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

**THE PROTECTION OF NATIONAL MINORITIES  
AND ELECTIONS**

**Document prepared on the basis of comments by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## **I. Introduction**

1. *At the request of the Office of the OSCE High Commissioner on National Minorities (HCNM), during its 68<sup>th</sup> plenary session (13 - 14 October 2006) the European Commission for democracy through law examined the document on dual voting for persons belonging to national minorities, prepared by the HCNM on the basis of the comments on that document prepared by Ms Durrieu (CDL-EL(2006)029), rapporteur appointed by the Council for Democratic Elections, as well as of comments submitted by its sub commission for the protection of minorities.*

2. *After discussing the subject, the Commission agreed that due account should be taken of the wide variety of models adopted to ensure the election of special minority representatives in the national and regional assemblies. Under the applicable standards on protection of national minorities, States have considerable discretion in determining how effective participation by national minorities in public affairs is to be achieved. That margin of discretion should enable them to take account of their particular historical and social circumstances, while at the same time complying with Article 3 of the Additional Protocol to the ECHR and Article 25 of the UN's ICCPR and relevant case-law.*

3. *Further to that discussion, the HCNM prepared a revised version of the document on dual voting for persons belonging to national minorities, which was submitted for comments to Ms Durrieu (member of the Council for Democratic Elections) and Mr Bartole (substitute member, Italy). See documents CDL-EL(2007)025 and CDL-EL(2007)020. These comments were discussed at a joint session of the Council for Democratic Elections and the Sub-Commission on the Protection of Minorities, held on 18 October 2007. On that basis, the Venice Commission requested the Secretariat to prepare, in co-operation with the reporting members, a consolidated document on the basis of the opinions expressed by the members of the Commission and of the Council for Democratic Elections. The present document will leave a number of questions open due to the divergences between the rapporteurs. It sets out the points on which an agreement was reached, but mentions the differences either expressly or by placing a section of the text into square brackets. A revised text will be drafted on the basis of the conclusions of the joint session of the Council for Democratic Elections and of the Sub-Commission on the Protection of Minorities on 15 March 2008, in view of the adoption of a final document during their next common meeting, which will take place on 12 June 2008.*

4. *In the meantime, the Venice Commission, under the auspices of the President of the Republic of Croatia and in cooperation with other bodies and institutions, organised an UNIDEM Seminar on the participation of minorities in public life (Zagreb, 18-19 May 2007) that dealt with many connected items (inter alia, dual voting rights, exemption from electoral quorum, reserved seats, dual majority rule, treatment of the non nationals, etc.). The papers presented at this Seminar were taken into account in the preparation of these comments.*

## **II. General remarks**

5. In its document the Office of the High Commissioner on National Minorities (HCNM) underlined that ideally, in a well integrated society, persons belonging to minorities are members of or vote for parties which are not organised on ethnic lines, but are sensitive to the concerns of minorities. However, in certain situations where people vote along ethnic, linguistic or religious lines and a certain minority is structurally not represented or underrepresented, it might be necessary to establish mechanisms to facilitate or guarantee the election of minority representatives with the view to reducing tensions. There exists a variety of mechanisms and dual voting for persons belonging to national minorities could be one of them.

6. A given mechanism may help to reduce tensions in one country, but create tensions in another.

7. Advisability and circumstances are therefore dependent on short-term rather than structural situations and raise the problem of what sort of interim responses to offer in these situations so that they will evolve to reflect general norms and customs. This is encapsulated in paragraph 25 of the note: "Integration .... [is a] conflict prevention strategy .... It is essential that persons belonging to minorities vote for mainstream parties. By doing so, they will also promote minority interests and concerns in the platforms of mainstream parties." The situation of new democracies has to be taken duly into account in this regard.

8. Before considering in greater detail the acceptability of the right to dual voting, it should be noted that the matter has a relatively limited scope. The right to dual voting is but one of the ways of guaranteeing that persons belonging to national minorities are represented in parliament. There are many other ways of achieving this aim,<sup>1</sup> both specific to minorities and more general in nature.

