Beyond International Conditionality: Local Variations of Minority Representation in Central and South-Eastern Europe

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Preface

The right of minorities to participate in public life often poses great challenges to states. Several disparate approaches have been developed in modern liberal democracies to address the claims of national or ethnic minorities to have influence on the political life of the country. Whenever political cleavages emerge along national identity lines in a state, minorities, being in a structural minority position without any chance to attain power through democratic elections, may need special arrangements granting them effective participation in public life. This was reaffirmed in different international documents on minority rights adopted after 1990. In some cases, domestic constitutional developments led to new forms of participation and political recognition of minorities, and in other cases, international organisations played an important role in the evolution of domestic legislation. Following the international community's interventions into violent inter-ethnic conflicts, especially in the case of Yugoslav successor states, the situation of minorities was a key issue in post-conflict arrangements. Even in other post-socialist European countries, the implementation and adaptation of international minority rights standards influented domestic developments, particularly through membership policies adopted by Western international organisations, The 'new democracies' usually tended to adopt strict rules regarding identity issues, and minorities often feel threatened by the national majority's political dominance. Nevertheless, either as a result of post-war compromises that emerged in the post-Yugoslav context or as a response to international concerns, none of these states opted for a repressive nationalist

constitutional model. They usually recognise the existence of minorities in their constitutions, and most of these states joined both the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages. Fundamental issues relevant to the participation of minorities in public life have been settled: people belonging to minorities usually do not face citizenship problems, equal voting rights are granted, and minority parties have been granted the freedom of association. Even more, in the parts five to ten years specific representative arrangements have been developed or modified in many of these countries. The chapters of this book intend to give an overview of these changes. The political dynamics of minority-majority relations appear often more decisive than the legislative changes in this field. In the following chapters, the authors address these important questions about the effectiveness of the existing representative or consultative institutions and the discernable gaps between law on the paper and in practice.

The original idea to research new developments in the field of political participation and representation of minorities in South-Eastern Europe was stemmed from the editors' work at the Institute for Minority Studies, Centre for Social Sciences of the Hungarian Academy of Sciences. Between the autumn of 2012 and the autumn of this calendar year, the National Research, Development and Innovation Office of Hungary, under the OTKA K-105432 project, sponsored a research project on "[t]he right of minorities to political participation in Europe - analysing new perspectives and practices in Central and South-Eastern Europe."[1] Although during the years the structure of this final volume has changed in many details, it still reflects the results of this OTKA project.

The original goal of our research was to identify and exlpore the theoretical, legal, and political problems related to the political patricipation of minorities based on existing international standards. The main concerns and recommendations regarding minority political participation reflected in various UN, OSCE, and CoE documents are usually seen as offering guidelines for the establishment of new political and legal institutions in the region (territorial power-sharing arrangements, non-territorial autonomy, and consultative rights). The solutions established in recent years and their related political and legal discussions in the countries selected for case studies (mostly ex-Yugoslav states) offer

[1] http://kisebbsegkutato.tk.mta.hu/a-kisebbsegek-kozeleti-reszvetelhez-valo-joga-kutterv accessed on 28 September 2016

new examples for the investigation of effective participation of minorities in public life. The research findings contribute to a better understanding of the social integration of minorities.

In addition also the new Hungarian Act on Nationalities was thoroughly analysed. We asked ourselves two initial questions before starting the research years ago: How do participatory rights enable the social and political integration of minorities in the countries in question, and how are these examples in line with the relevant international standards? And further, what role can internantional organisations play in the improvement of national legislation in this field? We were also curious about the effectiveness of certain special rights (reserved seats in parliaments, consultative rights et cetera) and different models of the separation of powers (in particular, non-territorial or cultural autonomies)[2] in representing minory self-interests and potentially guarantee the peaceful co-existence of the majority and minority populations. In its first part, the book frames the topic by touching upon the general theoretical aspects of the issue. Markku Suksi's article explains how the OSCE High Commissioner's Lund Recommendations of 1999 have been affecting and improving the European norms and praxis relevant to minorities' effective participation in public affairs and public life. Balázs Vizi focused on the international legal standards from a bit more of a practical viewpoint in the context of European integration. This chapter offers an overview of conditionality policy within the context of European Union enlargement and its effects on minority rights and participation in public life. The volume's second half provides case studies. In the chapter on Croatia, Maria Dicosola convincingly argues that following a period of active involvement of international organisations, in the last ten years democractic consolidation improved the situation of minorities, including their political rights in the country. Even in light of the concerns formulated by the European Union during the accession process, Croatia proved to have become more responsive to accommodate political claims of minorities living in the country. Hungary was considered to be a model for granting a special framework of representation through minority self-governments under its 1993 legislation. László András Pap analyses the new developments following the adoption of the new Act on the Rights of

[2] See also on this from a broader perspective Tove Malloy – Alexander Osipov – Balázs Vizi (eds.) *Managing Diversity through Non-Territorial Autonomy. Assessing Advantages, Deficiencies, and Risks*. (Oxford, Oxford University Press, 2015)

Nationalities in 2011. In addition to critiquing a reform of non-territorial autonomy, the article offers an analysis of the newly established institution of minority spokepersons elected to the parliament. Stevo Pendarovski, Ivan Dodovski, and Marina Andeva give an analytical overview of the political consequences of the implementation of the Ohrid Framework Agreement for minorities living in Macedonia (FYROM). Their contribution sheds light on the political difficulties under internal and external pressure that lead to a more stable accommodation of minority political claims. Kosovo seems to be the perfect case to analyse international intervention in developing minority protection legislation. Adrian Zeqiri gives a positive evaluation of this process, and highlights the lasting problematic issues regarding both granted seats in parliament as the consultative rights of minorities. Norbert Tóth provides a legal analysis of the situation of the National Minority Council in Serbia. We intended to follow new directions and methods to provide some new information about minorities and minority rights in this region. But first and foremost, we hoped to give an account on recent developments related to the rights of minorities and their participaation in public life.

The editors are grateful to the contributors to this volume. They were always responsive and very patient with us during the editorial and publishing process. Special thanks are due to Zarije Seizović who – following the unexpected withdrawal of one of our colleagues – promptly accepted our very late invitation for contribution and still managed to keep the tight deadlines. We also thank the series editors of the European Academy Bolzano, Francesco Palermo and Günther Rautz for accepting our book proposal in the series "Minderheiten und Autonomien," and Beate Bernstein for patiently guiding us through the editing process at Nomos Verlag.

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Budapest, September 2016. *The Editors*

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Markku Suksi

EFFECTIVE PARTICIPATION OF MINORITIES IN PUBLIC AFFAIRS AND PUBLIC LIFE – EUROPEAN NORMS AND PRAXIS EVALUATED IN LIGHT OF THE LUND RECOMMENDATIONS

1. Introduction

In the beginning of the 1990s, nationalism grew more aggressive and even violent, particularly in the former Yugoslavia. Many (but by no means all) of the newly independent States or States that became free from Socialist rule were actually reconstituted as full-fledged nation states functioning on the premise of 'one people, one language, one state'. As a consequence, the treatment of minorities grew more hostile in parts of Central and Eastern Europe and South-Eastern Europe.[3]

The international community became increasingly willing to recognize minority rights for groups of persons who tried to survive under the pressure of dominant majority cultures.[4] The effort to establish minority rights was started by the Conference (later Organization) for Security and Cooperation in Europe, which in 1990 enacted the so-called Copenhagen Document with a provision in Para. 35 on the effective participation of minorities.[5] The United

[3] The research towards this article was carried out during a research leave funded jointly by the Pool of Professors and Åbo Akademi University, and travel to Emory University, Atlanta, was funded by the Finnish Society of Sciences. The author wishes to thank the funders for the grants.

[4] When the Universal Declaration of Human Rights (the UDHR) was adopted in 1948 by the General Assembly of the United Nations, a provision concerning participation in the government of one's own country was included in Article 21. However, at the same time, in a separate resolution appended to the UDHR, the issue of minorities was detached from the discourse of general human rights and left in a waiting room of pending issues that should be looked into in the future. See GA Res. 217 (III). International Bill of Human Rights, where Part A contains the UDHR and Part C a resolution entitled the Fate of Minorities.

[5] In combination with the right to participation in Article 25 of the 1966 Covenant on Civil and Political Rights (hereinafter: the CCPR), Article 27 CCPR on rights of minorities did not bring much relief to minorities and their relatively common exclusion from meaningful participation in public affairs. However, the drafting history of Article 25 CCPR suggests that the drafting committee of 1947 originally proposed that "every one has the right to take an effective part in the government of the State of which he is a citizen", although the term "effective" was eventually dropped. See Marc J. Bossuyt, *Guide to the "travaux*

Nations followed suit in 1992 with its non-binding Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and National Minorities, which includes requirements of effective participation in Articles 2(2) and 2(3).[6]

The Council of Europe accompanied the UN by adopting a binding treaty, the 1995 Framework Convention for the Protection of National Minorities (hereinafter: the FCNM), which contains a reference to effective participation in Article 15. In addition, the European Court of Human Rights has passed, on the basis of Article 3 of the First Protocol in 1950 to the European Convention of Human Rights (hereinafter: the ECHR), a number of judgments that relate to effective participation of minorities. Thus in the European space, there exist two binding norms at the international level which, in light of the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life (hereinafter: the LR), contain prescriptions on effective participation of national minorities in public life.

Within the general framework of participation, what does effective participation of minorities entail under European regional international law? Is effective participation a procedural requirement or a material notion, or perhaps both? How have interpretations of the main treaty bodies in Europe evolved with respect to effective participation of minorities in light of the Lund Recommendations?

These questions will be examined on the basis of the different dimensions concerning effective participation of minorities contained in the Lund

preparatoires" of the International Covenant on Civil and Political Rights. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987, pp. 469-478. In spite of proposals from the drafting committee in 1947 and from some states to include vertical rights for minorities in Article 27 CCPR that could have facilitated participation, the final formulation of the Article is mainly recognizing the freedom of persons belonging to minorities to engage in horizontal relationships of all sorts with persons in the same group. See *Bossuyt* 1987, Guide, pp. 469-478, 493-499.

[6] Concerning the contents of effective participation of minorities in the UN Minority Rights Declaration, see *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session. Working Group on Minorities, Eleventh session, 30 May-3 June 2005. E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005., pp. 8-11.

Recommendations.[7] Interpretations of relevant treaty bodies, in this case judgments of the European Court of Human Rights and recommendations of the Advisory Committee on the Framework Convention for the Protection of National Minorities[8] are reviewed within the dimensions of effective participation contained in the LR. It is recognized that judgments of the European Court of Human Rights (hereinafter: the ECtHR) and recommendations of the Advisory Committee (hereinafter: the AC) have very different legal impacts on States,[9] but that both are nonetheless to be understood as authoritative interpretations of their respective conventions (and from time to time, they make reference to each other's praxis). The praxis of the AC is particularly important, because Article 15 FCNM contains the term "effective participation", which the ECHR does not.[10] The categories

[7] The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note. September 1999. The Hague: OSCE High Commissioner on National Minorities, 1999, at http://www.osce.org/hcnm/30325?download=true (accessed on 8 February 2016).

[8] The materials used come from compilations of opinions of the Advisory Committee by article, in this case Article 15, that the secretariat of the Framework Convention has produced for the first, the second, the third, and the fourth cycle of state reporting at www.coe.int/en/web/minorities/compilation-of-opinions (accessed on 8 February 2016). See Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention. First Cycle. Strasbourg, 4 July 2011. Strasbourg: Council of Europe, 2011; Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention. Second Cycle, Strasbourg, 2 February 2016. Strasbourg: Council of Europe, 2016; Compilation of Opinions of the Advisory Committee relating to Article 15 of the Framework Convention. Third Cycle. Strasbourg, 29 June 2015. Strasbourg: Council of Europe, 2015. In addition, for the Fourth Cycle of state reports, this article uses the ones published by 12 February 2016, which were Cyprus, Denmark, Estonia, Germany, Liechtenstein, the Slovak Republic and Spain, as indicated by paragraph references to the recommendations made by the Advisory Committee.

[9] The impact of the recommendations of the Advisory Committee is enhanced if the Committee of Ministers of the Council of Europe incorporates them in its resolutions concerning the State in question. However, the Committee of Ministers often does not become as explicit in relation to the States as the Advisory Committee.

[10] Because the research materials in part consist of praxis of the AC, literary sources concerning Article 15 FCNM or effective participation of minorities are not referenced here. For good comment, see Weller (ed.), *The Rights of Minorities in Europe: A Commentary*, *passim*., Weller with Nobbs (eds), *Political Participation of Minorities*, *passim*, and Weller, Article 15, *passim*. See also Myntti, *A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, for concrete examples of effective participation.

expressed in the LR are thus used as an analytical tool to bring out the structure of interpretations concerning effective participation of minorities. Although this chapter will address issues of minority representation, the intention here is not to delve into the definition of a minority.

2. Ordinary Participation as the Starting Point

In the European arena of nation states, the starting point for an examination of effective minority participation is constituted by the case of *G. and E. v. Norway*,[11] in which the European Commission on Human Rights examined the allegations that rights guaranteed by the ECHR had been violated when persons belonging to the indigenous Sami population had been exposed to negative impacts of the construction of a hydro-electric dam in Alta river in the northernmost part of Norway. In this case, the European Commission on Human Rights concluded the following in a *dictum*:[12] "The Commission observes that the Convention does not guarantee specific rights to minorities. The rights and freedoms set forth in the Convention are, according to Article 1 of the Convention, guaranteed to 'everyone' within the jurisdiction of a High Contracting Party. The enjoyment of the rights and freedoms in the Convention shall, according to Article 14, be secured without discrimination on any ground such as, *inter alia*, association with a national minority."

