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**ELECTORAL LAW AND REPRESENTATION OF MINORITIES**

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## Electoral law and representation of minorities

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1. The protection of minorities has become one of the major preoccupations of European public law. The involvement of members of minorities in the various aspects of life in society and more specifically their political participation serve two goals.<sup>1</sup> In the first place it is a tool to advance a stable democratic system. The exclusion of minorities from political participation, can indeed pose a real risk to the stability of the system. The High Commissioner for the protection of minorities, Mr Vollebeck, rightly pointed out - and I quote - "If minorities do not feel that their voices are being heard through the democratic process, they will be more likely to resort to less acceptable means for promoting their interests. Nothing is more dangerous in the long term than a cohesive group of disgruntled citizens who sees no point in showing loyalty to a State because it feels "foreign" to them. If however, they feel that they "belong", that the State is also "theirs" then civic identity is more likely to transcend that of ethnicity, linguistics or religion."<sup>2</sup> The effective participation of minorities in public life, is thus an important factor to prevent conflicts and the alienation of minorities, to establish of a peaceful society and to advance a real democratic governance.<sup>3</sup>

2. In addition to the democratic stability argument, the effective political participation of minorities can also be understood from a minority rights perspective.<sup>4</sup> The involvement of minorities in political decision making, - especially when it affects them directly - can be an important tool to guarantee minority rights. A report from Human Right Watch, contrasting municipalities in Croatia where Serb parties participate in local government, with those municipalities where they are excluded, despite constituting a significant share of the population, clearly suggests that the political inclusion of the Serb minority significantly advances minority rights.<sup>5</sup> In order to ensure that the specific concerns of the minorities are taken into account, it is essential that they have the possibility to partake into the political decision-making process in matters that directly affect them.

3. The full and effective participation in the various aspects of life in society, and more specifically in political life, is rightly considered to be a "third generation minority right".<sup>6</sup> This right has its roots in international human rights law. Article 25 of the ICCPR notes that every citizen shall have the right and the opportunity... (a) to take part in the conduct of public affairs directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." The key provision for the subject in the ECHR 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." In more recent documents that date from the 1990's, a specific emphasis is laid on the right of political participation of minorities. Let me just refer to paragraph 35 of the Concluding Document of the Copenhagen Meeting of the Conference on the Human

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<sup>1</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », in Political Parties and Minority Participation, Friedrich Ebert Stiftung – Office Macedonia, Skopje, 2008.

<sup>2</sup> K. Vollebaek, OSCE High Commissioner on National minorities, Statement to the 2<sup>nd</sup> session of the UN Forum on Minority Issues, [www.osce-hcnm.org](http://www.osce-hcnm.org)

<sup>3</sup> See Ar. Lijphart, Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries (Yale University Press, New Haven, 1999)

<sup>4</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », p. 6.

<sup>5</sup> Human rights Watch, (HRW), Croatia: A Decade of Disappointment Continuing Obstacles to the Reintegration of Serb Returnees, vol 18, (2006), p. 19, referred to in F. Bieber, « Introduction : Minority Participation and Political Parties », p. 6

<sup>6</sup> G. Sinania, "Minority in Albania and their participation in Public Life", in Political Parties and Minority Participation, Friedrich Ebert Stiftung – Office Macedonia, Skopje, 2008, 201.

Dimension of the CSCE of 1990<sup>7</sup>, to article 2, paragraphs 2 and 3, of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992<sup>8</sup> and *last but not least* to Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities of 1995<sup>9</sup>. The rather general standards developed in these documents, have been further elaborated by international organisations and bodies active in this field, such as the OSCE High Commissioner on National Minorities (HCNM), the Office for Democratic Institutions and Human Rights (ODIHR) and also the Venice Commission. The recommendations they produced in so-called “soft law” documents, such as the 1999 Lund Recommendations on the Effective Participation of National Minorities in public life<sup>10</sup> (HCNM), the Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (ODIHR)<sup>11</sup> and the Code of Good Practice in Electoral Matters<sup>12</sup> or the study “Electoral law and National Minorities”, of the Venice Commission<sup>13</sup>, all aim to provide guidance on guaranteeing the right of minorities to effective participation in public life and are based on experience and examples of good practice.

