpasses 25.000 persons, the list of founding members must contain at least 25.000 persons, *domiciled in at least 15 counties from Romania, but no less than 300 persons for each of these counties*". This is also likely to exclude the founding and registration of organisations at the local level in units where there is a significant concentration of persons belonging to a sizeable minority at national level. It is true that Article 46 provides for the possibility to establish territorial divisions within any organisation of citizens belonging to a national minority, but this does not satisfactorily address the excessive difficulty to set up another, distinct organisation.

48. There is a legitimate concern for the state to introduce some legal safeguards for associations to be authorised to take part in elections as "organisations of citizens belonging to national minorities". It is therefore perfectly understandable that the state expects serious guarantees of representativity from such organisations as electoral privileges must not be abused. However, the Commission is of the opinion that the conditions for registration may not be of such a severity that they disproportionately favour groups which are represented in Parliament to the disadvantage of (new) groups which wish to participate in public life. In the

draft law at issue, the proposed restrictions, which (with the exception of the 10% threshold) largely mirror the corresponding provisions of the Law on Local Elections, are not reasonable and do not meet the requirement of proportionality.

49. This is all the more problematic since electoral privileges are not the only element at stake. Indeed, in addition to participation in elections, the qualification as “organisations of citizens belonging to national minorities” entails several competences listed in Article 48 of the draft law. These competences include the right to be represented in the Council of National Minorities, the right to administer special funds and receive yearly allowances from the State budget, the right to propose the appointment of representatives in certain institutions and to notify the National Council for Combating Discrimination of cases of discrimination.

50. As a consequence, the whole Chapter III of the draft law may potentially result in excluding significant parts of national minorities from representative and consultative bodies, as well as from a range of participation rights, which would seem out of proportion. Indeed, the organisations of citizens belonging to national minorities are associations and the conditions they are required to fulfil to be registered have to be analysed as restrictions to the freedom of association. If the authorities consider that more restrictive conditions are necessary for these organisations to be allowed to take part in elections, it is recommended to reserve only the competences spelled out in Article 48 lit a to the organisations mentioned in Article 39, paragraph 1 lit. b; by contrast, the competences spelled out in Article 48 lit b to h should not be excluded for organisations of national minorities mentioned in Article 39, paragraph 1 lit. a. Article 47 of the draft law, which will oblige the organisations already represented in Parliament and/or in the Council of National Minorities to re-register, does not seem able to remedy this inherent shortcoming of the system.

51. While the Commission has serious concerns about the aforementioned conditions for registration, it considers it extremely positive that the election process leading to the setting up of the National Councils of Cultural Autonomy has been conceived in a much more open way. Article 62, paragraph 5 indeed makes it clear that the members of the organisations mentioned in Article 39, paragraph 1 lit. a and lit. b will all be allowed to stand as candidates. This arrangement will ensure a fair electoral competition, without unduly favouring the candidates from the organisations of citizens taking part in the parliamentary, presidential and local elections.

52. The Commission notes that the registration process of organisations of citizens belonging to national minorities necessarily requires to process personal ethnic data. In this context, it is essential to make sure that individual declarations of affiliation made in the census, which are mentioned in Article 40 as a tool to evaluate the numerical size of the minority concerned, cannot be publicly disclosed. The list of the signatures of the members of the organisations, mentioned under Article 42, should also be protected in an appropriate way. It is self-evident that any special voting system for national minorities require that the voters and the candidates reveal their belonging to a minority. This does not mean, however, that the list of voters should be made publicly accessible. There are indeed many possibilities to secure the confidentiality of these personal data.

53. It is thus necessary either to introduce in the draft law certain guarantees ensuring protection for ethnic data or at least make an explicit cross-reference to such guarantees if they are already entrenched in other legislation. Only those “persons belonging to the national minority whose Council is going to be established” will be entitled to elect their National Council of Cultural Autonomy (see Article 62, paragraph 1 of the draft law), but the Commission understands that it is not the intention of the authorities to set up a specific register of “minority” voters. Everyone who declares to belong to a given minority will therefore be entitled to take part in the election of the corresponding Council of Autonomy. The list of those who took part in the elections should, however, not be used by the authorities for other purposes and its access should be restricted.