9. Slovenia is currently the only country that grants dual voting rights to members of national minorities: two representatives of the Italian and Hungarian minorities elected on special lists have full status as members of parliament. In 1998, the Slovenian constitutional court found that this arrangement was compatible with the principle of equality because it was enshrined in bilateral treaties with Italy and Hungary. Granting members of minorities dual voting rights would be disproportionate if there was too much deviation from the one person one vote principle.

10. In Cyprus, minority representatives belonging to religious groups only have observer status and are consulted on matters relating to religion.

11. Article 15 of the Croatian Constitution grants equal rights to members of all national minorities, stipulating that the law **might** give them the right - besides the general voting right - to elect their representatives to the Croatian Sabor (parliament), but such a dual voting was not introduced up to now. Articles 15 and 16 of the Law on elections of parliamentarians to Sabor (2003) stipulate that the national minorities have 8 seats in the Sabor, elected by a specific electorate covering the whole territory of Croatia. The Serbian national minority votes for 3 representatives; the Italian and Hungarian ones for 1 each; while the Czech and Slovak minorities elect together 1 representative; the Austrian, Bulgarian, German, Polish, Roma, Romanian, Rusinian, Russian, Turkish, Ukrainian, Valachian and Jewish minorities elect together 1 representative, and so do the members of the Albanian, Bosniak, Montenegrin, Macedonian and Slovene minorities.

### **III. The international legal framework**

12. **A. The 1950 European Convention on Human Rights** [hereafter: the Convention] offers protection for all the major fundamental rights and freedoms. The following rights apply to everyone present in countries that have ratified the Convention, irrespective of nationality: rights to life, liberty and security, respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression and information, freedom of the press, freedom of assembly and association, right to protection of property, and right to education and teaching in conformity with the parents' religious and philosophical convictions.

13. Article 14 of the Convention is crucial. It proscribes any distinction in the exercise of these rights "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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<sup>1</sup> See the two studies by the Venice Commission on this question, CDL-AD(2005)009 – Report on Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making processes in European countries, and CDL-INF(2000)004, Electoral law and national minorities.

14. This Article therefore establishes the universality of the rights embodied in the Human Rights Convention.

15. All 47 member states of the Council of Europe are parties to it. It therefore follows that persons belonging to national minorities and residing in one of the 47 member states enjoy all the rights specified in the Convention, read in conjunction with Article 14. They may not be discriminated against in the exercise of these rights and the European Court of Human Rights [hereafter: the Court] may be asked by an alleged victim to rule against any infringements of them.

16. The key provision for the subject of the present study is Article 3 of the first Protocol to the Convention, which provides for free elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". This provision is the European counterpart of the universal rule set out in Article 25 of the International Covenant on Civil and Political Rights (see also Article 2 of the Covenant on non-discrimination), as rightly stated in paragraph 9 of the HCNM note.

17. Minority rights therefore already enjoy extensive protection on the basis of international human-rights instruments of a general nature. Clearly, the standard-setting articles of the European Convention on Human Rights make provision for states to restrict the exercise of the rights set forth therein, but these restrictions must be provided by law, serve a legitimate aim and be proportional and necessary in the interest of public order or to protect the rights and freedoms of others.

18. These restrictions must be subject to judicial review and it is the Court that ultimately determines whether they meet the formal and substantive requirements, are proportionate and do not discriminate, in accordance with Article 14 of the Convention.

19. The **case-law** of the Court is taking in consideration the frame of the domestic legal system concerned: therefore, on the one side, it is very strict in reviewing compliance with the principle of equality and, on the other side, it allows the States in the matter a great margin of appreciation to balance the requirement of the protection of the minorities with the national, traditional constitutional and electoral arrangements. The Court declared, in the *Mathieu-Mohin & Clerfayt v. Belgium* judgment,<sup>2</sup> that "[t]he rights [enshrined in Article 3 of the Additional Protocol to the Convention] are not absolute.. the Court... has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate... In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'...It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election" (so-called "amplifier effects").<sup>3</sup> This conclusion leaves space for a policy of reverse discrimination if a legitimate aim is pursued and the free choice of the electors is not thwarted (*Podkolzina v. Latvia*).