4. All these documents show that there is a wide spectrum of mechanisms or models to create the conditions for the participation of minorities. Three types of processes can be distinguished: the consultation of minorities by means of appropriate procedures, the participation of minorities in the decision making process both at national level and local levels, when necessary by means of a specific electoral design, and finally decentralisation and minority self government. As the High Commissioner on National Minorities rightly pointed out, the “suitability of a certain mechanism or model will depend on the historic, geographic, political and economic circumstances of each individual case.”<sup>14</sup> States enjoy a large margin of appreciation in adopting the appropriate measures. Although parliamentary representation is surely not the only and perhaps even not the most effective form of minority inclusion, it is surely symbolically the most important. Minorities represented at a national, regional or local level, feel that they have a stake in society and that their voices can be heard. For this reason the Parliamentary Assembly of the Council of Europe already in 2003 recommended to “pay particular attention ... to ensure parliamentary representation of minorities”.<sup>15</sup>

5. In my report I will focus on the electoral law and the possibilities it gives to members of national minorities of being present in elected bodies. The Venice Commission has a double approach. In many opinions the Commission took the stance that “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

<sup>7</sup> § 35 (1) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities

<sup>8</sup> Article 2.2 Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. 3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

<sup>9</sup> Article 15: “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.”

<sup>10</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, September 1999, . Published and disseminated by the OSCE High Commissioner on National Minorities (HCNM). Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (2001)

<sup>11</sup> Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (2001)

<sup>12</sup> Code of Good Practice in Electoral Matters, Guidelines and explanatory report, Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002) CDL-AD (2002) 23

§ 2.4.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

<sup>13</sup> Report on “Electoral Law and National Minorities”, 25 January 2000, CDL-Inf (2000) 4.

<sup>14</sup> K. Vollebaek, OSCE High Commissioner on National minorities, Statement to the 2<sup>nd</sup> session of the UN Forum on Minority Issues, [www.osce-hcnm.org](http://www.osce-hcnm.org)

<sup>15</sup> Recommendation 1623 (2003), adopted by the Parliamentary Assembly on its 27th sitting on 29 September 2003.

to which they are initially affiliated. However, this does not exclude specific measures of a transitional nature when needed in order to ensure proper representation of minorities”.<sup>16</sup>

6. I believe this double approach to be very sound. The ultimate aim of minority protection is the full integration of the minorities in the society. Ideally, in a well integrated society, the ordinary rules of electoral law, which treat all people in the same way, should in principle create the conditions for persons belonging to minorities to participate in the electoral process and to have access to the electoral assemblies. These persons have the right to vote and to stand for office. They also have the right to establish their own political parties, organised on ethnic lines. In many countries such parties have been created. They have been “at the forefront of representing minority interests” and have been influential. Only in a few countries – Albania, Bulgaria and in the past also Bosnia Herzegovina – mono ethnic parties have been prohibited. Such bans constitute a restriction upon the freedom of association, which – according to the Venice Commission – can hardly be consistent with the European Constitutional heritage.<sup>17</sup> Moreover, these bans have to a large extent been ineffective. In Albania, the Union for Human Rights is the successor of the Greek minority party Omonia and in Bulgaria, the Movement for Rights and Freedoms is, *de facto*, the Turkish minority party. Both are tolerated under seemingly non ethnic labels.<sup>18</sup> The assessment endorsed by the Venice Commission that bans on ethnic parties are unusual, ineffective and incompatible with human rights standards<sup>19</sup>, does not mean that such parties are indispensable. On the contrary, in a well integrated society persons belonging to minorities, should be encouraged to be members of, or to vote for parties which are not organised on ethnic, linguistic or religious lines, but are sensitive to concerns of minorities.<sup>20</sup>

7. However we do not live in an ideal world. In some societies the process of integration is still going on. When in such societies 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. Affirmative action can then be justified. Affirmative action aims at the establishment of *de facto* not only *de jure* equality. In connection with national minorities it can be defined as a set of “policies and practices which favour ethnic, linguistic or religious groups who have historically experienced disadvantages” in effectively participating in public life.<sup>21</sup> Affirmative action is very often subject to criticism. Measures to favour minorities are often assessed as leading to the discrimination of the majority. The European Court on Human Rights has taken a nuanced stance on the issue. The Court is on the one side very strict in reviewing compliance with the principle of equality, but on the other side it allows the States a great margin of appreciation in the choice of the voting system and more specifically in balancing “the requirement of the protection of minorities with the national, traditional constitutional and electoral arrangements.”<sup>22</sup> The Court accepts that all votes must not necessarily have equal weight as regards the outcome of the election. If a legitimate aim is pursued – providing means for an effective participation of minorities – and if the action taken is