Non-discrimination was thus the starting point, but the European Commission went on to say the following: "The applicants are Norwegian citizens, living in Norway, and under Norwegian jurisdiction. They have, as other Norwegians, the right to vote and to stand for election to the Norwegian Parliament. They are thus democratically represented in Parliament, although the Lapps have no secured representation for themselves."[13]

From this procedural rule enforcing a majoritarian point of democracy, a

[11] Applications Nos. 9278/81 & 9415/81 (joined), Decision of 3 October 1983, p. Decisions and Reports 35, p. 30.

[12] The application did not deal with Article 3 of the First Protocol, but with other provisions of the Convention. The Commission nonetheless discussed also participation of the Sami through elections.

[13] It is necessary to recognize that the application did not claim any violation of Article 3 of the First Protocol. This means that the right to vote in parliamentary elections and the right to stand as a candidate in such elections was not questioned.

position that the ECtHR qualified at a later point of time in another context,[14] the European Commission moves to a more material conclusion: "The applicants are thus entitled to enjoy the guarantees of the Convention. They are also bound by Norwegian law and obliged to comply with decisions lawfully taken."

Therefore, because the Sami of Norway were (and still are) so few in numbers and thus less likely to be able to vote in their own representative to the Norwegian Parliament, their hopes are directed towards a parliament primarily consisting of the majority population for passing national legislation, such as zoning law and, law on reindeer herding, with particular impact on Sami interests. Therefore, in the 1980s, such a minority was expected to be content with the regular scheme of parliamentary representation and to work with the political institutions under the prevailing circumstances. However, the reference to the fact that "the Lapps have no secured representation for themselves" may be understood in several ways. In addition to a meaning according to which they might remain without representation in the national parliament (although the Norwegian Sami have several times had one representative in the Norwegian Parliament), the sentence could also be an indication of the possibility to create special representation for a minority by allocating, for instance, one seat to the minority population. In fact, the ECtHR has had the chance to express itself on such special seats designed to promote the position of minority groups and on other issues that can be connected to effective participation of minorities (see below, section 5.2.).[15] This has been done against the background of Article 3 of the First Protocol to the European Convention on Human Rights:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

[14] The ECtHR held in the case of *Young, James and Webster v. the United Kingdom* (ECtHR, Jdg. of 13 August 1981, Series A no. 44, p. 25, § 63) that, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

[15] There may be a link to effective participation here through language in the Preamble to the ECHR, according to which fundamental freedoms are best maintained by, *inter alia*, an "effective political democracy", which may, depending on the circumstances, translate itself to effective participation of minorities.

The provision is about the general right to free elections, originally formulated as a duty for the State to hold free elections. It does not specifically apply to minorities, although there is a possibility that a minority dimension is supported by Article 14 ECHR. Persons who may be members of a minory group and also political parties that represent minority points of view have, however, used Article 3 of the First Protocol to bring cases to the ECtHR. When resolved, such cases become part of a praxis that is relevant within the categories of effective participation of national minorities itemized in the LR.

3. Obligation of the State to Ensure Effective Participation

Similarly to the Copenhagen Document of 1990, Article 15 FCNM, adopted in 1995, makes reference to the concept of effective participation of national minorities. Article 15 FCNM stipulates the following:

> 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 provision is very general and does not, at least formally speaking, create any right for persons belonging to minorities to effective participation, but instead a duty on the part of the State to create conditions that are necessary for the effective participation of minorities. Therefore, on the basis of the text, the States have a positive obligation, but persons belonging to minorities or minorities as a collective do not have any *prima facie* rights on the basis of the article. The provision also makes an interesting material distinction between effective participation in cultural, social and economic life, on the one hand, and in public life, on the other, adding to the latter an emphasis for such public affairs that affect the persons belonging to national minorities. It seems reasonable to think that the term public affairs has, in Article 15 FCNM, the same reach as identified by the HRC in General Comment no. 25 for Article 25 CCPR, namely the legislative, executive, and administrative powers in a State and institutionally all aspects of public administration in a State, including the formulation and implementation of policy at the international, national, regional, and local levels. What effective participation entails in a material sense is, however, not spelled out in the provision.

According to the Explanatory Report to the FCNM,[16] Article 15 FCNM aims, above all, to encourage real equality between persons belonging to national minorities and those forming a part of the majority. Therefore, *de facto* equality, not equality *de jure*, is the focus of Article 15. In order to create the necessary conditions for effective participation by persons belonging to national minorities, the Explanatory Report mentions that the States could promote – in the framework of their constitutional systems – a variety of measures. Here, the internal constitutional systems of the States seem to set the framework for what can be expected of a State: in some countries, the constitution may be more permissive, whereas in other, the constitution may be less so. Examples of measures that are available could be, according to the Explanatory Report, *inter alia*, the following: when Parties are contemplating legislation or administrative measures likely to affect minorities directly, consulting with these persons, by means of appropriate procedures and, in particular, through their representative institutions; involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly; undertaking studies in conjunction with these persons to assess possible impacts of projected development activities; effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels; and decentralised or local forms of government.

The AC has produced lines of interpretation about what effective participation of minorities could and should entail against the background of Article 15 FCNM. The legal situation concerning effective participation of minorities has, while keeping these original features, moved at least some from this starting point.

4. Lund Recommendations on the Effective Participation of National Minorities in Public Life as a Background

In 1999, an expert meeting convened by the High Commissioner on National Minorities developed the Lund Recommendations on effective participation of minorities within the framework of para. 35 of the Copenhagen Document. In doing so, the expert meeting used the open-ended nature of para. 35 and

[16] Explanatory Report appended to the Framework Convention on National Minorities, para. 80, at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf (accessed on 8 February 2016).

elaborated recommendations and outlined alternatives in line with the relevant international standards of participatory forms that could be effective for minorities beyond "ordinary" participation.[17] Therefore, the CCPR and the FCNM as well as the UN Declaration were included amongst the relevant international standards considered when drafting the LR. However, the LR do actually not depart from a right of minorities to effective participation, but use a language which instead seems to emphasize the obligation of the State to ensure effective participation for minorities. In this respect, the LR deviate from the point of departure of Article 25 CCPR, Article 2(3) of the UN Declaration and para. 35 of the CSCE Copenhagen Document and show an affinity with Article 15 FCNM. Still, the LR should be understood as a further development of the right to effective participation mentioned in para. 35 of the Copenhagen Document. In doing so, the LR go on to develop a more comprehensive listing of alternatives in two prongs, one being participation in the governance of the State as a whole and the other self-governance over certain local or internal affairs.[18]

In the first prong, participation in the governance of the State as a whole, the LR list the following broader categories (with more specific subdivisions not necessarily mentioned here): arrangements at the level of the central government, elections, arrangements at the regional and local levels, and advisory and consultative bodies. In the second prong, other self-governance over certain local or internal affairs, the LR list the following broader categories (with more specific subdivisions not necessarily mentioned here): non-territorial arrangements and territorial arrangements.

Below, these categories will be used to indicate how the cases resolved by the European Court of Human Rights and the recommendations issued by the

[17] In the case of *Grosaru v. Romania* (ECtHR, Jdg. of 2 March 2010), the ECtHR makes reference to the Lund Recommendations in para. 25 of Section II, entitled Relevant Domestic and International Law and Practice: "C. Lund recommendations on the effective participation of national minorities in public life. 25. The Lund recommendations were adopted in Lund (Sweden) in September 1999 by a group of international experts under the aegis of the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE). The relevant parts of those recommendations read as follows: […]." The Court then quotes part B on the elections, that is, paras. 7 through 10 LR. This means that the LR have at least in one case of the ECtHR received recognition by the Court in a manner that enhances their status and bring the concept of effective participation of minorities into the context of free elections in Article 3 of the First Protocol.

[18] *The Lund Recommendations*, Introduction, p. 6.

Advisory Committee to the FCNM fit into the framework of the Lund Recommendations. From a methodological perspective, the LR are used here as a yardstick or a measurement tool to measure the possibility to create a profile for the concept of effective participation of national minorities in public life in the European space through considering the praxis of the ECtHR on the basis of Article 3 of the First Protocol ECHR and the praxis of the AC on the basis of Article 15 FCNM.

5. Participation in the Governance of the State as a Whole

5.1. Arrangements at the Level of the Central Government

The ECtHR has dealt with special representation of national minorities or other forms of guaranteed participation in the legislative process relevant to para. 6 LR in the case of *Danis et l'association des personnes d'origine turque c. Roumanie* (ECtHR, Jdg of 21 Apr. 2015). In the elections of 2004, two organisations representing the Turkish population were competing over the one seat dedicated to the Turkish population. The other received a greater number of votes and thus its representative was seated in the Romanian parliament as representative of the Turkish population. In the election of 2008, the incumbent was considered automatically registered, but this "incumbent" minority organization of the Turks in Romania was treated favourably because of a relatively late change of rules that required the other organization to fulfil certain criteria. In turn, the significant competitor was rendered incapable of filing candidates under the new registration requirement. The Court found a violation of Article 14 ECHR in combination with Article 3 of the First Protocol: minority parties or political organisations competing about the one seat in the Parliament must be treated equitably.

The AC has provided relatively general recommendations under para. 6 LR to a large number of States during first,[19] second,[20] and third[21] cycles of monitoring. In fact, it appears that these more general recommendations

[19] Altogether 21 States: Albania, Armenia, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Germany, Ireland, Latvia, Lithuania, Moldova, Montenegro, Norway, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Switzerland.

[20] Altogether 27 States: Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Finland, Georgia, Germany, Ireland, Latvia, Lithuania, Macedonia, Moldova, Montenegro, the Netherlands, Norway, Poland, Portugal, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Ukraine, UK.

[21] Altogether 16 States: Austria, Bulgaria, Estonia, Finland, Germany, Ireland, Italy, Kosovo, Norway, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, UK.

constitute the largest portion of recommendations during the three monitoring cycles, although during the third cycle, they seem to be fewer. These recommendations deal with general opportunities for minorities to have an effective voice in the central government. For instance, in the first cycle of reporting concerning Romania, the AC was identifying similar problems as the ECtHR around organisations represented in Parliament and/or the Council of National Minorities that enjoyed a preferential treatment in comparison to other organisations representing minorities. It recommended that the Government, in the allocation of state support, proceed not exclusively through the organisations represented in Parliament and/or the Council of National Minorities, but also through the channel of other organisations representing minorities. In the second cycle, Bulgaria received the recommendation to "take measures to improve minorities' representation in elected assemblies, by removing all undue obstacles, including those enshrined in law, to the effective participation in public affairs of persons belonging to national minorities. Substantial efforts should be made to promote a better representation of the Roma at all levels. Particular attention should also be paid to the representation of persons belonging to numerically smaller minorities."[22] During the third cycle of monitoring, the AC invited Slovenian authorities "to ensure timely and effective consultation of representatives of the Hungarian and Italian minorities, especially when preparing new legislation of concern to them, in order to make sure that their views are duly taken into account".[23]

In addition, para. 6 LR contains four sub-paragraphs that deal with special arrangements to create opportunities for minorities to have an effective voice in the central government. Necessary and situation-specific special arrangements are outlined in a non-exclusive list of four sub-paragraphs. Taken together with the above general recommendations under para. 6 LR, these sub-paragraphs make the entire para. 6 LR the largest in terms of AC recommendations to States (followed by AC recommendations concerning para. 12 LR on advisory and consultative bodies).

The first sub-paragraph of para. 6 LR incorporates recommendations by the AC to the States during the first,[24] the second[25] and the third[26] cycle of

[22] Second Opinion on Bulgaria, adopted on 18 March 2010, FCNM/II(2012)001, paras. 188, 189.
[23] Third Opinion on Slovenia, adopted on 31 March 2011, para. 128.
[24] Altogether 6 States: Bosnia and Herzegovina, Croatia, Cyprus, Hungary, Serbia, UK.

monitoring for special representation of national minorities, for example, through a reserved number of seats in one or both chambers of parliament or in parliamentary committees; and other forms of guaranteed participation in the legislative process. Interestingly, the number of recommendations in this sub-category was relatively large during the third cycle. In the first cycle of monitoring, the AC noted concerning Hungary that, "to date, domestic legal provisions concerning the possibility for national minorities to be represented in Parliament have not been implemented through the adoption of relevant legislation" and recommended "that Hungary take appropriate action towards implementation of these provisions".[27] In the second cycle, a recommendation was issued to Hungary in the same vein, but there was also a recommendation for Poland to "examine, in consultation with the representatives of the national minorities, legislative and practical measures which would create the necessary conditions for the political representation of minorities in the Sejm and the Senate to reflect more adequately the composition of Polish society".[28] During the third cycle, the above recommendation concerning Hungary was repeated, and a similar recommendation was issued for Kosovo.