20. The wide margin of discretion in electoral matters granted to states by the Court applies in particular to the choice of the voting system.

21. The Court and the previous European Commission of Human Rights found the great majority of electoral systems to be compatible with the Convention:

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<sup>2</sup> Judgment of 2 March 1987, application no. 9267/81, paras 52 and 54.

<sup>3</sup> (See also *Silvus Magnago and Südtiroler Volkspartei v. Italy*), European Commission of Human Rights, decision of 15 April 1996, application No. 25035/94: "What must be guaranteed is the principle of equality of treatment of all citizens; without however that it follows that all votes must necessarily have equal weight as regards the outcome of the election".

- Proportional representation or majority voting
- Simple (one round) or relative (two round) majority voting
- Two stage or indirect voting (as in the case of French senatorial elections by an electoral college made up of elected members)  
The question arises as to whether the Court might find such a system of indirect suffrage, in which voting is restricted to certain "privileged" citizens, even if they are elected members, to be compatible with the Convention, since in practice it deprives the great majority of the population of the right to vote.
- Single transferable or alternative voting, in which citizens receive two or more votes, which promotes co-operation between communities.
- In brief, the way how votes are translated into seats is compatible with Article 3 of the Additional Protocol to the Convention if it is in accordance with the equal suffrage principle.  
Exceptions, restrictions and variations are accepted if their purpose is lawful and necessary and the method chosen is proportionate to the outcome sought.  
According to the Court, such alternatives permit different treatment of minorities to enable them to participate effectively in public life, if reasonable.

22. Recently (in *Yumak and Sadak v. Turkey*), the Court stated that the 10 percent threshold applied in Turkey's elections is perhaps the most suitable one but the Turkish authorities are in the position to conveniently assess the choice of an appropriate system. Therefore the states can pay due attention to the general exigencies of the national electoral policies in conformity with historical and political factors. Article 3 of the Protocol goes no further than prescribing "free" elections held at "reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people" in the choice of the legislature. It follows that Protocol 3 "does not create any obligation to introduce a specific system" of elections, but it applies in particular to the modalities of the elections.

23. **B. The Framework Convention for the Protection of National Minorities (FCNM)** is the specific legal binding instrument ensuring protection of minorities in the Council of Europe member states. According to Article 15 FCNM "the 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". The explanatory report underlines that the provision's aim is "above all to encourage real equality between persons belonging to national minorities and those forming part of the majority". *Inter alia* the following measures are listed to create the necessary conditions for the participation by persons belonging to national minorities:

- consultation with these persons by means of appropriate procedures and, in particular, through their representatives institutions;
- involving these persons in the preparation, implementation and assessment of measures likely to affect them directly;
- undertaking studies, in conjunction with them, to assess the possible impact on them of the projected measures;
- effective participation of persons belonging to national minorities in the decision making processes and elected bodies both at national level and local levels; decentralised or local forms of government.

24. A recently (April 2006) published compilation of opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities offers interesting information on the interpretation given by that body to the mentioned provision of the FCNM.

25. The position of the Advisory Committee was clearly stated in the first cycle opinion on Hungary adopted on 22 September 2000, when it recognised that "the question of establishing electoral arrangements for parliamentary representation is a domain where from the point of view of international standards (Article 3, Protocol 1 of the European Convention on Human Rights, and Article 15 of the Framework Convention) states enjoy a broad margin of appreciation". But, notwithstanding that "it cannot and would not wish to trespass thereon", the Advisory Committee did not refrain from criticising those states which, according to their own domestic standards, had adopted electoral arrangements for parliamentary representation which appeared insufficient and not satisfying. As a matter of fact, the body did not envisage, of its own initiative, proposals for convenient provisions aimed at insuring the representation of national minorities in the elective national and local assemblies of the concerned states. Note that the issue of dual voting was not considered.