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<sup>16</sup> [Report on Dual Voting for Persons belonging to National Minorities adopted by the Council for Democratic Elections at its 25th meeting \(Venice, 12 June 2008\) and the Venice Commission at its 75th plenary session \(Venice, 13-14 June 2008\)](#), CDL, 2008/013, § 65

<sup>17</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, Adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62th Plenary Session (Venice, 11-12 March 2005) Study No. 307 / 2004, CDL 2005/009

<sup>18</sup> Daniel Bochsler, Electoral rules and the representation of ethnic minorities in Post-Communist democracies. in: European Yearbook of Minority Issues 7, p. 16

<sup>19</sup> Report on “Electoral Law and National Minorities”, CDL 2000/4, 14

<sup>20</sup> [Report on Dual Voting for Persons belonging to National Minorities](#), CDL, 2008/013

<sup>21</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009.

<sup>22</sup> [Report on Dual Voting for Persons belonging to National Minorities](#), CDL, 2008/013.

proportional to this aim and to the real needs of minority group in question, then the affirmative action can be justified.<sup>23</sup>

8. States have a large scope of appreciation in this matter. Many different solutions are possible. International practice does not oblige states to adopt any specific solution when ensuring the representation of minorities in the public decision-making processes.<sup>24</sup> In its Report on “Dual voting for persons belonging to National Minorities”, the Venice Commission stated that “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 integration, in practice, of minorities in the political system.”<sup>25</sup> The Venice Commission stated also that “there is no absolute rule in this field”<sup>26</sup> What can be an appropriate solution to promote representation of minorities in one country, may hinder this representation in another. Whether a preferential treatment is legitimate and what kind of measures have to be taken, is a matter of the states’ discretion. Affirmative action electoral rules can be formulated for the various dimensions of the electoral system and the electoral law. In this report I will examine specific electoral rules related to : 1) the electoral system in general (proportional or mixed system) 2) the electoral districts (their size, form and magnitude) 3) the numerical threshold 4) reserved seats and 5) the voting rights, and more specifically the dual voting right.

## 1. The electoral system in general

9. Generally spoken, the choice of the electoral system – proportional representation, majoritarian rule or a mixed system<sup>27</sup> – has other explanations than minority inclusion or exclusion<sup>28</sup>, but it is obvious that it is not irrelevant to the participation of members of minorities. It is conventional wisdom that the more an electoral system is proportional, the greater the chances minorities have to be represented in the elected bodies. Majoritarian systems are often seen as not appropriate.<sup>29</sup>

10. This is however only a relative, not an absolute truth. The proportionality of the outcome may indeed be influenced by other factors. The presence of an electoral threshold, the size of the constituencies, the number of seats per constituency are decisive factors. Bieber rightly pointed out, - and I quote “that PR in combination with relatively high thresholds might actually be a greater disadvantage to minorities than majoritarian systems when these minorities are geographically concentrated. In Albania for example, the Greek minority party has been able to enter the Parliament only due to the mixed electoral system.”<sup>30</sup> In its report on “Electoral law and National minorities” the Venice Commission recalled that a proportional system ... does not in itself guarantee that the composition of the elected body is a true reflection of that of the

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<sup>23</sup> Report on Dual Voting for Persons belonging to National Minorities; CDL, 2008/013; Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries. CDL 2005/009.

<sup>24</sup> [Report on Dual Voting for Persons belonging to National Minorities](#), CDL, 2008/013 § 5.

<sup>25</sup> [Report on Dual Voting for Persons belonging to National Minorities](#), CDL, 2008/013, § 65

<sup>26</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009.

<sup>27</sup> In some countries (Albania, Hungary, Lithuania, and earlier applied in Bulgaria, Croatia, Macedonia, Russia and Ukraine), a mixed electoral systems is applied: one part of the parliamentary seats is allocated in single-seat districts, whereas the other part is accorded by PR.

<sup>28</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », p. 17.

<sup>29</sup> [Report on Dual Voting for Persons belonging to National Minorities](#), CDL, 2008/013; Daniel Bochsler, Electoral rules and the representation of ethnic minorities in Post-Communist democracies, 5

<sup>30</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », p. 17..

electorate. The proportionality of the outcome may be limited by several factors<sup>31</sup> So lets concentrate on some of the these factors.