The second sub-paragraph of para. 6 LR can incorporate AC recommendations to the States during the first,[29] second,[30] and third[31] cycles of monitoring on formal or informal understandings for allocating to members of national minorities to cabinet positions, seats on the supreme or constitutional court or lower courts, and positions on nominated advisory bodies or other high-level organs. This category is not particularly well developed in the AC praxis, but contains some concrete proposals. One example is from the first cycle concerning Latvia, when the AC found that the role of the Council for Minority Participation in the decision-making process was too limited regarding measures affecting national minorities. The AC considered "that the authorities, in co-operation with the minorities' representatives, should identify ways of making it more effective".[32] For Lithuania, the second cycle contained, *inter alia*, the recommendation to

[25] Altogether 4 States: Cyprus, Finland, Hungary, Poland.
[26] Altogether 11 States: Armenia, Austria, Cyprus, Finland, Hungary, Ireland, Italy, Kosovo, Poland, Russian Federation, Ukraine.
[27] Opinion on Hungary, adopted on 22 September 2000, p. 16.
[28] Second Opinion on Poland, adopted on 20 March 2009, ACFC/OP/II(2009)002, para. 194.
[29] Altogether 4 States: Estonia, Georgia, Latvia, Poland.
[30] Altogether 3 States: Ireland, Lithuania, Poland.
[31] Altogether 4 States: Albania, Cyprus, Finland, Italy.
[32] Opinion on Latvia, adopted on 9 October 2008, ACFC/OP/I(2008)002, para. 203.

permanently maintain the post of Minority Advisor within the Prime Minister's Office in order to make full use of the potential of the Permanent Group of Experts and to consult with it on a more regular basis. In the third cycle, Albania was recommended to review and revise, "preferably within the framework of the adoption of a comprehensive law on national minorities, the composition and the functioning of the institutional bodies responsible for minority issues, with a view to establishing regular dialogue and effective decision-making between, on the one hand, a government body enjoying decision-making power and, on the other hand, organisations which truly represent the various national minorities".[33]

During the first,[34] second[35] and third[36] cycles, the third sub-paragraph of para. 6 LR resulted in relatively few recommendations by the AC concerning mechanisms to ensure that minority interests are considered within relevant ministries through, e.g., personnel addressing minority concerns or issuance of standing directives. The recommendation for Croatia during the first cycle was to continue to pursue initiatives aimed at improving the effectiveness of these bodies and, in doing so, ensure that persons belonging to national minorities have a central standing in the resulting organisational structure. In the second cycle, the United Kingdom was recommended to keep its new project-based approach to consultations under review and to ensure that the closure of the Race Relations Forum and other standing consultative structures has not had any detrimental impact on the opportunities for minority ethnic communities to participate in public life. In the third cycle, Ukraine was urged "to re-establish a specialised and stable government body with sufficient financial and human resources to co-ordinate all issues relating to national minority protection, in order to ensure transparency and build confidence that adequate levels of attention are paid by the state to minority protection issues".[37]

Finally, the fourth sub-paragraph of para. 6 LR concerning special measures for minority participation in the civil service as well as the provision of public

[33] Third Opinion on Albania, adopted on 23 November 2011, ACFC/OP/III(2011)009, para. 171.
[34] Altogether 7 States: Albania, Armenia, Croatia, Lithuania, Norway, Sweden, Ukraine.
[35] Altogether 3 States: Germany, Switzerland, UK.
[36] Altogether 6 States: Bosnia and Herzegovina, Czech Republic, Denmark, Lithuania, Moldova, Ukraine.
[37] Third Opinion on Ukraine, adopted on 22 March 2012, ACFC/OP/III(2012)002, para. 145.

services in the languages of the national minority resulted in a level of attention from the AC to recruitment (including the judiciary) during the first,[38] second[39] and third[40] cycle of monitoring which is perhaps overall somewhat higher than for the other three sub-paragraphs. In the first cycle, the AC used, for the first time so far, a sharper language usually found in treaty bodies like the ECtHR when concluding for Croatia that the situation concerning minorities in public service employment is *not compatible* with Article 15 FCNM. The AC recommended that Croatia "closely monitors the situation in all sectors with a view to ensuring that no discriminatory measures are taken and introduce additional positive measures aimed at eradicating the persisting negative consequences of the past practices".[41] In the second cycle, recommendations for Serbia are relatively concrete in calling upon the authorities to take vigorous measures to address the under-representation of national minorities in public administration and in the judiciary, particularly for the Albanian and the Bosniac minorities, and asking for specific attention to be paid to ensure an adequate representation of the Bosniacs in Sandžak's police force. These recommendations were renewed for Serbia in the third cycle, and similar ones were issued for Macedonia, requesting authorities to ensure that "posts which are offered to persons belonging to national minorities have clear duties and remits associated with them which allow for the effective participation of persons belonging to national minorities in the economic life of the country".[42]

The entire para. 6 of the Lund Recommendations, including the four sub-paragraphs, covers the largest material part of the AC's recommendations within the framework of the three completed cycles of monitoring. In the fourth cycle, the AC's comments relevant within para. 6 LR have so far been issued for Cyprus[43] and Slovakia.[44] From this, it appears as if the line

[38] Altogether 13 States: Albania, Bulgaria, Croatia, Cyprus, Georgia, Italy, Latvia, Macedonia, Moldova, Montenegro, Romania, Serbia, UK.

[39] Altogether 12 States: Albania, Croatia, Estonia, Italy, Kosovo, Latvia, Moldova, Romania, Serbia, Slovakia, Switzerland, UK.

[40] Altogether 9 States: Croatia, Cyprus, Estonia, Finland, Italy, Macedonia, Moldova, Serbia, Slovakia.

[41] Opinion on Croatia, adopted on 6 April 2001, ACFC/INF/OP/I(2002)003, p. 21. The only other reference to incompatibility was included in a recommendation for Estonia concerning election issues during the first cycle. See Opinion on Estonia, adopted on 14 September 2001, ACFC/INF/OP/I(2002)005, para. 55.

[42] Third Opinion on "the former Yugoslav Republic of Macedonia", adopted on 30 March 2011, ACFC/OP/III(2011)001, para. 174.

[43] Cyprus: Para. 77: "The AC calls on the authorities to further strengthen the competences of the Armenian, Latin and Maronite representatives in all decision-

established in the previous monitoring cycles would continue.

5.2. Elections

Para. 7 LR focuses on the electoral process as a channel for effective minority participation. In the case of *Ofensiva Tinerilor c. Roumanie* (ECtHR, Jdg. of 15 Dec. 2015), a political association claiming to represent the Polish in Romania was denied registration in parliamentary elections, in part because the registration of a new political association was opposed by another organization already representing the Polish. The Court was of the opinion that the denial was based on unclear legislation and was actually arbitrary. The lack of clarity in the election law of Romania on how it would be applied to national minorities, as well as the absence of sufficient guarantees for the impartiality of the bodies charged with examining the applicant's nomination of candidature, both violated the guarantees afforded by Article 3 of the First Protocol. Although the case dealt with the nomination of candidates to the minority seat, here relevant for para. 7 LR, it bears an affinity with the allocation of seats in the case of *Grosaru v. Romania* (see below, section 5.2.).

Total exclusion of certain minority groups from participation in elections obviously runs counter to the guarantees of Article 3 of the First Protocol, in particular in conjunction with Article 14 ECHR. As established in the case of *Sejdic and Finci v. Bosnia and Herzegovina* (ECtHR, Jdg. of 22 Dec. 2009), a constitutional requirement to identify with one of the three constituent peoples of Bosnia and Herzegovina (Bosniacs, Croats and Serbs) led to the exclusion

making processes affecting their communities' interests and concerns. It encourages them to take the necessary steps to effectively promote the recruitment of members of these communities into public administration, the judiciary and law-enforcement bodies." Para. 78: "The AC calls on the authorities to promote direct representation of Roma interests and concerns in all decision-making affecting this community."

[44] The Slovak Republic: Para. 80: "The AC encourages authorities to promote the adequate representation of national minorities in public life, including through measures that facilitate their engagement in broader political processes and mainstream political parties." Para. 81: "The AC further calls on the authorities to review the position of the Plenipotentiary for National Minorities within the broader human rights structure, to ensure that high-level political attention is accorded to all issues pertaining to national minority protection, and that the views and concerns of all minorities are effectively considered in relevant decision-making processes. Para. 82: The AC further urges the authorities to promote the recruitment of persons belonging to national minorities, in particular Roma, into public service."

of, for instance, persons belonging to Bosnia and Herzegovina's Roma and Jewish minorities. This was deemed a violation of the ECHR. Hence although the three so-called constituent peoples had every opportunity to effective participation on the basis of the guarantees in the constitutional structure of the State, such as with veto mechanisms concerning vital issues, every other minority group was actually prevented from participating in elections if they chose to not self-identify with one of the constituent peoples.[45]

Similarly, in the case of *Aziz v. Cyprus* (ECtHR, Jdg. of 22 June 2004), the ECtHR found that the Turkish population living in the part of Cyprus controlled by the Government of Cyprus was deprived of the right to vote and stand in elections to the Cypriot legislature in contravention of Article 3 of the First Protocol. The Court observed (para. 26) "that the Cypriot Constitution came into force in August 1960. Article 63 thereof provided for two separate electoral lists, one for the Greek-Cypriot community and one for the Turkish-Cypriot community. Nonetheless, the participation of the Turkish-Cypriot members of parliament was suspended as a result of the anomalous situation

[45] A similar situation emerged in the case of *Zornic v. Bosnia and Herzegovina* (ECtHR, Jdg of 15 July 2014), where the applicant did not want to identified herself with any group in Bosnia and Herzegovina, that is, neither with any of the constituent peoples nor any minority group. The applicant maintained that despite being a citizen of Bosnia and Herzegovina she is denied by the Constitution any right to stand for election to the House of Peoples and the Presidency because she does not declare affiliation with one of the "constituent peoples" or any ethnic group. The Court made reference to *Sejdić and Finci* and said that elections to the House of Peoples of Bosnia and Herzegovina fall within the scope of Article 3 of the First Protocol. Accordingly, Article 14 of the Convention in conjunction with Article 3 of the First Protocol was applicable in the *Zornic* case. In para. 31, the Government tried to argue that the applicant could at any time choose to affiliate with one of the "constituent people", but the Court observed that the same could be said for members of minority groups, such as the applicants in *Sejdić and Finci*, or citizens without any ethnic affiliation. The Court noted that in Bosnia and Herzegovina, "there are no objective criteria for one's ethnic affiliation […]. It depends solely on one's own self-classification. There may be different reasons for not declaring affiliation with any particular group, such as for example intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of Bosnia and Herzegovina. While it is not clear what the present applicant's reasons are, the Court considers them in any case irrelevant. The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification. Therefore, the Court concluded that there has been a violation of Article 14 taken in conjunction with Article 3 of the First Protocol and a violation of Article 1 of Protocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina and for the Presidency of that State.

that began in 1963. From then on, the relevant Articles of the Constitution providing for the parliamentary representation of the Turkish-Cypriot community and the quotas to be adhered to by the two communities became impossible to implement in practice." Because the applicant was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives in the country of which he is a national and where he has always lived, the Court found a violation of Article 3 of the First Protocol.

The AC's direct praxis regarding elections within the framework of para. 7 LR is relatively thin. In the first cycle, Bosnia and Herzegovina,[46] Estonia[47] and Hungary[48] were recommended measures in this respect, while in the second cycle, Albania,[49] Croatia[50] and the United Kingdom[51] received

[46] The AC found that in the limited cases where there exists a possibility for national minorities to be represented in elected bodies through the category of "Others", there have been cases of abuse. Therefore, the competent authorities should review the current representation of "Others" and adopt the necessary amendments in electoral laws to ensure that persons belonging to national minorities have a real chance to be elected.

[47] It was concluded that the right of persons belonging to national minorities to participate in public affairs is greatly advanced by the possibility of non-citizens (that is, Russians that formerly were citizens of the Soviet Union) to vote in local government council elections. It was also concluded that the Estonian language proficiency requirements for candidates in local and parliamentary elections are not compatible with Article 15 FCNM. It was recommended that Estonia pursues the abolition of these requirements as a matter of priority.

[48] It was concluded that the so-called "cuckoo-problem", the situation where persons not belonging to a given minority, through the openness of the electoral system, nevertheless manage to get themselves elected as representatives of that minority, risks undermining the credibility of the system as a whole. It was recommended that Hungary actively pursues remedies for these difficulties.

[49] The AC recommended that the authorities should ensure that persons belonging to national minorities, in this case Roma, who have been excluded from the electoral process owing to the use of birth certificates as identification are fully included in the electoral process through the use of identity cards or any other system to be adopted.

[50] The AC held that Croatia should maintain its system guaranteeing the representation of persons belonging to national minorities in Parliament and in local and regional self-government, reviewing the schemes periodically in order to ensure that they adequately reflect the developments in the country and the needs of the national minorities concerned. Shortcomings in the election process should also be addressed in the run-up to the forthcoming elections.

[51] The AC urged the authorities to examine, in close cooperation with the persons concerned, the factors that may be hindering minority ethnic representation in

recommendations to this effect. In the third cycle, only Croatia[52] and Romania[53] were issued election-related recommendations, and in the fourth cycle, so far Spain[54] has been the only country to receive recommended measures in this area. It seems likely that when recommending election-related measures for Romania, the AC is partly venturing into the same areas as the case of *Grosaru v. Romania* (see below).

As concerns para. 8 LR on the regulation of the formation and activity of political parties under the freedom of association,[55] the ECtHR has concluded in the case of *Parti pour une société démocratique (DTP) et autres c. Turquie*, (ECtHR, Jdg. of 12 Jan. 2016) that a legal order that prevents minority populations from organizing political parties and divests the elected members of such a party of their mandates in the parliament would run counter to Article 3 of the First Protocol for preventing participation. Similarly, concerning the prevention of political activities of a person belonging to a minority, the Court said in *Zdanoka v. Latvia* (ECtHR, Jdg. of 17 June 2004) that the ideas advocated by the applicant concerning the Russian-speaking minority in Latvia and the legislation on language matters discerned no evidence of anti-democratic leanings (former Communist party) or

legislative bodies and identify further ways of encouraging greater participation of persons from minority ethnic backgrounds in electoral processes at all levels.

[52] The AC called on the Croatian authorities to devise a system to correct voter registration records in consultation with civil society and representatives of national minorities in order to ensure that the special voting rights of persons belonging to national minorities are duly implemented.

[53] The AC considered that the authorities should, when drafting the Law on National Minorities, create conditions for free and fair competition in the electoral process between different organisations representing national minorities. They should also ensure that the allocation of seats is done in a simplified and transparent way.