54. Introducing the proposed guarantees to protect ethnic data would contribute to fully respecting the right not to disclose one's affiliation with a national minority, which is in keeping with Article 3 of the Framework Convention. It is to be welcomed that Articles 4 and 13 of the draft law partly reflect this principle. However, both provisions make this right dependent on other legislation ("in compliance with the law" and "except the cases mentioned in the law", respectively). This weakens the right not to declare one's affiliation with a national minority. Exceptions to this right should therefore be more clearly defined, serve a legitimate aim and be proportionate to that aim.

57. "[T]hat it may be legitimate for the state to restrict to citizens only the right for these organisations to take part in parliamentary and presidential elections. The draft law, however, also seem to imply that only citizens belonging to these organisations may participate in local elections. This is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to foreign residents."

**(CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania.)**

"52.The Commission also wishes to stress that any special voting system for minorities requires that the voters and the candidates concerned reveal their belonging to a minority. There are many possibilities to secure the confidentiality of the information provided. The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it."

**(CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §52.)**

The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. In that direction the Venice Commissions' Code of good practice in electoral matters provides some of the basic principles for developing electoral affirmative action rules in accordance with the Europe's electoral heritage. Among them we will emphasise here the following principles:

- 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.

Affirmative action electoral rules, as the experience of the OSCE High Commissioner on National Minorities shows, are particularly productive when applied in local elections. Furthermore, in territories where national minorities represent a substantial part of the population, the delimitation of territorial entities (constituencies, municipalities), in such a way as to prevent dispersal of the members of a national minority, may favour the representation of minorities in the elected bodies, as underlined by Recommendation 43, on Territorial Autonomy

and National Minorities, of the Congress of Local and Regional Authorities of the Council of Europe.

The above mentioned principles can provide a basis for developing common European frameworks, if not yet standards for affirmative action rules, for national minorities' participation in the decision-making.”

**(CDL-AD(2005)009, Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, §§9- 11, 15, 16, 67-70.)**

133. The process of voter identification is of paramount importance for the overall integrity of the electoral process. Before voting, voters are required to prove their identity, usually through presentation of identity documents. It is important that the Election Law or instructions by the electoral administration body clearly specify what kind of identity document is valid for the purpose of voter identification. In some countries, the legal situation is complex and not very clear. International observers criticised, for example, the case of the 2003 parliamentary elections in Croatia. Special care should be taken with regard to groups that may lack necessary identity documents, like, for example, refugees, internally displaced persons or specific minority groups (e.g. Roma). Especially in those countries where “multiple voting” is a well-known problem, not effectively verifying voters’ identities is considered to be a severe problem.

182. Sometimes there also strong demands for a better representation of national minorities in Parliament. In such cases, the electoral systems may facilitate the minority representation, for example, by the use of proportional representation systems in nation-wide or in large multi-member constituencies (without a high threshold of representation). But also PR list systems in small multi-member districts or even plurality/majority systems in single-member constituencies may ensure minority representation if the minorities are territorially concentrated. Also, the candidacy and voting form, among other things, may have an influence on minority representation. In some countries (e.g. Poland and Germany), there are “threshold exemptions” for candidates lists or parties presenting national minorities (see CDL-AD(2005)009, paras 35, 49).

183. Alternatively, or additionally, there are sometimes provisions for reserved seats that are separately allocated to national minorities (e.g. in Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Slovenia, Romania). However, the notion of setting aside seats reserved for minorities is debatable (CG/BUR (11) 74). While reserved seats might be a short-term mechanism to secure the representation of minorities in a transitional period, in the long term the interest of the minorities and the country itself might be better served by representation through the “ordinary” electoral system (see for discussion the Parliamentary Assembly’s report on the 2002 parliamentary elections in Montenegro; Doc 9621 Addendum IV). Furthermore, with reserved seats, there is always the problem of deciding which minorities should be entitled to have such seats and who legitimately represents the respective minority in national or local parliaments (see for example CDL-AD(2004)040).

**(CDL-AD(2006)018, Report on electoral law and electoral administration in Europe.)**

17. The Electoral Code maintains an electoral system with one single constituency covering the whole country, with a proportional distribution of seats. The possibility for national minorities to be represented in the Parliament is closely related to the matter of electoral system itself. The Opinion on the Election Law quoted the Venice Commission stating that it is “necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative subdivisions as well as into electoral constituencies” (Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, CDL-INF(96)4).”