26. The Advisory Committee respected the choice of the states dealing with the organisation of the national parliamentary institutions and underlined, for instance, the importance of consultative bodies in the field of national minorities policies, the necessity of guaranteeing to persons belonging to national minorities fair presence in these bodies, and the requirement of having efficient administrative departments especially entrusted with the task of dealing with the problems of the national minorities. The Committee clearly shared the idea that the implementation of Article 15 FCNM can be provided for in full respect with the constitutional traditions of the states, especially when they have a long tradition of compliance with the principles of democracy and freedom. On the other side, the Committee pays great attention to the legislative encroachments on the exercise of the electoral rights of the persons belonging to national minorities (see, for instance, the remarks on the language voting requirements in Estonia) and suggested the necessary reforms many times. In the same line the Committee coherently emphasised the importance of the territorial or cultural self-government in the field of the protection of national minorities without suggesting the adoption of one solution or another, therefore complying with its programme not to interfere with the margin of appreciation of the states in the matter.<sup>4</sup>

27. In the first cycle opinion on Romania, adopted on 6 April 2001, the Committee mentioned the risk that institutional arrangements aimed at insuring the participation of persons belonging to national minorities may give a preferential treatment to one organisation of a national minority and sideline to some extent other organisations of the same minority and the persons who prefer to accede to this last organisation. This remark could be easily connected with the consideration made by the HCNM in his note that in any case the tendency of persons belonging to minorities to be members of, or to vote for parties which are not organised on ethnic lines, has to be encouraged even in the presence of ethnic political parties. No political or cultural minority organisation should be given the monopoly of the representation of a minority.<sup>5</sup>

#### **IV. The Venice Commission**

28. The Code of Good Practice in Electoral Matters details the various aspects of equal suffrage, which is one of the principles of the European electoral heritage. Equal suffrage entails *inter alia*:<sup>6</sup>

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<sup>4</sup> On participation of persons belonging to national minorities in elected bodies, see also the document of the Advisory Committee on the Framework Convention for the Protection of National Minorities entitled « Participation of persons belonging to national minorities in cultural, social and economic life and in public affairs », adopted on 27 February 2008.

<sup>5</sup> See CDL-AD(2004)040, in particular paragraph 43 ff.

<sup>6</sup> CDL-AD(2002)023rev, point I.2.

“2.1. Equal voting rights: 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 (*one person – one vote principle in the narrow sense*).

2.2. Equal voting power: seats must be evenly distributed between the constituencies.”

29. The Code of Good Practice in Electoral Matters contains a specific provision concerning protection of minorities, drafted as follows:

“2.4. Equality and national minorities

...

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.”

30. According to the explanatory report annexed to the Code “Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, e.g. by waiving the quorum for the national minorities’ parties, do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists”.<sup>7</sup> However, the Code is not explicit about whether two votes are possible when voters not belonging to minorities have only one.

31. In its opinions and reports as well, the Venice Commission has frequently dealt with electoral matters in the field of the protection of national minorities.

32. A clear summary of its positions can be found in document CDL-AD(2005)009 - Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries.

33. The basis is the freedom of associating in the form of political parties representing national minorities: “yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties” (CDL-AD(2005)009, paragraph 68).

34. According to a principle laid down in the Code of Good Practice in Electoral Matters, and frequently stated by the Commission also in other documents, 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.<sup>8</sup>

35. But neither candidates nor voters must find themselves obliged to reveal their membership to a national minority.

36. Electoral thresholds should not affect the chances of national minorities to be represented.

37. Number, size and magnitude of the electoral districts may be designed with the purpose to enhance the minorities’ participation, not only but especially in territories where national minorities represent a substantial part of the population. In these cases the delimitation of

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<sup>7</sup> Para 23.

<sup>8</sup> CDL-AD(2002)023rev, I.2.4.b.

territorial entities (constituencies, municipalities) may favour the representation of the national minorities and prevent the dispersal of their members.