## 2. The electoral districts

11. Above all, the size of the constituencies and the number of seats they contain, play an essential part in the proportionality of the result: the fewer seats there are in a constituency, the higher the electoral quotient is and the harder it is for a party to obtain a seat.<sup>32</sup> Therefore the delimitation of the constituencies can be used as a tool to advantage or to disadvantage minorities. The phenomenon of the ethnic gerrymandering is well known. Constituencies can be drawn to prevent that state majorities become regional minorities, and to reduce the chances minorities have to gain a seat.<sup>33</sup> But the delimitation of the constituencies in such a way as to prevent dispersal of the members of a minority, can also be a tool to ensure minority representation.<sup>34</sup> When the minority is territorially concentrated, the recognition of this territory as a constituency, helps the minority to be represented in the elected bodies, especially if a majority system is applied.<sup>35</sup> Single member electoral constituencies, in areas where minorities are concentrated, enhance the chance for the minorities to be represented, especially when a parliamentary seat is attributed to the constituency, even if the number of voters is not complying with the criteria provided for by the general rules of electoral law.<sup>36</sup> Another possibility is to establish - as it has been done in Croatia - a country-wide electoral district, allowing minorities to choose whether to vote for a minority candidate or for a candidate in the constituency of their residence.<sup>37</sup> Once again, it is not possible to provide for a “best practice” in this field, as much depends on both the legal and the factual situation in a given state. In general, it can only be confirmed that the delimitation of electoral constituencies should facilitate equitable representation of the whole population and that it can be a tool to favour the representation of the national minorities by preventing the dispersal of their voters.

## 3. The numerical threshold

12. In many proportional representation (PR) systems, an electoral threshold has been introduced, reserving seats to parties which reach a minimum percentage of the votes.<sup>38</sup> The threshold varies generally between 2,5 (Albania) to 5 percent, but sometimes it runs up to 7 % as in Russia or even to 10 % in Turkey. The main reason to introduce a threshold is to prevent the further fragmentation of the political spectrum. The effect is that small parties have difficulties to obtain seats. The electoral threshold is also an important obstacle for minority

<sup>31</sup> Report on “ Electoral Law and National Minorities”, CDL 2000/4, p. 5.

<sup>32</sup> Report on “ Electoral Law and National Minorities”, CDL, 2000/4

<sup>33</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », p. 21. See D. Bochler , Electoral rules and the representation of ethnic minorities in Post-Communist democracies. p. 9: “Countries in which (some) minorities are de facto excluded from their own representation because the districts are too small for (some) non-concentrated minority groups Croatia, Macedonia, Slovenia. Only for single-seat district mandates: Hungary, Lithuania, Russia (1993–2003), Ukraine (1994–2002), Macedonia (only in 1998)”

<sup>34</sup> Recommendation 43, on Territorial Autonomy and National Minorities, of the Congress of Local and Regional Authorities of the Council of Europe. CDL 2005/009

<sup>35</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009

<sup>36</sup> [Report on Dual Voting for Persons belonging to National Minorities.](#)

<sup>37</sup> F. Bieber, « Introduction : Minority Participation and Political Parties » .

<sup>38</sup> Analysis of the electoral thresholds adopted in the member States which have proportional representation shows that only four States have opted for high thresholds: Turkey has the highest, at 10%; Liechtenstein has an 8% threshold; the Russian Federation and Georgia use 7%. A third of the States impose a 5% threshold and 13 of them have chosen a lower figure. The other member States (seven in number) do not use thresholds. Moreover, in several systems the thresholds are applied only to a restricted number of seats (in Norway and Iceland, for example). Thresholds for parties and thresholds for coalitions may be set at different levels. In the Czech Republic, for example, the threshold for one party is 5%, whereas in the case of a coalition it is raised by 5% for each of the constituent parties. In Poland, the threshold for coalitions is 8% whatever the number of constituent parties. There are similar variations among the thresholds for independent candidates: in Moldova, for example, the relevant threshold is 3%.

parties.<sup>39</sup> To lower the threshold<sup>40</sup> or even to abolish it for minority parties is a very effective affirmative action to enhance minority representation. In Serbia the minority parties failed to cross the 5% threshold in the 2003 parliamentary elections. After the abolishment of the threshold in 2004 five minority parties representing Hungarians, Bosniaks, Albanians and Roma returned to Parliament in the next elections of 2007. In Poland and Germany the threshold of 5% does not apply to minority lists.<sup>41</sup> The European Court on Human Rights stated in the case *Yumak and Sadak v. Turkey*, that it would be desirable for the 10% threshold applied to Turkish elections to be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies.<sup>42</sup> The position of the Venice Commission is that electoral thresholds should not affect the chances of national minorities to be represented. The lowering or even the lifting of the threshold for minority parties can be justified