[54] Para. 98: "In addition to promoting the participation of Roma in appointed bodies, the AC again calls on the authorities actively to promote the effective participation of Roma in elected bodies at all levels, for example by promoting the reflection of the diversity of society in the lists of candidates of political parties."

[55] In this context, it is clear on the basis of the cases of, *inter alia*, *Sidiropoulos v. Greece* (ECtHR, Jdg. of 10 July 1998), *United Macedonian Organisation Ilinden v. Bulgaria* (ECtHR, Jdg. of 2 Oct. 2001) and *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (ECtHR, Jdg. of 20 Oct. 2005) that groups of persons which want to promote minority issues, autonomy or secession, even if inconvenient for the State, have the right under the ECHR to have their organizations registered as legal persons and the right to carry out their activities without interference.

incompatibility with the fundamental values of the Convention. Therefore, a permanent disqualification from standing for parliamentary elections was not proportionate to the aims that the Latvian law pursued, and also not necessary in a democratic society. As a consequence, a violation of the EHCR had taken place. In other words, attempts to promote the position of the Russian-speakers in Latvia were not equal to activities of a forbidden political organization, but were instead entirely legitimate.

However, an association created for minorities cannot expect to have the right to monopolize an electoral mechanism that the constitution of a state creates. In the case of *Gorzelik and Others* v. *Poland* (ECtHR, Jdg. of 17 February 2004), the applicants tried to register a minority association for Poland's Silesian minority called the "Union of People of Silesian Nationality" in the memorandum of association. The association aimed to conduct activities throughout the Polish territory and to possibly establish local branches. The aims of the association were perfectly legitimate, as were the means of achieving the aims. A number of internal issues established in the memorandum of association were contentious from the start, including the question of whether or not the Silesians constitute a minority at all. In the end, the organisation was denied registration. In essence, the issue from the point of view of the Polish authorities was that a group of persons whose minority character was in doubt would, by means of registering such a minority association, be able to secure easy access to the national parliament by circumventing the support threshold and thus misuse legal norms for purposes that they were not intended for.[56] The ECtHR did not find a violation of Article 11 ECHR on the freedom of association, because it was "prompted by the need to protect the State electoral system against the applicants' potential attempt to claim unwarranted privileges under electoral law".

The AC has so far not issued any recommendations under Article 15 FCNM that would deal with para. 8 LR, that is, with the formation and activity of political parties. However, there is AC praxis in this respect under Article 7 FCNM from the first,[57] the second[58] and the third[59] cycle of monitoring that

[56] It can be said against the background of Article 25(b) and (c) CCPR that the electoral consequences of setting up such an association could have compromised the equality of the vote and equal access to public service as well as the right to stand as candidate. See *Suksi*, 'The Electoral Cycle', pp. 17–21, 28–31.
[57] Bulgaria, Georgia, Kosovo, Moldova, Russian Federation, Ukraine.
[58] Azerbaijan, Bulgaria, Moldova, Romania, Russian Federation.
[59] Azerbaijan, Bulgaria, Moldova, Romania, Russian Federation.

makes it relevant for political affairs and political life of minorities. For instance, the AC considered that provisions in Article 11 paragraph 4 of the Constitution of Bulgaria concerning political parties on ethnic, racial, or religious lines and pertinent legislative provisions raise problematic issues in the light of the FCNM and thought that the authorities should re-examine the provisions in question in order to remedy the lack of legal certainty in these matters. In addition, Bulgaria was asked to secure adequate guarantees for the practical application of Article 7 of the Framework Convention, something that was repeated during the second and the third cycle, when also a reference was made by the AC to the case of *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, resolved by the ECtHR in 2005 (see above, fn. 51), where the dissolution of a political party of a minority was held to be a violation of Article 11 of the ECHR. Moldova and the Russian Federation appear to have similar issues with minority parties on a continuous basis.

Para. 9 LR deals with the electoral system's facilitation of minority representation and influence. The ECtHR would not, out of respect for the State's sovereignty over matters of the electoral system, prescribe any particular electoral system for a State.[60] However, when an electoral system has been put in place, such as particular electoral provisions for minorities, the Court will not refrain from determining whether the national electoral provisions are applied in a manner that is compatible with Article 3 of the First Protocol. As indicated by the case of *Yumak and Sadak v. Turkey* (ECtHR, Jdg. of 8 July 2008), Article 3 of the First Protocol does not seem to contain any requirement regarding a lower numerical threshold for minority representation in the legislature. The Court approved a voting threshold of 10 % without any reserved seats, although in practice, minority groups would not normally be able to achieve representation in the Turkish parliament. The case of *Riza et autres c. Bulgarie* (ECtHR, Jdg of 13 Oct. 2015) deals with invalidation of out of country votes cast in polling stations in Turkey. The court was not convinced by the process of invalidation of votes cast by Bulgarian citizens who resided in Turkey. These actions were deemed as violations against the right to vote of such Bulgarian citizens who resided in Turkey. In addition, the actions violated the right to stand for election of three persons who, if the votes had been counted, would have received mandates in the Bulgarian parliament, where they would have represented the Turkish minority in Bulgaria. Also, the Court considered that repeat elections for the affected out-of-country voters were impossible to arrange in this context.

[60] *Mathieu-Mohin and Clerfayt, infra*, section 5.3.

Therefore, the Court held that violations of Article 3 of the First Protocol had taken place.

Grosaru v. Romania (ECtHR, Jdg. of 2 March 2010) dealt with the allocation on the basis of the votes cast for the one mandate reserved to each national minority in Romania. The applicant was a member of the Association of Italians of Romania and stood as a candidate in the parliamentary elections of 26 November 2000 for the Italian Community of Romania, one of the organisations representing the Italian minority in Romania. That organisation submitted a single-candidate list containing the applicant's name in nineteen of the forty-two constituencies. Once the votes had been counted, the Central Electoral Office decided, on the basis of the 1992 law on elections to the Chamber of Deputies and to the Senate, to allocate the parliamentary seat belonging to the Italian minority to the Italian Community of Romania, which had secured 21,263 votes at the national level. Although the applicant had secured 5,624 votes out of a total of 21,263 at the national level, the Central Electoral Office allocated the parliamentary seat to another member of the Italian Community of Romania who had stood for election on another single-candidate list and had secured only 2,943 votes, but winning a single constituency. The Court noted (para. 48) that Romania has chosen to ensure special representation for minorities in Parliament, and that this European country contains the largest number of minority parties or organisations represented in elections and in Parliament. The Court found that the applicable election rules did not specify whether the seat should be allocated to a candidate receiving the largest number of votes at the national level or constituency level, although such a detail may prove decisive when determining the winning candidate. In addition, the Court doubted the impartiality of the bodies involved in the decisions that allocated the mandate to a candidate with less votes, because representatives of political parties constituted one-half of the bodies and no judicial body had ever properly examined the matter. As a consequence (para. 57), the Court found a violation of the ECHR and considered that "the lack of clarity of the electoral law as regards national minorities and the lack of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's challenges impaired the very essence of the rights guaranteed by Article 3 of Protocol No. 1".

The AC's praxis around para. 9 LR is quite limited. Only two recommendations can be found, both located in the third cycle. For Albania, the AC encouraged the authorities to consider measures to improve the representation of national minorities in elected assemblies by removing all

undue obstacles, including those enshrined in law, particularly concerning the Roma and persons belonging to numerically-smaller minorities. The implication here appears to be, with a view to the assessment, that threshold requirements should be abolished for minority parties. As for Romania, the AC considered that the authorities should, when drafting the Law on National Minorities, create conditions for free and fair competition in the electoral process between different organisations representing national minorities. Here, there seems to be a link to the above case of *Grosaru v. Romania*, because the AC thought that the rules should also ensure that seats are allocated in a simple and transparent manner.

It appears that the ECtHR has not resolved any cases that deal with geographical boundaries from a participation point of view concerning elections at the national level (para. 10 in the LR). The praxis of the AC concerning geographical boundaries is also very limited, with only one recommendation each in the first and the third cycle of monitoring. In relation to Ukraine, the AC concluded in the first cycle that it "finds that the specific rules aimed at protecting national minorities in the context of the drawing of constituency boundaries were not retained in the new Law on Elections, adopted in 2001. The Advisory Committee considers that the idea reflected in the previously applicable provisions should be kept in mind in the administrative practice and its re-introduction in the legislation should be considered."[61] In the case of Lithuania in the third cycle, the Advisory Committee encouraged "the authorities to continue a close dialogue with minority representatives regarding any changes to constituency boundaries to ensure that their opportunities to be effectively represented in the legislature are not negatively affected".[62]

5.3. Arrangements at the Regional and Local Levels

The focus of Article 3 of the First Protocol is on elections to legislative assemblies, and because only around half of the European States have sub-state arrangements with constitutionally defined legislative powers proper, the ECHR rarely applies to arrangements at the regional and local levels. In the case of *Magnago and Südtiroler Volkspartei v. Italy* (Eur.Comm.HR, Dec. of 15 April 1996), the former European Commission of Human Rights found, in

[61] Opinion on Ukraine, adopted on 1 March 2002, ACFC/INF/OP/I(2002)010, para. 109.

[62] Third Opinion on Lithuania, adopted on 28 November 2013, ACFC/OP/III(2013)005, para. 96.

a case concerning the rights of the German-speaking minority in Northern Italy, that the Convention did "not compel the Contracting Parties to provide for positive discrimination in favour of minorities".[63] The Court noted, however, in the case of *Partei die Friesen v. Germany* (ECtHR Jdg. of 28 January 2016) that "this decision was taken before the entry into force of the Framework Convention on 1 February 1998. The Court further observes that the Framework Convention, while acknowledging the margin of appreciation enjoyed by the State in electoral matters, puts an emphasis on the participation of national minorities in public affairs (…). However, the possibility of exemption from the minimum threshold is merely presented as one of many options in this context." The Court went on to observe that "[t]he Advisory Committee on the Framework Convention expressed the opinion that the potentially negative impact of minimum thresholds on the participation of national minorities in the electoral process needed to be duly taken into account. It considered that exemptions from threshold requirements had proved useful for enhancing national minority participation in elected bodies." The opinions of the AC on the FCNM may thus influence the interpretations of the ECtHR.[64]

The issue of special representation at the level of a constituent state of a federation as an exponent of para. 11 LR (corresponding to para. 6 at the level of the central government) was dealt with in the case of *Partei die Friesen v. Germany* (ECtHR Jdg. of 28 January 2016). The applicant party, which represented a national minority, claimed that the rights of the minority had been violated by the Land Niedersachsen because it had not introduced similar exemptions for minority parties in Lower Saxony as had been introduced for other national minorities in two other states of the federation (for the Danes in Schleswig-Holstein and for the Sorbs in Sachsen and Brandenburg). The Court said (para. 41) that it has, by making reference to the case of *Gorzelik and Others v. Poland*, found "that the forming of an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights". The Court agreed with a German court in that "no clear and binding obligation derives from the Framework Convention to exempt national minority parties from electoral thresholds. The States parties to the Framework Convention enjoy a wide margin of appreciation in how to approach the Framework Convention's aim of promoting the effective

[63] As quoted in *Partei die Friesen v. Germany*, para. 42, *infra*.
[64] Opinions of the Advisory Committee on the FCNM are referenced also in the case of *Makuc and others v. Slovenia* (ECtHR, partial decision on admissibility of 31 May 2007).

participation of persons belonging to national minorities in public affairs as stipulated in Article 15. Consequently, the Court takes the view that, even interpreted in the light of the Framework Convention, the Convention does not call for a different treatment in favour of minority parties in this context." Therefore, Germany was not in violation of Article 14 ECHR read in conjunction with Article 3 of the First Protocol when no exemption from the voting threshold had been created for minority parties in Lower Saxony. It was entirely within the legislative sovereignty of the state in the federation, in this case Lower Saxony, to determine whether or not such an exemption should apply in that state (*Land*). The exemptions held by other minority parties in other states on the basis of their respective state laws were not considered discriminatory in relation to the party in Lower Saxony.

Para. 11 LR is a recurring theme amongst the AC's recommendations. The largest number of recommendations was made during the first cycle of monitoring,[65] while there have been less recommendations given during the second[66] and the third[67] cycles. Decentralisation was one technique favoured by the AC during the first cycle, reflected in the recommendations for Serbia and Montenegro. However, already during the first cycle of monitoring, the AC pinpointed a problem for Ukraine that today exists for the Russian Federation: "The Advisory Committee finds that, following the abolition of reserved seats in the legislature of the Autonomous Republic of Crimea, the presence of Crimean Tatars in the said body has been drastically reduced. The Advisory Committee considers that Ukraine should pursue its efforts to improve this situation."[68] During the second cycle, focus on general decentralization measures was dropped, while a very specific recommendation was made for Slovenia concerning the position of the Roma in the area of local self-government, in particular to ensure that a Roma councillor could be elected to the Grosuplje local council. The AC continued to place emphasis on Roma during Slovenia's third cycle. A similar recommendation was made for Bulgaria. A recommendation for Germany in the fourth cycle also focused on the situation of the Roma and Sinti. However, in addition, Germany received recommendations concerning more effective participation of the Sorbian

[65] Altogether 10 States: Azerbaijan, Estonia, Hungary, Macedonia, Montenegro, the Netherlands, Poland, Russian Federation, Serbia, Ukraine.
[66] Altogether 6 States: Czech Republic, the Netherlands, Serbia, Slovenia, Switzerland, UK.
[67] Altogether 6 States: Armenia, Bulgaria, Denmark, Italy, Slovenia, UK.
[68] Opinion on Ukraine, adopted on 1 March 2002, ACFC/INF/OP/I(2002)010, para. 110.

minority in decision-making processes.