38. In this perspective, if it is necessary for member 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 (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); "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). Therefore, "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" (CDL-AD(2004)040, Opinion on the law for the election of local public authorities in Romania).

## **V. The OSCE – the Lund Recommendations**

39. The importance of the electoral process for facilitating the participation of minorities in the political sphere is also emphasised by "The (OSCE) Lund Recommendations on the effective participation of national minorities in public life" taking into account the experience in Europe and elsewhere.

40. The right to take part in the conduct of public affairs (including the rights to vote and to stand for office) has to be guaranteed to persons belonging to national minorities as well as the freedom to establish political parties, which can be based on communal identities or are not identified exclusively with the interests of a special community.

41. Different arrangements of the electoral system may facilitate minority representation:

- in presence of minorities concentrated territorially single member districts may provide sufficient minority representation;
- proportional representation systems may assist in the representation of minorities;
- some forms of preference voting – single transferable vote (proportional system), alternative vote (majority system)<sup>9</sup> – may facilitate minority representation in connection with ranking candidates in order of choice by voters;
- lower threshold (or exemption from the threshold) may enhance the inclusion of national minorities in governance (see the HCNM document, paragraph 7);
- delimitation of electoral districts should facilitate equitable representation (see the HCNM document, paragraph 15).

42. These arrangements should, where appropriate, be made at the national level as well as at the regional and local levels.

## **VI. The admissibility of specific rules on the representation of national minorities in elected bodies**

43. As stated by the HCNM (paragraph 7 of the document), there are a variety of mechanisms to implement the right to effective participation in public affairs. Participation of national minorities in public life, and more precisely their representation in elected bodies, can be ensured in certain cases by applying the general rules of electoral law with a view (or the effect)

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<sup>9</sup> See the HCNM document, paragraph 24.



of ensuring proper minority representation; in other cases, States apply specific rules providing for representation of minorities or facilitating it.

44. For instance, the choice of the proportional electoral system may ensure an effective participation, even when no exception is introduced to the general electoral system. But obviously when a threshold is introduced, the provision for a lower threshold for the national minorities parties implies special exceptions to the general rules. On the other side, single member electoral districts in areas where territorially concentrated minorities are present, may imply an exception to the general rules on allocation of seats only if the number of electors assigned to the minority electoral districts are not complying with the criteria of the general distribution of voters in the electoral districts provided for by the general rules of electoral law. Reserved seats are a more obvious way of favouring minority representation.

45. Specific rules on representation of minorities in elected bodies may affect two aspects of equal voting rights, as defined in the Code of Good Practice in Electoral Matters: equal voting rights and equal voting power.<sup>10</sup>

46. The case-law of the Court recognises the lawfulness of “preferential treatment” measures to assist national minorities if these serve a lawful purpose and if the means used are not disproportionate to the objective sought. Whether such measures are legitimate is a matter for states' discretion. Differences of treatment would probably only be disproportionate where the voting inequalities were significant.

47. Special provisions on minorities' voting rights do not necessarily conflict with the principle of equality but every adaptations of voting results is an example of reverse discrimination. Therefore they have to be justified according to the principle of proportionality, which means that they do not violate the principle of equality if and as far as they are necessary to cover the gaps and difficulties which hamper the participation of minorities in public life.

48. With regard more particularly to specific voting rules for national minorities, states may deviate from the principle of equal suffrage by adapting their electoral systems in the narrow sense (way or translating votes into seats) in a legitimate fashion and adopting special systems in respect of minorities if their purpose is lawful and necessary, and the method chosen is proportionate to the outcome sought.

49. States have in the matter a large scope of appreciation and many different solutions are possible. International practice does not oblige them to adopt one or another specific solution. when ensuring the proportional representation of minorities in the public decision-making processes [; in doing so they will take into account their constitutional principles to the extent that these principles are dealing with the matter and give specific guidelines for the solution of the problem]. Therefore, the states [are allowed to adopt solutions which are coherent with their constitutional systems, and] they can introduce special exceptions to these systems according to the principles of rationality and proportionality.<sup>11</sup> Therefore, votes need not necessarily have equal weight as regards the outcome of the election.