#### 4. Reserved seats<sup>43</sup>

13. Reserved seats are of course the most obvious way of favouring minority representation. In many countries a certain number of seats are set aside on basis of ethnic affiliation. The mechanisms for distributing such seats vary greatly.<sup>44</sup> In Slovenia, one seat in the National Assembly is reserved for the Italian minority and one seat for the Hungarian minority.<sup>45</sup> In Montenegro another system of reserved seats for the Albanian minority exists since 1998, based on a special constituency with five reserved seats for the Albanian community. In Kosovo, 20 seats in the 120-member Parliament have been set aside for minorities. Irrespective of the participation of minorities and the additional seats minorities might gain through proportional representation, 10 seats are reserved for Serbs and 10 for all other minorities.<sup>46</sup> In Romania, the organisations of citizens belonging to a national minority, which do not win parliamentary representation in either chamber, are entitled to one seat each in the Chamber of Deputies on the condition that the organization obtains at least 10 per cent of the average number of valid votes casted for an elected Deputy. There is no upper limit on the number of seats reserved for a minority. After the 2008 elections, 18 seats were distributed among ethnic minority parties. In Croatia the law specifies that out of 140 seats, eight seats are guaranteed in advance for national minority members.<sup>47</sup> The most recent Hungarian Act on the Elections of Members of Parliament, which was adopted in December 2011, also contains specific provisions aimed at favouring the participation of national minorities in parliament. Nationality lists may be drawn up by the thirteen recognised nationality self-governments, supported by at least one per cent of the voters registered with a maximum of 1,500 signatures

<sup>39</sup> D. Bochsler writes: "There are plenty more countries that use PR electoral systems with high legal thresholds that prevent their ethnic minorities from accessing national parliament with their own parties: the Czech Republic (5% threshold), Russia (7%), and until 2003 Serbia (5%). In Estonia (5%),<sup>40</sup> Latvia (5%), Moldova (6%), and Ukraine (3%), only the Russian minorities (in Moldova along with ethnic Ukrainians) could numerically surpass the thresholds (...) In Slovakia, only the Party of the Hungarian Coalition can pass the 5% threshold, whereas other minority groups fall below the threshold. In Montenegro, parties underlie a 3% threshold. This hurts all minorities apart from the large Serbian community (32% of the population), which in the 2006

elections was for a first time represented through the Serbian List. For the Albanian minority, a special rule applies.' Daniel Bochsler, *Electoral rules and the representation of ethnic minorities in Post-Communist democracies*, p. 14-15.

<sup>40</sup> Since 1992 Lithuania applies a lower threshold for its minorities.

<sup>41</sup> Report on "Electoral Law and National Minorities", CDL 2000/4.

<sup>42</sup> ECHR, *Yumak and Sadak v. Turkey*, 8 July 2008, § 147. "the Court considers that in general a 10% electoral threshold appears excessive."

<sup>43</sup> A. Reynolds ;, *Reserved seats in National Legislatures: a research note*, *Legislative studies Quarterly*, 2011,

<sup>44</sup> F. Bieber, « Introduction : Minority Participation and Political Parties », p. 24.

<sup>45</sup> Report on "Electoral Law and National Minorities", CDL 2000/4.

<sup>46</sup> 10 seats for the representatives of the [Serbs](#). 4 seats for the representatives of the [Roma](#), [Ashkali](#) and [Egyptians](#). 3 seats for the [Bosniaks](#), [Montenegrins](#), [Croats](#), [Hungarians](#), [Toskan](#) 2 seats for the [Turks](#). 1 seat for the [Gorans](#).

<sup>47</sup> The Serb national minority elect three representatives; the Hungarian national minority elect one representative; the Italian national minority elect one representative; the Czech and Slovak national minorities elect one representative together; the Austrian, Bulgarian, German, Polish, Roma, Rumanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minorities elect one representative together; Albanian, Bosniac, Montenegrin, Macedonian and Slovenian national minorities elect one representative together. CDL 005/009.

from the nationality. The five per cent threshold is waived for such nationality lists and a certain number of mandates will be reserved for minorities, the so-called preferential mandates. They will be allocated to the nationality lists that obtain at least one quarter of the number of votes needed for an ordinary mandate.<sup>48</sup> Moreover any nationality which drew up a nationality list but failed to win a mandate, will still be entitled to a non-voting parliamentary spokesperson, who is the unsuccessful candidate ranked first on the nationality list. This new system will be applied for the first time at the 2014 general parliamentary elections.