A guarantee at the regional level for the rights of persons belonging to national minorities according to para. 11 LR (with reference to para.7) was handled in the case of *Polacco and Garofalo* (Eur.Comm.HR, Decision of 15 September 1997, D&R 90-A). In this case, the European Commission on Human Rights concluded that "only those who had been living continuously in the Trentino-Alto Adige Region for at least four years could be registered to vote in elections for the Regional Council, which were held every five years". The Commission took the view that this requirement was not disproportionate to the aim pursued given the region's particular social, political and economic situation and considered that "it could not be regarded as unreasonable to require voters to reside there for a lengthy period of time before they could take part in local elections, in order to acquire a thorough understanding of the regional context so that their vote could reflect the concern for the protection of linguistic minorities". A somewhat similar situation was at hand in the case of *Py v. France* (ECtHR, Jdg. of 11 Jan. 2005), which dealt with the French territory of New Caledonia in the Pacific Ocean (a part of France for the purposes of the ECHR), where the indigenous population, the Kanaks, was facing an influx of immigration from metropolitan France and also from other countries. The applicant, who was from metropolitan France, was subject to local legislation passed by the Congress of New Caledonia. But in order to be able to vote in the elections, the election legislation imposed a residence requirement of ten years, which amounted to two mandate periods of the legislature. Although the residence requirement might appear disproportionate to the aim pursued, the Court raised the issue of whether there are local requirements in New Caledonia within the meaning of Article 56 ECHR, such that the restriction in question on the right to vote may be deemed not to breach Article 3 of the First Protocol. The Court opined that local requirements, if they refer to the specific legal status of a territory, must be of a compelling nature if they are to justify the application of Article 56 ECHR. The Court felt (para. 64) that "the history and status of New Caledonia are such that they may be said to constitute 'local requirements' warranting the restrictions imposed on the applicant's right to vote". In those circumstances (para. 65), "the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, has not been impaired". Consequently, there was no violation of the provision.

In an interesting admissibility case of *Federacion Nacionalista Canaria v. Spain* (ECtHR, inadmissibilty decision of 7 June 2001), the Court was within the purview of para. 11 LR concerning regional and local levels with

reference to para. 7 on elections. With a reference to the cases of *Mathieu-Mohin and Clerfayt v. Belgium* (ECtHR, Jdg. of 2 March 1987) and *Matthews v. the United Kingdom* (ECtHR, Jdg. of 18 Feb. 1999), the Court reiterated (para. 1) that the word "legislature" does not necessarily mean the national parliament and opined that the word has to be interpreted in light of the constitutional structure of the State in question. Regarding Spain, the Court notes that Article 66 of the Constitution confers the exercise of legislative power on Parliament (*Cortes Generales*), and because the Autonomous Communities have legislative assemblies that participate in the exercise of legislative power, they are therefore part of the "legislature" within the meaning of Article 3 of the First Protocol. The Court noted that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it is based on proportional representation, the "first-past-the-post" system, or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation. The applicant asserted that due to the system of proportional representation in force in the Autonomous Community of the Canary Islands and the thresholds set in order to avoid the fragmentation of political representation, it had been denied the opportunity to represent, in the Autonomous Community's legislative assembly, more than 28% of those who had voted on the island of Lanzarote. The system founded by the Statute of Autonomy for the Canary Islands established that the number of residents per seat in each of the constituencies had to lie within specified limits: either at least 30% of all valid votes must be obtained in an individual constituency, or at least 6% of all valid votes must be obtained in the Autonomous Community as a whole. The Court considered that this kind of system, instead of hindering election of candidates such as those put forward by the applicant federation, actually "affords smaller political groups a certain degree of protection. It emphasises that in the instant case the applicant federation did not satisfy either of the conditions prescribed by law." The application was found to be manifestly ill-founded and therefore inadmissible.

Recommendations touching upon elections at the regional and local levels are not prominent within the praxis of the AC. The number of recommendations is relatively even in the three cycles, with three in the first cycle,[69] five in the second one,[70] and two in the third one.[71] In each cycle, Bosnia and

[69] Altogether 3 States: Bosnia and Herzegovina, the Russian Federation, Slovenia.
[70] Altogether 5 States: Bosnia and Herzegovina, Denmark, Latvia, Russian Federation, Spain.
[71] Altogether 2 States: Bosnia and Herzegovina, Slovenia.

Herzegovina received recommendations targeted towards assuring the electoral rights of national minorities at the local level, from including the other minorities (outside of the constituent peoples) and improving the inclusiveness of local elections in the first cycle to ensuring that the positive measures in favour of national minorities are not exploited by persons or groups who do not represent persons belonging to national minorities in the second cycle. Also in the third cycle, there was somewhat of a shift in the focus of recommendations for Bosnia and Herzegovina. Still, the basic tenet is the same, supplemented with the wish to review the criteria for inclusion of national minority representatives on party lists so as to prevent abuse of the system by candidates who do not represent national minorities and by a wish to review the 3% threshold for guaranteed reserved seats, taking account of the results of the next census when they become available. Also, the AC was concerned about the drop in the number of minority representatives elected in the 2012 local elections and requested a review in order to remedy any problems identified in time for the next local elections in 2016.

Neither the European Court of Human Rights (which has no competence in the area of non-legislative elections) nor the Advisory Committee on the FCNM has given any interpretations concerning the regional or local level with respect to paras. 8 and 9 LR. This makes it impossible to know what the concept of effective participation might contain in the areas of political parties and the electoral system as applied in regional and local elections.

As concerns the reference in para. 11 LR to para. 10 on geographic boundaries at the regional level, an issue that is probably of great importance for minorities, the ECtHR has actually not resolved any cases related to this issue except for in the case of *Mathieu-Mohin and Clerfayt v. Belgium* (ECtHR, Jdg. of 2 March 1987). In this case, the boundary issue is indirectly present for elections at the regional level. According to the Court (para. 57), "[o]ne of the consequences for the linguistic minorities is that they must vote for candidates willing and able to use the language of their region". The Court conceded that a similar requirement is found in the organisation of elections in a relatively high number of States, and that such requirements do not necessarily threaten minority interests. "This is particularly true, in respect of a system which makes concessions to the territoriality principle, where the political and legal order provides safeguards against inopportune or arbitrary changes - by requiring, for example, special majorities (…). The French-speaking electors in the district of Halle-Vilvoorde enjoy the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors. They are in no way deprived of these rights by the mere fact that they must vote either

for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council. This is not a disproportionate limitation such as would thwart 'the free expression of the opinion of the people in the choice of the legislature'."[72] Here, the geographical boundary between the linguistic groups was apparently considered neither opportune nor arbitrary. The resulting consequences for those elected concerning the required language for the oath of office were considered legitimate. The AC has not given any recommendations relevant for this dimension of effective participation.

5.4. Advisory and Consultative Bodies

Bodies with advisory and consultative tasks, mentioned in para. 12 (and 13) LR, fall outside the ambit of Article 3 of the First Protocol because they are not legislative bodies elected by means of general elections. Therefore, the ECtHR has no praxis concerning such bodies. In contrast, the Advisory Committee on the FCNM has a wide praxis within this area. In fact, the prevalence of recommendations dealing with advisory and consultative bodies almost reaches the level of general recommendations linking to para. 6 LR. Combined with the recommendations within para. 6 LR, the recommendations linking to para. 12 LR (and para. 13 LR) emphasize consultations with minorities as a main mode of engaging minorities in effective participation. Conversely, this probably means that recommendations leading to actual decision-making powers for minorities are fewer (see below).

Recommendations concerning the creation or functioning of advisory and consultative bodies were plentiful in the first,[73] second,[74] and third[75] cycles of

[72] The special majorities mentioned in the case as a protection against inopportune or arbitrary changes of boundaries are matched in the LR by language to the same effect in para. 22.

[73] Altogether 18 States: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Italy, Macedonia, Montenegro, the Netherlands, Romania, Russian Federation, Serbia, Slovakia.

[74] Altogether 20 States: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Italy, Kosovo, Portugal, Romania, Russian Federation, Slovakia, Spain, Ukraine.

monitoring. In addition, the number of recommendations issued by the AC increased during each monitoring cycle, bringing these types of recommendations to par with the more general recommendations linked to para. 6 LR. In such a setting, it is only natural that the same countries are often featured in all of the monitoring cycles, such as Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Finland, Russian Federation, and Slovakia. Here, focus will be on recommendations issued to Bosnia and Herzegovina and Bulgaria.

In the first cycle, Bosnia and Herzegovina was issued a recommendation concerning the Council of National Minorities, which should have been established no later than 14 November 2003 as a special advisory body of the Parliamentary Assembly of Bosnia and Herzegovina to gather representatives of national minorities, but had not been set up by the time of monitoring. The AC considered such a body instrumental to enhancing the participation of persons belonging to national minorities in view of the many obstacles hampering their direct access to a number of elected bodies. The AC recommended that similar councils be established in the Federation and in Republika Srpska. Such councils were deemed especially necessary to alleviate the situation of the non-constituent peoples, and it was recommended that the Advisory Board for Roma should include Roma representatives and be regularly consulted on relevant issues by the competent ministries on relevant issues. The AC returned to this topic in the second cycle and voiced a certain improvement of the situation, although there still were outstanding issues concerning advisory and consultative bodies, especially around the efficient functioning of the Council of National Minorities and an increase the financial and human resources at the Advisory Committee for Roma's disposal. Also, the AC called for the rapid and transparent appointment of a Council of National Minorities of the Federation, as outlined in the Federation's Law on National Minorities. Finally, in the third cycle, the AC focused on the functioning of the advisory and consultative bodies in Bosnia and Herzegovina by making recommendations to improve their activities through de-politicizing their activities and ensuring that the members of the Council are genuinely representative of national minorities, particularly the Roma. It also urged the authorities to pay special attention to the proposals put forward by the Councils of National Minorities. It suggested that such

[75] Altogether 24 States: Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Germany, Ireland, Italy, Kosovo, Lithuania, Moldova, Poland, Portugal, Russian Federation, Slovakia, Spain, Sweden, Switzerland, Ukraine, UK.

proposals be followed up on, and that any decision not to address the proposals should be justified.

For Bulgaria, the position and functioning of a particular advisory body has been in focus. In the first cycle, the recommendation was relatively general, focusing on additional efforts needed at the institutional level to enhance consultation of minorities on issues concerning them. The AC proposed strengthening of the Council for Ethnic and Demographic Questions. Further focus on functions and membership can be found in the recommendations from the second cycle, when the AC called on the Bulgarian authorities to ensure that the National Council for Co-operation on Ethnic and Demographic Issues can effectively play its role as a consultation mechanism and enable persons belonging to national minorities to participate effectively in decision-making. The AC also called on the authorities to ensure that admission of NGOs representing national minorities to the National Council for Co-operation on Ethnic and Demographic Issues follows a transparent and inclusive process and that the length of time for which they are admitted be extended to at least three years. Finally, in the third cycle, the AC makes recommendations to enhance the position of the advisory body through further clarification of powers and strengthening the role of the National Council for Cooperation on Ethnic and Integration Issues in order to ensure that it enables persons belonging to national minorities to participate effectively in decision-making.

6. Self-Governance over Certain Local or Internal Affairs

6.1. Introduction

Because Article 3 of the First Protocol deals with elections to the legislature, the ECHR does not have a direct bearing on the organizational structures or institutional solutions suggested by the LR in the second prong, such as territorial and non-territorial arrangements. In so far as a participatory structure for a minority involves a territorial arrangement with legislative powers, the ECHR has, as we have seen above, some relevance for self-governance. In general, however, the ECHR does not require any particular administrative structure from a State, but allows a lot of discretion for the State concerning its internal organisational arrangements.

The situation could be different with the FCNM, especially concerning the requirement on effective participation for minorities. Effective participation could be brought about by means of, for instance, non-territorial and territorial

arrangements, where persons belonging to minorities assume the leading positions in the organizational structures, perhaps with relatively far reaching decision-making powers, and often even legislative powers. It is interesting however to note that the AC seldom touches upon non-territorial arrangements and rarely recommends anything concerning sub-state arrangements such as territorial autonomy. Perhaps the AC thinks that issues of this kind touch upon the core of the sovereignty of a State and is therefore cautious to comment on these issues. Another natural reason for the low level of recommendations in this area might be the fact that we are still early into the history of the FCNM. Therefore, it is reasonable to start with general recommendations (such as consultation processes and organs), and if the general recommendations fail to make an impact, the level of requirements that the FCNM establishes for States concerning effective participation of minorities could be increased.

6.2. Non-Territorial Arrangements

Different non-territorial arrangements for securing effective participation may provide tailor-made solutions for minority needs. As indicated above, the low number of recommendations given by the AC during the first,[76] second,[77] and third[78] monitoring cycles that concern paras. 17 and 18 LR on non-territorial arrangements is striking. In addition, some of the recommendations are issued under Article 5 FCNM on the preservation of culture and identity instead of Article 15 FCNM.

The recommendations of the AC are issued to States that already have non-territorial arrangements in place (or, as concerns Romania and Serbia during the second cycle, with forthcoming legislation, which implies that the decision to introduce the arrangement had already been made by the State). This means that the AC has actually not issued any such recommendation to any State that would promote the introduction of non-territorial arrangements for a national minority. Instead, the AC has been interested in supporting the activities of existing institutional arrangements and in specifying procedures surrounding such arrangements, emphasizing in particular the consultation mechanisms in relation to such arrangements. There is less attention to such substance that might be important for national minorities mentioned in para. 18 LR, such as education, culture, use of minority language, and other matters crucial to the

[76] Altogether 4 States: Estonia, Finland, Hungary, Sweden.
[77] Altogether 6 States: Estonia, Finland, Hungary, Romania, Serbia, Sweden.
[78] Altogether 5 States: Estonia, Finland, Hungary, Serbia, Sweden.

identities and lifestyles of national minorities. All of the AC's recommendations deal with so-called cultural autonomy, but there is no single recommendation concerning other forms of non-territorial arrangements such as functional autonomy (although functional autonomy and financial autonomy is mentioned in one of the opinions concerning Hungary).