50. If a state is a newly established democracy after many years of totalitarian regime and of repression of its minorities, it could be advisable, as a transitional measure, to provide for reserved seats for the minorities in the elective assemblies. But this solution does not favour the integration of the minorities in the general societies, especially not if the members of a minority are not allowed to make a choice between different political parties because the seat or the seats are reserved only to a political party which pretends to be the exclusive representative of the minority. Therefore the choice of a solution has to be made not only balancing the rights

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<sup>10</sup> CDL-AD(2002)023rev, I.2.1 and I.2.2, see above ch. IV.

<sup>11</sup> On the reach of the principle of equal suffrage, see also the HCNM note, paragraphs 12 to 16.

and interests of the persons belonging to a national minority with the rights and interests of the people at large, but also balancing the rights and interests of the persons belonging to a national minority with the rights and interests of the minority as a group or a community.

51. History is especially relevant in this respect. When in the past, for instance in an old democracy, there was free adherence of a minority or of a part of it to national political parties, irrespective of its ethnic identity, and, therefore, integration in the society at large was in progress, it might be preferable to avoid reserving a seat to a political party representing a minority, and rather assign the seat, which is reserved to the minority, to the person belonging to the minority who, as a candidate, obtained a proportionally larger support in a national political party than other candidates of other national political parties, equally belonging to the minority. This can be a means of balancing the requirement of the integration of the minority in the society at large, on the one hand, and the necessity of ensuring the presence of the national minorities in the national decision-making processes, on the other.

52. All the solutions providing for reserved seats for persons belonging to national minorities imply the disadvantage that the persons concerned are obliged to declare their ethnic or linguistic identity. The danger cannot be avoided. Therefore it is necessary that the human rights and fundamental freedoms at large are guaranteed by the national legal system to all those who declare themselves to belong to a national minority.

## **VII. The specific issue of dual vote**

53. According to the HCNM, "States enjoy less flexibility in altering the "one person, one vote"<sup>12</sup> principle, than in designing the methods that translate votes into seats of parliament" (par. 16 of the document). If admissible, exceptions to the "one person, one vote" principle must be rare. [Since they depart from the fundamental principle of equal voting rights, they could be justified only by the impossibility to reach the expected result through implementation of the numerous special mechanisms which are available, including positive discrimination in conversion of votes into seats.] The issue remains whether these exceptions are completely inadmissible. The Court has not adjudicated this question. In brief, two kinds of arguments may be adduced for the general inadmissibility of such exceptions. First, they might be said to be inadmissible because the principle of equal voting rights is to be considered of an absolute nature. Such an absolute character, however, would be a peculiarity in electoral or human rights law, if not in law in general. The second argument for a general inadmissibility might be based on the assumption that other measures allowing for minority representation are always at hand. Such assumption requires further examination.

**54. *It is on this point that the conclusions by Ms Durrieu and by Mr Bartole differ.***

### **Solution based on Mr Bartole's comments**

55. ***Mr Bartole considers that*** the dual voting system for persons belonging to national minorities can reconcile the requirement of providing for a reserved representation of a minority, especially if a State comes from a totalitarian experience, with the necessity of favouring the integration of the minority in the national political life. It is an example of reverse discrimination which may be justified by the history of a country, especially if it is provided for as a temporary arrangement until the effects of the repression and of the totalitarian regime are satisfactorily (even if only partially) cancelled. It may be the only system to ensure, on the one side, that the minority has the guarantee of being represented in public affairs, and, on the other side, that the persons belonging to the national minorities are allowed, on an equal basis, to take part in the national political debate. Admittedly, other measures to ensure participation of minorities in public life exist which do not impinge, or impinge less, on other voters' right to equal

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<sup>12</sup> Equal voting rights; equal numerical value of votes.