14. The Venice Commission has a nuanced opinion on the system of reserved seats. In the first place it underlined that in general, these electoral rules that favour affirmative action have limited range. The beneficiaries of these reserved seats have of course been the smaller minorities. The number of beneficiaries is however clearly and sharply determined either by the Constitution or the Law or by other accompanying legislative acts.<sup>49</sup> And as the number of the reserved seats is generally small, and almost always lower than the number of minorities present in the country, they have not been a major distortion of proportionality and equal representation.<sup>50</sup> As to the assessment of the system the Venice Commission has stated that “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.”<sup>51</sup> Finally the Commission has emphasized that “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”<sup>52</sup>

## 5. Dual voting rights

15. The last affirmative action electoral rule I would like to draw your attention at, is the so-called “dual voting” system. In some countries persons belonging to national minorities are entitled to cast two votes: they may vote for a general list but may also vote for specific minority lists. Slovenia is currently the only country that grants dual voting rights to members of national minorities: members of the Hungarian and Italian minorities have the right to elect on a special list a representative of the minority, but at the same time they also have the right to vote for ordinary candidates. Unlike the other citizens who cast only one vote, persons belonging to minorities have the right to “dual voting”. 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. In Cyprus, further to their general right to vote as members of the Greek community, the members of the Maronite, Armenian and Latin religious groups elect a deputy to the House of Representatives. But this representative has only a consultative status. The Croatian Constitution stipulates that the law might give members of all national minorities, besides the general voting right, the right to elect their minority representatives to the Croatian Sabor (parliament), but such a dual voting was not introduced up to now.<sup>53</sup>

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<sup>48</sup> Section 16 d) « The total number of national list votes shall be divided by ninety-three, and the result shall be divided by four, the preferential quota shall be the integer of the resulting quotient.

<sup>49</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009

<sup>50</sup> F. Bieber « Introduction: Minority Participation and Political Parties ».

<sup>51</sup> Report on Dual Voting for Persons belonging to National Minorities, CDL, 2008/013, § 52

<sup>52</sup> Report on Dual Voting for Persons belonging to National Minorities, CDL, 2008/013, § 54.

<sup>53</sup> Report on Dual Voting for Persons belonging to National Minorities, CDL, 2008/013, § 10 to 12.

16. According to the HCNM, "States enjoy less flexibility in altering the "one person, one vote" principle, than in designing the methods that translate votes into seats of parliament"<sup>54</sup>. Departure from the principle "one person, one vote" may only be exceptional: exceptions should 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."<sup>55</sup> In the same sense the Venice Commission in its report on "Dual voting" stated that although an exception to the principal "one person, one vote" might at first sight seem to be inadmissible, in certain specific circumstances it might be the only system to ensure on the one side that the minority is represented and on the other side "that the persons belonging to minorities are allowed on an equal basis, to take part in the national political debate". The Venice Commission referred to states coming from a totalitarian experience, with the necessity of favouring the integration of the minority in the national political life. Being an exception to the fundamental principle of "one person, one vote", the dual voting system needs to be very exceptional. In its report the Venice Commission concluded that it may be admitted, if "it respects the principle of proportionality under its various aspects. This implies that it can only be justified if:

- it is impossible to reach the aim pursued through other less restrictive measures which do not infringe upon equal voting rights;
- it has a transitional character;
- it concerns only a small minority."<sup>56</sup>

## 6. Conclusions

17. I come to my conclusions. We have examined the specific electoral rules aimed at guaranteeing minority representation in elected bodies. It can be useful to recall, with the Venice Commission, that "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."<sup>57</sup>

18. This being said, it is a challenge to democratic societies, to allow minorities to participate in political decision making, as this still is the best way to preserve interethnic peace and stability. Although affirmative action always will have a controversial nature, its rationale is strong. In its 2005 "Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries", the Venice Commission emphasized five important principles. I think it is worthwhile to mention them as a conclusion:

- 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.

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<sup>54</sup> HCNM, Equal voting rights; equal numerical values of votes, § 16.

<sup>55</sup> Report on Dual Voting for Persons belonging to National Minorities, CDL, 2008/013, § 56

<sup>56</sup> Report on Dual Voting for Persons belonging to National Minorities, CDL, 2008/013, § 71.

<sup>57</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009

- 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.”<sup>58</sup>

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<sup>58</sup> Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, CDL 2005/009, § 68.C