**(CDL-AD(2006)001, Joint opinion on the Electoral Code of Moldova.)**

82. As noted earlier, Article 81 of the Law on Parliamentary Elections creates an exception to the legal threshold for mandate allocation for “political parties of ethnic minorities and coalitions of political parties of ethnic minorities”. These political parties and coalitions participate in the mandate allocation for members of Parliament even if they receive less than 5 per cent of the votes. Although Article 81 of the Law on Parliament Elections requires a definition of “political party of ethnic minority” in order to determine which political parties and coalitions under the legal threshold are entitled to participate in the allocation of mandates, the concept is a positive one that facilitates the representation of ethnic minorities. The OSCE/ODIHR and the Venice Commission recommend that consideration be given to providing a similar provision in the Law on Local Elections.

**(CDL-AD(2006)013, Joint recommendations on the Laws on parliamentary, presidential and local elections and electoral administration in the Republic of Serbia.)**

56. Article 15 of the Council of Europe’s Framework Convention for Protection of National Minorities states that “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.”

57. The affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commission Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with European electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of national minorities, electoral thresholds should not affect the chances of national minorities to be represented, 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.

58. Also, the possession of dual or multiple nationality should be no obstacle for exercising voting rights in both countries. This approach is completely consistent with Article 17, para. 1 of the European Convention on Nationality, which stipulates that those citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country.

**(CDL-AD(2005)011, Report on the abolition of restrictions on the right to vote in general elections.)**

46. In particular, the Venice Commission points out that conditions for participation in local elections should be attuned to the local situation and should not be subject to any condition related to representation at national level. For instance, an organisation of a certain national minority may be highly representative of that national minority in a certain county, even though it does not fulfil the requirement that the number of its members is equal to or more than 15 % of the total number of citizens who, at the latest census, have declared they belong to that minority, and even though it would not have at least 300 members in 15 counties of the country. The requirement concerned is even more striking since Article 44 of the Law does restrict the requirement of a certain measure of support to the constituency concerned.

47. The said unequal treatment also runs counter to the principle of proportional representation. In relation to national minorities a deviation from formal proportional representation may be justified to guarantee access of national minorities to representative bodies. The Code of Good Practice in Electoral Matters provides for this in Principle I.2.4 as follows: “*Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (...) do not in principle run counter to equal suffrage*”. However, such a measure of “positive discrimination” should not have the effect that it favours one national minority or one group within a national minority to the disadvantage of one or more others to the extent that the latter are not able to effectuate their right to participation in public affairs.

52. The presence of only one list for each minority in the political game could help this minority to be represented - proportionally - in the elected bodies. However, this does not justify restricting competition between lists of the same minority. In the free play of political forces, one can assume that both voters and candidates would think, and dispute, the consequences of their vote and its possible division between rival groupings. Even in the case that miscalculations may give rise to some unwished for result of loss in representation, the lesson derived from that experience is within the usual scope of the democratic process, where electorates also learn by mistake, and not through the supposed prescient limitation of their choices.

57. However, the provision of Article 7 is problematic. It strongly restricts the possibility of more than one grouping of persons belonging to a national minority to be represented in authorities at local level throughout the country. In practice, this principally affects the Hungarian minority. These restrictions do not appear justified. In particular, they are not justified by the necessity of ensuring unity so as to preserve the electoral weight of a minority, inasmuch as one has to take for granted that electors know how to safeguard their minority interests. It has to be emphasised that these comments only concern local elections.

**(CDL-AD(2004)040, Opinion on the Law for the election of local public administration authorities in Romania.)**

The provisions of the Draft Code on the language of electoral bodies, ballot-papers, forms and other materials should be expanded to include all the issues that have arisen in this connection during past elections.

An adequate amount of voter information and education materials should be made available in all languages used by constitutionally-recognized minorities, and electoral forms should be provided to electoral bodies located in any municipality in the minority language used by the necessary number of citizens in that municipality (20% or more).

The provisions in the Draft Code related to the use of minority languages during municipal elections should be extended to apply to all kinds of elections conducted in those municipalities.

The Draft Code should direct the relevant authorities to ensure that minority voters, especially those minorities which exceed the 20% figure as a proportion of the entire population, are able to have their voter registration recorded also in their own language.

**(CDL-AD(2006)008, Joint opinion on the draft Electoral Code of “the former Yugoslav Republic of Macedonia”, par. 151 Recommendations, 3. Language issues.)**

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