suffrage. However, the mere fact that other measures than dual vote exist, and indeed have been adopted by other States, does not call for the conclusion *in abstracto* that the dual vote is unacceptable as such. Dual vote could only be found inadmissible *in concreto* that is if in a particular case it failed to pass the proportionality test.<sup>13</sup>

56. Moreover, obviously, the freedom of political expression has to be provided for not only in the vote for the general national representation, but also when the elections for the reserved seats are at stake: it could be particularly helpful if more than one political party representative of a minority were allowed to run in the election for the reserved seat. However it would be better to assign the seat, which is reserved for the minority, to the person belonging to the minority, who, as a candidate, obtained a proportionally larger support in a national political party than other candidates, who also belong to the minority, of other national political parties.

### **Solution based on Ms Durrieu's comments**

57. *Ms Durrieu considers that there should be no exception to the principle of the equal voting rights and she believes that the development of the argument in the body of the HCNM note leads to such a conclusion.*

58. The opinion of the HCNM, according to which the integration of minorities into society is the best conflict prevention strategy, has to be approved. It was enriched by the Commission's observations on the notion and the principle of "citizen's identity" or of acquired "citizenship" that goes beyond ethnic identity, which leads to progressive and successful integration. This is the aim to be reached and a way of preventing conflict in an efficient manner. In this case, a double vote could be contrary to the approach. The reply must be proportionate and adapted to the objective.

59. On that basis, it seems unlikely that granting dual voting rights to a "privileged minority" will improve their relations with other citizens. Indeed, such a privilege, in the legal sense of the term, could lead to conflict. Other solutions, such as those described in this framework allow the avoidance of interfering with the principle of equality or at least for less important inequalities, involving only the principle of equal voting power. According to the principle of subsidiarity, they have then to be always preferred to dual voting.

60. In conclusion, while exceptions may be possible to the principle of the equal voting power, this is not the case with regard to the equal voting rights. Therefore, dual voting should not be retained, except for very exceptional cases, very particular situations, sensitive minorities and brief transitions where no special adaptation mechanism would be satisfactory.

### **VIII. Conclusion**

61. Representation of minorities in elected bodies may be ensured either by the application of the general rules of electoral law or by specific rules. The situation depends on a number of variables, such as the nature of the electoral rules (e.g. proportional v. plurality/majority system), the repartition of the minorities (in particular, whether they are in a majority in any part of the territory) and the degree of inclusion, in practice, of minorities in the political system.

62. The long-term interests of minorities and of societies as a whole are in principle better served by representation under the "ordinary electoral system" which guarantees equal rights to citizens, irrespective of the group to which they are initially affiliated. However, this does not exclude specific measures of a transitional nature when needed in order to ensure proper

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<sup>13</sup> Cf. European Commission of Human Rights, decision of 1 September 1993, *Hewitt and Harman v. the United Kingdom*, application 20317/92.

representation of minorities. These solutions include *inter alia* exceptions to rules on the threshold, reserved seats and overrepresentation of districts in which the minority is in a majority.

[63. Dual voting as a system is very seldom applied in practice.]

64. Alternative, more decentralised, political models might offer another solution, especially in situations where national minorities are concentrated in certain regions. The recognition granted to regional forms of government in Italy (Trentino-Alto Adige and Valle d'Aosta), Spain (Catalonia and the Basque Country) and the United Kingdom (Scottish devolution and recent developments in Northern Ireland) shows that states can develop forms of organisation that reconcile political unity and the presence of minorities, while continuing to respect universal rights.

65. This might lead other countries to accept greater autonomy for their minorities. However, there also counterexamples, such as the rejection of the Annan plan by Cyprus.

66. In the context of autonomy for national minorities, consideration needs also to be given to the state of Europe and its evolution. The break-up of multi-ethnic empires and the increasing number of identity-based demands in the Council's 47 member states, including the examples of Kosovo, Chechnya, Transnistria, South Ossetia and Abkhazia, are all grounds for caution. The threat of terrorist violence, as in the Basque Country, or of Balkan-style ethnic cleansing are also sad realities.