In the first cycle, the AC raised in its recommendations the issue of non-territorial arrangements only with Estonia, Finland, Hungary, and Sweden. In the case of Estonia, the AC concluded that it is "of the opinion that some of the initiatives to protect national minorities, such the National Minorities Cultural Autonomy Act, contain elements that are not suited for the present situation of minorities in Estonia and need to be revised or replaced in order for them to be effective. This pertains in particular to their personal scope of application."[79] The AC proposed to the Committee of Ministers concerning the opinion on Hungary that "the sphere of duties and jurisdictions of minority self-governments and the regulations pertaining to financial contributions by the state and by local governments need to be refined, as well as the regulations on the co-operation between local governments of settlements and local self-government bodies of minority groups. It recommends that appropriate action be taken." In addition, the AC submitted the proposal to the Committee of Ministers to recommend that appropriate action be taken concerning "the form in which to establish minority self-governments on regional and county level, which is a missing link".[80]

In the second cycle, the AC took note of forthcoming legislation in Romania and Serbia and recommended some clarifications. For Romania, the AC recommended for legal clarity to be provided regarding cultural autonomy institutions and procedures envisaged by the draft law on the Status of National Minorities. Judging from the more specific recommendations for Serbia, it may be assumed that the Serbian draft legislation stood out to the AC as a particularly far-reaching non-territorial arrangement. The AC found it

[79] Opinion on Estonia, adopted on 14 September 2001 by the Advisory Committee on the Framework Convention, ACFC/INF/OP/I(2002)005, para. 68. In respect of Art. 5 FCNM, the AC held in its proposal to the Committee of Ministers that "the National Minorities Cultural Autonomy Act of 1993 has had no substantial impact on the practical situation in Estonia and recommends that initiatives to revise or replace this legislation should be pursued with a view to strengthening the applicable norms and to adapting them to the current minority situation of Estonia".

[80] Opinion on Hungary, adopted on 22 September 2000 by the Advisory Committee on the Framework Convention, ACFC/INF/OP/I(2001)004, paras. 50, 51, and p. 16.

possible to issue more specific recommendations for Serbia, such as to ensure that the forthcoming law on the national minority councils provides appropriate guarantees for the councils to take part in decision-making processes in matters affecting them, and to give the councils adequate support from the respective authorities in order to fulfil their tasks efficiently. The AC also referred to ensuring that the principle of free self-identification of persons belonging to national minorities is fully guaranteed during the registration process for persons belonging to national minorities in the special electoral roll. It thus appears that the AC had noticed the significant decision-making powers that would be accorded to the national councils of national minorities in Serbia. For Hungary, the recommendation of the AC was to "continue its efforts to strengthen the operational and financial autonomy of the minority self-governments in order to help them to acquire, run and manage public institutions relevant to minorities. In this context, the transition from a co-decision mechanism to one in which the self-governments have full decision-making powers should be supported. Clearer rules on state and local authority funding and support for the minority self-governments could help to improve relations between the local minority self-governments and local authorities."[81] For Estonia, the recommendation was made, actually on the basis of Article 5 FCNM, to "[a]ddress shortcomings in the National Minority Cultural Autonomy Act by drawing up, in consultation with those concerned, legislation that is more inclusive and takes better into account the present-day concerns of persons belonging to national minorities".[82]

During the third cycle of monitoring, the AC encouraged the Hungarian authorities to continue to facilitate the full and active participation of persons belonging to national minorities in decision-making processes at the national, regional, and local levels through minority self-governments, with a view to continue consultations between the self-government entities and authorities. The AC recommended for Serbia to refine the new system of national councils of minorities. The recommendation suggested to focus on removing conflicts with other laws, laying down clear criteria for the transfer of competences to national minority councils, ensuring that all cases potentially involving conflicts of interests between two or more councils are regulated on the basis of clear criteria, and strengthening the legal provisions governing elections to and the implementation of elections to national minority councils

[81] Second Opinion on Hungary, adopted on 9 December 2004, ACFC/INF/OP/II(2004)003, para. 119.
[82] Second Opinion on Estonia, adopted on adopted on 24 February 2005, ACFC/INF/OP/II(2005)001, para. 189.

so as to ensure full respect for the principle of free self-identification. Also, the authorities should abstain from intervening in internal functionings of national minority councils.

6.3. Territorial Arrangements

As indicated above, recommendations by the AC concerning territorial arrangements within the framework of paras. 19 through 21 in the LR are rare. In the first monitoring cycle, there were two recommendations (for Denmark and Moldova), while in the second and the third cycle, there was one recommendation each, one for Serbia and the other for Moldova. Again, the AC is mostly recommending the development of existing territorial arrangements rather than proposing the introduction of such arrangements in States that yet could implement such arrangements.

In the first cycle of monitoring, the AC started with positive remarks concerning territorial autonomy in Denmark, underlining the importance of home rule for Greenland and the Faroe Islands to the effective participation of the individuals concerned in cultural, social, and economic life and in public affairs. Territorial autonomy can thus clearly be important in the context of effective participation of minorities, because autonomy of the kind established in the Faroe Islands and Greenland would certainly allow the minority at hand to be well positioned to participate effectively in public affairs. For Moldova, the recommendation was geared towards improving the existing arrangement, because the representatives of the autonomous territory of Gagauzia had voiced dissatisfaction with the scope and functioning of the autonomy they have been granted. In addition, there was an overall positive comment on the territorial autonomy of Vojvodina in the then Serbia and Montenegro.

In the second cycle, the recommendation concerning Serbia dealt with a territorial arrangement that operates parallel to the non-territorial national councils mentioned above, namely Vojvodina, for which there was law-drafting underway. The AC was of the opinion that the future statute should clearly define the respective competences of the central and provincial authorities, including areas of relevance for national minorities. Here, the focus is again on improving an existing arrangement.

The recommendations on territorial arrangements from the third cycle dealt again with Moldova. The AC recommended the allocation of sufficient financial resources to the economic development of Gagauzia and encouraged the authorities to pursue the dialogue with a view to provide a clearer

determination of the Gagauz Autonomous Territorial Unit's competences and for a more effective functioning of the autonomy regime. Apparently, the AC had become aware of the dysfunctional nature of the territorial arrangement in Moldova and supported the improvent of this imperfect arrangement that was creating frustration amongst those for whom it was intended.

7. Concluding Remarks

Our review of the praxis of the European Court of Human Rights and the Advisory Committee on the FCNM reveals an interesting profile and mutual complementarity when analysed against the background of the Lund Recommendations on the Effective Participation of National Minorities in Public Life.

The praxis of the ECtHR, consisting of around 20 cases, focuses on elections (para. 7 LR) and electoral rules (paras. 8, 9, 11 LR), as Article 3 of the First Protocol applies to elections. The provision, which is quite specific in comparison with Article 15 FCNM, does not focus on participation in general or on effective participation of minorities in particular, but the cases reviewed here are clearly relevant for both. The practice of the Court permits, within a broad margin of appreciation, different electoral systems that aim to enhance the position of minority populations through participation in electoral structures. For instance, at the same time as a threshold of up to 10 % is approved by the Court - with the consequence that parties representing minorities are potentially excluded from acquiring mandates in a parliament - the Court is of the opinion that reserved seats for minorities are possible and even a positive feature in a constitutional system. However, the Court clearly disapproves discriminatory arrangements and arbitrary applications of domestic election law relevant for minorities. Furthermore, it is not possible under the ECHR for the Court to propose any particular electoral system for the promotion of the position of a national minority, because decisions of that sort are within the purview of the sovereign State. In the praxis of the ECtHR, effective participation of national minorities is mainly a material rule concerning the right of minorities to free elections. From that perspective, the interpretations have travelled a long way since the first case in 1983 concerning Norway. In addition, the ECtHR has established a broad range of freedom for political parties of minorities under Article 11 of the ECRH, but has not allowed political processes to be hijacked by attempts to organize opportune minority parties.

The praxis of the Advisory Committee on the Framework Convention,

consisting of around 160 - 170 recommendations concerning Article 15 on effective participation of minorities during the first three cycles of monitoring (with an additional 15 or so on Articles 5 and 7), is different in nature and is less focused on elections. In fact, in AC recommendations, there is relatively little on elections. However, it is possible to observe a certain parallelism in the judgments of the ECtHR and the recommendations of the AC regarding reserved seats, as well as a complementarity outside of the area of elections. The AC recommends measures of a general nature (para. 6 LR) as well as the creation and activities of advisory and consultative bodies (paras. 12, 13 LR), at least in part because Article 15 FCNM is very general and open-ended in comparison with Article 3 of the First Protocol and does not, it should be underlined, create any right to effective participation. In this respect, the AC has kept itself well within the boundaries of the Explanatory Note to Article 15 FCNM. The main thrust of the AC recommendations appears to be consultations and consultation mechanisms with national minorities, not public powers granted to national minorities. This means that the praxis of the AC is more about the procedural issues of effective participation and less about material issues. This "consultative" orientation that emphasizes dialogue becomes very clear when considering recommendations of the AC that involve non-territorial and territorial arrangements of self-governance, (paras. 14, 15, 16 LR), which are very few. Hence arrangements and mechanisms that could lead to a strong enhancement in the effective participation of a minority are less favoured than arrangements that do not transfer power from "the State" to the minority group. Against this background, it is legitimate to ask in a somewhat critical tone whether consultations and dialogue really can lead to effective participation of national minorities. In light of the LR, the AC still has a lot of latitude left to step up the level of recommendations as concerns the effectiveness of minority participation along categories indicated by the LR. There is room to improve and to move further into specific recommendations dealing with particular public powers and, in particular, with particular institutional arrangements of a non-territorial or territorial nature.

The AC's focus on consultative features does not mean that its recommendations necessarily become unspecific (although the ECtHR has sustained the opinion of a German court that no clear and binding obligation derives from the FCNM to exempt national minority parties from electoral thresholds). In many cases, the recommendations pinpoint particular public bodies or organs and even geographical locations, not to speak of minority groups affected by the policies of a State (in particular, Roma, Sinti, and Travellers, but also other groups and, in addition, female members of national

minorities). The AC is not resolving individual complaints of the same kind as the ECtHR, but the recommendations issued by the AC can nevertheless contain a level of detail not far off from the judgments of the Court (although the AC does not, after the first cycle of monitoring, make reference to the conduct of States as being incompatible with the FCNM, and it has never referenced anything as a violation). Of course, the Court has the specific task to resolve individual cases, so the judgments of the Court become very detailed accounts of the circumstances of the case and of how the facts resonate with Article 3 of the First Protocol. The AC will probably never be able to come close to that level of detail in its opinions, but this does not mean that the recommendations would be completely toothless; when considering the opinions of the AC in a longitudinal manner, it is evident that in many States, improvements have taken place, perhaps as a result of its recommendations. While the ECtHR may respond to issues involving effective participation of minorities when resolving election-related cases in a process of incremental evolution, where rather limited boundaries are set by the ECHR, the AC still has a lot of space to develop its full potential concerning the rather open-ended norms of the FCNM on effective minority participation in public life.

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Balázs Vizi

European integration and minority rights conditionalty policy

European integration and minority issues

In the 1990s, the revival of political mobilisation on ethnic basis raised great attention in the international community. Political transition to democracy in Central and Eastern European (CEE) states was coupled with emerging political cleavages along national or ethnic identity lines. The new democracies in CEE indeed not only faced the challenges of political transition from one-party rule to democracy, but also the problem of redefining or creating the identity of the state and its relation to the existing cultural and ethnic diversity that characterises many of these societies. Both national minority communities and majority nations started to redefine their nation-building endeavours in the new political framework, and this often led to to contrasting claims and inter-ethnic conflicts.

Furthermore, democratic transition and European integration have become closely interrelated processes for most post-communist countries.[83] The membership/partnership policy of European international organisations also played an important role in the implementation and stability of the new democratic institutions. The rise of ethnic-based politics as a characteristic of political transition in CEE and the protection of minorities as a desirable panacea, especially as a basic principle of democratic political ideals, have also been raised as key issues in the European integration process. International organisations have had a powerful influence in the reinforcement of arguments on minority rights protection within these states and in the attempts to create an appropriate legal and political environment for inter-ethnic stability through the improvement of minority rights protections.

The increasing attention given to the situation and legal

[83] Jan Zielonka and Alex Pravda (eds.) *Democratic consolidation in Eastern Europe,* Vol. 1-2. Oxford, Oxford University Press, 2001.

protection of minorities at an international level also entailed that questions related to minorities were more strongly articulated within the broadening process of European integration in the 1990s. The institutional expansion of the Western international organisational regime to CEE offered a new perspective for international co-operation. International organisations – like the Concil of Europe (CoE), the EU, and, to a lesser extent, even the North Atlantic Treaty Organisation (NATO) – were indifferent or weak in addressing the problems related to the accommodation of national and ethnic diversity within their member states before 1989, but turned out to be surprisingly active in taking minority issues to the floor in their relations with the new democracies in CEE. As a result, the propagation of minority rights protections as a 'pan-European' standard has become an integral element of their political profile, at least in their external relations. What could be seen as a novelty was not the extension of a consistent legal regime of minority rights, but the fact that the concept of the protection of minorities was increasingly articulated as a basic element of the 'ideal' of liberal democratic governance within the European framework of the institutional integration of CEE states. However, while within European organisations the lack of clarity regarding the basic standards in the treatment of minorities was not a crucial problem for Western European countries, it has become a difficult and intrinsic quandary for CEE states in their accession to the same international organisations.[84]

In this context, different international organisations played disparate roles and applied rather different forms of political and

[84] Will Kymlicka and Magda Opalski (eds.) *Can Liberal Pluralism Be Exported? Western political theory and ethnic relations in Eastern Europe*. Oxford, Oxford University Press, 2001. p. 47-58. See in particular Boris Tsilevich 'New Democracies in the Old World: Remarks on Will Kymlicka's Approach to Nation-building in Post-Communist Europe' in: Will Kymlicka and Magda Opalski (eds.) *Can Liberal Pluralism Be Exported? Western political theory and ethnic relations in Eastern Europe*. Oxford, Oxford University Press, 2001. pp. 154-170.

economic pressure and incentives to support not only democratic transition, but also positive developments in minority rights policies in CEE.

One of the most significant political tools applied by Western European states in this endeavour was their strategy related to the timing and conditions for the formal institutional integration of CEE countries into 'Western' international organisations. Extending partnership first and offering membership later to CEE countries in the CoE, NATO, and the EU was widely believed to be an effective strategy for reinforcing democracy and political stability in the region. Therefore, the concern about strengthening the protection of minorities was notably present in the membership policy applied by these international organisations towards CEE states.

The CoE, the EU and, in a less obvious but no less influential manner, NATO, have each applied a policy of conditional admission in supporting domestic political reforms and emphasising the importance of good neighbourly relations, regional stability, and the protection of minorities. In this regard, the prospect of membership in the CoE, NATO, and the EU has gained overwhelming importance and has proven to be a powerful motivation for policy change in CEE countries.[85]

Since the 1990s, the EU has become the most dominant player in this integration process, especially due to its eastward enlargement. The EU's power in international relations is not the result of its own foreign policy strategy, but rather its "club" power: the EU has become the most economically and politically attractive region and membership is strongly appealing to its close neighbors.[86]

[85] Karen E. Smith: 'Western actors and the promotion of democracy', In J. Zielonka, A. Pravda (eds.) *Democratic consolidation in Eastern Europe, Vol. 2: international and transnational factors*, Oxford, Oxford University Press, 2001. 31-57 pp.

[86] Richard Rosecrance: 'The EU: a New Type of International Actor' in: Jan Zielonka (ed.) *Paradoxes of European Foreign Policy*. The Hague, Kluwer Law International, 1998. pp. 15-25. See also Walter Mattli: *The logic of regional integration: Europe and beyond*. Cambridge, Cambridge University Press, 1999. For example, the EU, already in the early 1990s played such a determining role

Conditionality policy and international norms on minority rights

Conditionality in general terms is usually defined as "*a basic strategy through which international institutions promote compliance by national governments*" and "*a mutual arrangement by which a government takes, or promises to take, certain policy actions.*"[87]

The CoE and NATO formulated political conditionality within their membership policy. These political requirements, however, remained strictly consistent with their organizational goals: human rights protection, democratic stability, and security guarantees, respectively. If minority issues emerged on the either agenda, in both cases they were limited to the context of the specific interests of each organization. Furthermore, both NATO and CoE member states regarded enlargement as a geostrategic move rather than a transformative force. Thus, even in the case of the CoE, many human rights and minority rights conditions were formulated as *ex-post* conditionality. The future member states were often required to take only a formal commitment without specific legislative or policy measures.[88] The membership criteria adopted by the EU Copenhagen summit in 1993 included institutional, economic, and political elements. Candidate countries are requested to have stable institutions guaranteeing democracy, the rule of law, human rights, and *respect for and protection of minorities* (emphasis added); a functioning market economy and the capacity to cope with competition and market forces in the EU; and the ability to take

in the commercial relations of CEE states, that gave a clear preference for membership. In a similar way the political ideal of „belonging to Europe" was also closely associated with gaining EU membership.

[87] Jeffrey T. Checkel: *Compliance and Conditionality*. Oslo, ARENA Working Papers 2000/18

[88] *Ibid*.; Heather Grabbe: *A Partnership for Accession? The Implications of EU Conditionality for the Central and Eastern European Applicants*, RSC WP 99/12 (Firenze, European University Institute, 1999). Katlijn Malfliet – Stephen Parmentier: *On the membership of Russia to the Council of Europe* (Leuven, Raad voor Europees Onderzoek, 1997) and Andrew Cottey: *Central Europe after NATO Enlargement*, 1996–1998, NATO Research Fellowship Final Report.

on and effectively implement the obligations of membership, including adherence to the aims of political, economic, and monetary union.[89] The Copenhagen criterion includes legal (implementation of EU law and policies, the "*acquis*"), political, and economic (competitive market economy) conditions. The European Union, including the minority protection condition, established a broader political conditionality reaching beyond its internal legal and political competences.[90] In principle, political conditionality is less objectively measurable. In lack of clear normative or quantitative standards for compliance, the political requirements are more open to political contestation. This was even more the case with minority protection requirements.

Debates about how can EU influence domestic policy changes with its conditionality policy reflect the arguments on "logic of consequences" and "logic of appropriatness"[91] or the rationalist/constructivist divide in international relations theory.

From a rationalist standpoint, enlargement takes place only if the benefits of extending organizational institutions exceed the subsidiary costs of the accession of new members, both for the member states and for the applicant states. The accession procedure in these terms is following the simple logic of human-state behaviour: in order to maximize the benefits of integrating new states, national actors follow a consequentialist theory of action – member states define accession conditionality and provide incentives for candidate states in order to reduce the material and strategic risks of enlargement and accession states employ similarly rational calculations that drive their efforts and domestic policy towards fulfilling the conditions set up by the international organisation. In this perspective, accession conditionality may be perceived as an appropriate instrument to minimize the economic and political risks of enlarging and "to

[89] Council of the European Union. Copenhagen European Council Presidency Conclusions, 21-22 June 1993, SN 180/1/93 REV 1

[90] See also Eli Gateva: *European Union Enlargement Conditionality*. Palgrave-Macmillan, London, 2015.

[91] James G. March – Johan P. Olsen: *Rediscovering Institutions – The Organizational Basis of Politics*. New York et al., The Free Press, 1989.

bring about and stabilize political change."[92]

Minority issues can be understood as a security risk in this context: inter-ethnic conflicts may easily destabilize candidate states and promotion of minority rights protection can be seen as an appropriate tool to prevent such conflicts and to build political stability. The Union's concern about minorities was largely conceived as a strategic policy to increase stability and security in the accession countries. In fact, it was often formulated that the accommodation of ethnic diversity and the promotion of democracy serve basic security interests in post-communist Europe.[93]

The criticism of rationalist interpretations formulated by social constructivists is founded on the perception that enlargement is not driven by actor preferences, but is shaped by ideational, cultural factors. The most relevant of these factors is the degree to which actors inside and outside the organization share a common identity and a shared set of values and fundamental beliefs.[94] "*The more an external state identifies with the international community that the organization represents and the more it shares the values and norms that define the purpose and the policies of the organization, the stronger the institutional ties it seeks with the organization and the more the member states are willing to pursue horizontal institutionalisation with this state*".[95]

[92] Frank Schimmelfennig: ‚European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe' Paper prepared for Club de Madrid - IV General Assembly Prague, 10-12 November 2005. p. 1.

[93] Eric Herring 'International security and democratisation in Eastern Europe' in: G. Pridham – E. Herring – G. Sanford (eds.) *Building Democracy? The International Dimension of Democratisation in Eastern Europe*. London, Leicester University Press, 1997. p. 90-95. From a theoretical standpoint see Anita Inder Singh: *Democracy, Ethnic Diversity, and Security in Post-Communist Europe*. London, Praeger, 2001. Chapter 1.

[94] On 'cultural match' see Jeffrey T. Checkel: 'Norms, institutions and national identity in contemporary Europe' *International Studies Quarterly* 1999 (43) 1: p. 83-114.

[95] Frank Schimmelfennig and Ulrich Sedelmeier: 'Theorising EU enlargement: research focus, hypotheses, and the state of research'. In: *Journal of European Public Policy* 9/4 2002 p. 513.

On the basis of these assumptions, constructivists posit that the origins and the constitution as well as the goals and procedures of international organizations are more strongly determined by the standards of legitimacy and appropriateness of the international community to which they belong, than by the utilitarian demand for efficient problem-solving.[96] In a constructivist argumentation, rules and norms are constitutive as an enabling framework for action and a precondition for making causal claims.[97] In this perspective, the role of shared values, processes of persuasion, and socialization are important.[98] Human and minority rights norms are particularly important since they form an integral part of the liberal democracy ideal, promoted and seen as a pan-European model to follow by CEE states after the fall of communism.

Schimmelfennig also made an attempt to bridge rationalist and constructivist paradigms, arguing that "rethorical action" is a mechanism when institutional political actors use normative arguments strategically in order to justify their self-interested preferences.[99] In this sense, the security concerns of EU member states on minority issues could be advanced through the rhetorical actions about meeting minority rights standards. Indeed, it was not only the EU that made references to international standards; OSCE and CoE efforts to improve the situation of minorities were coupled with EU accession. EU membership conditionality was often a motivation behind changes to minority policies, but the CoE and OSCE, having a more normative basis, formulated the substance of policy

[96] Christian Reus-Smit: 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions' in: *International Organization* 1997, 51, p. 569.

[97] Cf.: Alexander Wendt: *Social Theory of International Politics*. Cambridge, Cambridge University Press, 1999.

[98] Tanja Börzel and Thomas Risse *When Europe Hits Home: Europeanization and Domestic Change*. European Integration Online Papers, 2000/15. <http://eiop.or.at/eiop/pdf/2000-015.pdf>

[99] Frank Schimmelfennig: ‚The Community Trap: Liberal Norms, Rhetorical Action and the Eastern Enlargement oft he European Union' in: *International Organization* Vol. 55, 2001/1 pp. 47-80

solutions.[100]

Norm diffusion – limits and potentials of international standards on minority rights

In this context, the EU could not promote its own normative regime on minority protection in CEE states, but rather it acted as an agent in transferring international norms to domestic legislation and politics in CEE candidate states. International instruments on minority rights however do not offer solid, unquestionable legal standards that could be translated into domestic legislation. Most international instruments on minority rights emerged in Europe and have not become universally acknowledged norms and they remain largely contested even among European states. The EU, building on the established practices of the CoE and CSCE/OSCE, linked human rights and minority rights with democracy and with security concerns.[101]
The foundations of international norms on minority rights developed in Europe in the 1990s were equally based on human rights and security concerns. The 'new regime' of international minority rights protection, features some basic characteristics. It builds on the existing post-WWII human rights regime and takes states' security concerns about specific political claims of minority groups into consideration. 1.) In principle, the 'new regime' does not depart from the individualist approach of modern human rights protection; 2.) it builds on the principle of equality and non-discrimination; 3.) minorities are not acknowledged as political communities and the right to self-determination is not assigned to them; 4.) the group character of minorities is not, or just implicitly acknowledged; 5.) the rights of minorities are usually formulated in vague terms, offering an ample room for divergent governmental policies and

[100] Judith G. Kelley: *Ethnic Politics in Europe. The Power of Norms and Incentives*. Princeton, Princeton University Press, 2004.

[101] Gwendolyn Sasse: EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy. *EUI Working Paper* No. 2005/16. Firenze, RSCAS, European University Institute, 2005.

interpretations.

Looking at the specific international norms on minority rights, for a long period of time Art. 27 of the International Covenant on Civil and Political Rights was the only direct reference to the rights of minorities under international law. This vaguely formulated provision recognized the right of persons belonging to minorities to preserve their identity, but it remained rather ambiguous about the specific duties and responsabilities of state parties in this regard.[102] The international protection of minorities started to get more attention only in the 1990s, first when the UN General Assembly adopted a declaration on the rights of minorities,[103] and then especially when in Europe the rights of minorities became a central issue in international relations. Outstanding achievements of this period include the adoption of the Copenhagen Document (1990), the establishment of the position of High Commissioner on National Minorities (Helsinki Document, 1992) within the OSCE, and the European Charter for Regional and Minority Languages (1992) and Framework Convention for the Protection of National Minorities (1995 - FCNM) within the CoE. However, though these documents provided a stable normative framework for State parties regarding the treatment of minority claims, OSCE documents were only political declarations. The two relevant international treaties, the Language Charter and the FCNM, are considered to contain weak provisions: states often agreed to terms that would potentially limit their undertakings, and in fact, the Language Charter offers a flexible 'á-la-carte' mechanism that allows signing states to select from a list of optional

[102] Art. 27 reads as follows: „In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Cf. Patrick Thornberry: *The Rights of Minorities and International Law*. Oxford: Clarendon Press, 1991. pp. 141-255. and also Human Rights Committee General Comment No. 23. on Art. 27. CCPR/C/21/Rev.1/Add.5 26 April 1994

[103] UN GA Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/RES/47/135 92nd plenary meeting 18 December 1992

obligations proffered by the Charter. And the FCNM also contains flexible conditions for specific rights, like "if [persons belonging to minorities] so request." Other international documents on minority rights abundantly attach certain conditions to state obligations, such as "if necessary," "within the framework of their legal system," "where appropriate," et cetera, without providing a definition or a tacit general consensus on the precise meaning and applicability of these limitations. Moreover, the Language Charter and the FCNM contain "soft control mechanisms," i.e. there are no legal sanctions or a judicial forum in place to render the implementation of these legal commitments effective. The monitoring procedure introduced by both treaties builds on the work of expert bodies and on the political recommendations adopted by government representatives in the Committee of Ministers of the Council of Europe.

The lack of a strong independent judicial or judicial-like institution to controll the implementation of these standards has left monitoring and evaluation procedures largely vulnerable to political considerations. Due to this, political concerns regarding the situation of minorities formulated within the framework of extending institutional relations between CEE states and the CoE, NATO, and the EU have gained greater prestige than the procedures established for the purpose of implementing international minority rights standards.[104] Or in other words, the efficiency of these specific procedures and mechanisms often depends greatly on their reinforcement by the institutional policies of CoE, NATO, and the EU towards CEE states. The activities of international organisations in this regard however are not strictly norm-guided, but appear to be driven by looser policy-driven mechanisms.[105]

The EU, however, applied a unique approach: its pre-accession

[104] See Bernd Rechel: Introduction in: Bernd Rechel (ed.): Minority Rights in Central and Eastern Europe. London-New York, Routlegde, 2009. pp. 3-11.

[105] Gaetano Pentassuglia: *Minorities in International Law*. Strasbourg, Council of Europe Publications, 2002. pp. 39-44.

monitoring procedure on minority rights combined normative and political elements. Taking minority rights protection into account on the enlargement agenda in an institutionalised form within the EU was a very new development in its implementation of the membership process, on its consequences for candidate states, and for the EU integration process. When preparing its regular reports on candidate states' progresses in the field of minority protections, the European Commission relied on the monitoring mechanisms established to supervise the implementation of the FCNM. The work of the OSCE High Commissioner on National Minorities (hereinafter also HCNM) similarly received great attention.

This 'intermediary' position necessarily entailed an interpretative involvement, i.e. articulating certain norms of minority rights protection while neglecting others, and constrained the EU to give particular meanings to norms in specific situations and in the context of its own institutional structures and preferences. Most studies on norm diffusion focus on the practices and procedures of how external norms are internalised in single states.[106] But in this case, the question is not only how, but also which norms are taken into consideration. EU conditionality expressly highlights the relevance of norm resonance and domestic norm construction in processes of norm diffusion.[107]

Besides the problem of identifying 'which norms matter?'[108] it is also a question of the interpretative framework in which actors' understandings of accession norms are defined.

Double standards and effective conditionality: non-discrimination and minority specific rights

When observing compliance either from a constructivist or a

[106] Jeffrey T. Checkel: 'The Constructivist Turn in International Relations Theory'. In: *World Politics* 50 (January 1998), p. 324-348.

[107] Antje Wiener and Guido Schwellnus: *Contested norms in the process of EU enlargement: non-discrimination and minority rights*. Constitutional WEB Papers, 2/2004.

[108] Jeffrey Legro: ‚Which norms matter? Revisiting the "failure" of internationalism' In: *International Organization* 51, 1. Winter 1997, pp. 31-63.

rationalist approach, it becomes evident that the normative foundations are important in developing an effective and crebible conditionality policy. Three elements seem to be important in this regard: conditionality has to be credible; conditions have to be concrete; and the external incentives must be more promising than domestic political costs.[109] Could EU conditionality policy on minority rights meet these criteria?

One of the major criticisms towards the EU approach to minority issues in its enlargement policy was that the EU applied double standards in this field and thus required candidate states to implement specific minority rights norms that have never been requested from member states. It is important here to distinguish between minority specific and non-minority-specific rights as two possible forms of minority protection.[110] We may identify two fundamental pillars of minority rights protection in international law: the prohibition of discrimination and the recognition of minority specific rights. The very basis of the legal status of a minority is the principle of non-discrimination. In spite of the important distinction often made between the principle of non-discrimination and the specific rights of minorities, minority rights cannot be analysed without observing the anti-discrimination principle. [111]

Non-discrimination means that the law must not attach any negative consequences to the fact that an individual belongs to a minority. So, the prohibition of discrimination is the first step

[109] See also Frank Schimmelfennig and Ulrich Sedelmeier: 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' in *Journal of European Public Policy*, 2004 (11) 4, p. 661-679.

[110] See in detail Kristin Henrard: ‚The EU, Double Standards and Minority Protection': A Double Redefinition and Future Prospects in: K. Henrard (ed.) *Double Standards Pertaining to Minority Protection*. The Hague, Martinus Nijhoff, 2010. pp. 21-70.

[111] All relevant legal and political documents reaffirm the principle of non-discrimination in relation to minorities see, e.g. UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Art. 2(1); FCNM Art. 6(2); CoE Language Charter Art. 7(2); CSCE Copenhagen Document Art. 32; CSCE Helsinki Document "The Challenges of Change", Part VI. Human Dimension, Art. 30-35.

and the indispensable basis for 'real' minority protection policy or legislation, but in itself cannot be a sufficient instrument.

Minorities benefit from the principles of equality and non-discrimination,[112] but an important distinction has to be made between the anti-discrimination approach and minority rights. [113] Specific minority rights as they are embedded in international documents usually cover three main areas that are particularly relevant for the preservation of minority culture and identity: a.) linguistic rights may comprise a wide set of private and public relation and areas where the use of minority languages is acknowledged; b.) the second group of specific rights are related to education on minority language; and c.) the third specific group of rights can be delimited as covering the right of minorities to effective participation in political, economic, and social life.

It is true that EU member states have not acknowledged specific minority rights under EU law and that member states also largely differ in recognising international standards on minority rights. Some of them have even refused to ratify the FCNM.[114] Nevertheless, the European Commission's regular reports and the European Parliament's resolutions on candidate states' progress made towards membership contain regular references to international minority rights standards. These references

[112] Thornberry: *op. cit*. Part III.

[113] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities gave useful indication on the matter by explaining the themes of its mandate: „1.Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish. 2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population (…) [if] a minority wishes for assimilation and is debarred, the question is one of discrimination." U.N. Doc. E/CN.4/52, Section V.

[114] The position of France and Greece is well known in denying the existence of minorities on their territories and thus denying the relevance of any international minority protection norm in their domestic constitutional regime.

remained rather vague, and they cannot be seen as any form of legal monitoring of the implementation of international minority rights standards. But the normative elements considered by EU bodies as relevant are reflected in the recurring references to the existing pillars of international minority rights law, such as in the FCNM and the OSCE documents, especially the statements and recommendations of the OSCE High Commissioner on National Minorities (HCNM). The ratification of the Framework Convention has become a tacitly accepted precondition of accession.[115]

Non-minority-specific rights are more tangible in EU law: the establishment of a legislative competence to combat discrimination (introduced by the Amsterdam Treaty) and the two anti-discrimination directives adopted in 2000 may be seen as having impact on the rights of minorities as well.[116]

Before the adoption of the Lisbon Treaty in 2007, four areas could be seen as potentially relevant to the rights of minorities: combating discrimination (Art. 13 TEC), European citizenship (Arts. 17-22 TEC), right to diversity (Art. 151 TEC), and protection of fundamental rights (Art. 6 TEU & Charter of Fundamental Rights).[117] These norms however were far from having any direct relevance to the effective legal treatment of minorities and minority specific rights. As a matter of fact, they have never been seen as offering guidelines on minority rights protection for EU member states. However, as Topidi states, "…the experience of enlargement as a conditionality process, combined with 'internal' legislative measures (including a

[115] The Commission explicitly urged among others Estonia for the ratification of the FCNM and as a matter of fact each candidate state signed and ratified it before accession.

[116] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (also known as Race Directive). OJ L 180, 19 July 2000, pp. 22-26. and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2 December 2000, pp. 16-22.

[117] Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, p. 33–184.

limited number of ECJ decisions), and an accompanying policy oriented post-2004, and 2007 towards the promotion of diversity and the elimination of discriminatory trends, demonstrate the gradual development of an EU policy on minority rights."[118] The normative framework in EU law has not changed significantly even after the adoption of the Lisbon Treaty in 2007. The inclusion of the respect for "rights of persons belonging to minorities" among the fundamental values of the EU in Art. I-2 TEU does not establish any legislative competence for the EU. The potential sanctioning mechanism of Art. 7. is far too theoretical, and thus it does not entail the translation of these values into normative commitments by Member States.
In this aspect, it can be argued that in the application of minority protection condition, the principle of non-discrimination, as a legally embedded norm in the *acquis*, could provide a 'hard', i.e. legally defined requirement for candidate states. On the other hand, in the absence of relevant normative background in EU law, specific minority rights standards could be only formulated as 'soft' norms, opening a broader room for interpreting compliance with membership requirements.[119]

European Union enlargement policy and specific minority rights
During the first wave of eastward enlargement, after accession negotiations started with the first CEE candidate states in 1998, a series of criticisms were formulated regarding the EU's performance on minority issues. During the accession process, the European Commission played a determining role since it was tasked with conducting the accession negotiations with candidate states and publishing the annual regular reports (progress reports) on candidate states' progress towards membership.
It is true that the EU's missing "coherent vision on the legal

[118] Topidi: *op. cit*. p. 5.
[119] Cf.: Guido Schwellnus – Antje Wiener: *Contested norms in the process of EU enlargement: non-discrimination and minority rights*. Constitutional WEB Papers, 2/2004.

position of minorities"[120] could not contribute to the consolidation of a general European minority rights standard.[121] But this could hardly be expected from EU, since the geopolitical logic of enlargement and the missing minority rights standards in the *acquis* did not help EU bodies to substantiate strict normative barriers regarding the situation of minorities. Still, the hidden concept of minority rights (better understood as non-minority-specific rights) within the *acquis* and the occasional references to international minority rights norms could induce political or legislative changes in candidate states. "Effective conditionality does not necessarily imply convergence among candidate states, especially when – as is the case with minority rights – no specific EU models are offered and conditions are either ill-defined or a diverse set of specific demands not deduced from a coherent set of principles."[122] In the field of minority specific rights, conditionality may have divergent outcomes in different candidate states and we cannot expect any coherent standard. But in the field of non-discrimination where specific EU rules are in place, legislative and policy changes in candidate states may be more convergent. The uneven effects of conditionality render difficult the overall evaluation of its effectiveness. But conditionality should not necessarily be understood as a "clear-cut variable in a causal mechanism that explains policy or institutional change."[123] Hughes *et al*. argue that conditionality is continuously developing in its content and is being shaped by various actors both within the EU institutions and by political actors in candidate states who may also instrumentalize conditionality for their domestic political goals.[124] From this

[120] Kyriaki Topidi: ‚The Limits of EU Conditionality: Minority Rights in Slovakia' in: *JEMIE* 2003(1), p. 31.

[121] Guido Schwellnus: Looking Back at Ten Years of EU Minority Conditionality vis-á-vis Central and Eastern European Candidate States in: *European Yearbook of Minority Issues*, Vol. 4. 2004/5 pp.321-340.

[122] *Ibid*. p. 324.

[123] Gwendolyn Sasse: EU conditionality… p. 19.

[124] James Hughes – Claire Gordon – Gwendolyn Sasse: *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe*. Houndmills, Palgrave, 2005.

approach, the changing content of political conditionality is part of the game. The arguments and preferences formulated by the Commission towards candidate states reflect the changing political context in which they were formulated.

During the first Eastern enlargement process between 1997-2007, an overview of the European Commission's comments on the situation of minorities in the regular reports[125] reveals: i) the Commission arbitrarily selected among problematic minority issues; ii) on various occasions, the comments published in the reports were inconsistent with the reports published in previous years; iii) actual political considerations oftentimes overshadowed the coherent interpretation of conditionality.[126]

A reading of the regular reports published in this period clearly shows that the Commission did not pay equal attention to all minority communities. The situation of the Russian speaking population in the Baltic States, the Roma living in the Czech Republic, Bulgaria, Hungary, Romania, and Slovakia, and to a lesser extent, issues related to the situation of Turks in Bulgaria and Hungarians in Slovakia and Romania was highlighted. This selection may lead to the conclusion that the Commission established a political hierarchy between the different minority-related problems. From a security perspective, the situation of Russian minorities in the Baltic States was strategically important to the EU in light of its political-economic relations with Russia. The social integration of Roma –with its significant population and living in very similar socially marginalised position in almost all candidate states – was also important not only for social stability in candidate states but also for increasing fears about their migration to the EU.[127] Apparently the

[125] All are accessible on the EU Enlargement website: <http://europa.eu/pol/enlarg/index_en.htm>

[126] See also James Hughes – Gwendolyn Sasse: Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs, *Journal on Ethnopolitics and Minority Issues in Europe,* 2003, No. 1. 1–38.

[127] Peter Vermeersch: Minority policy in Central Europe: Exploring the impact of the EU's enlargement strategy, *The Global Review of Ethnopolitics* Vol. 3, 2004, no. 2. 3–19.

European Commission confronted difficulties in assessing "progress" made by candidate states in the field of minority rights protection. In this aspect, mostly statistical data and formal measures, regarding for example legislative changes and the adoption of policy programs, was used as a basis for evaluation. The ratification of the FCNM and the adoption or modifications of specific laws (related to minority rights or cititenship) were evaluated as positive steps towards compliance. The general evaluations within their regular reports use vague and rather positive expressions in describing candidate states' commitments in this field. The overall evaluation of the candidate states' successes in fulfilling the political criteria of accession is almost always positive.[128] The wordings used in the regular reports are very similar: "a number of positive developments took place in this area";[129] "…authorities made significant progress in this area";[130] "considerable progress was made";[131] "the country has made considerable progress in further consolidating and deepening the stability of its institutions guaranteeing democracy, the rule of law, human rights and respect for minorities."[132] The returning references to "international" or "European standards" in the reports remain blurred. It would be difficult to deduce specific norms considered by the Commission as essential and unquestionable in the context of EU enlargement.[133] The only stable, visible, and significant request

[128] The only exception was Slovakia, which did not meet the political criteria in 1997 and 1998 under the Meciar government.

[129] 2001 Regular Report on Romania's Progress towards Accession, Brussels, 13.11.2001 SEC(2001) 1753. p. 29.

[130] 1999 Regular Report on Slovakia's Progress towards Accession, Brussels, 13.10.1999. p. 16.

[131] 2000 Regular Report on Estonia's Progress towards Accession, Brussels, 8.11.2000. p. 20.

[132] 2001 Regular Report on Estonia's Progress towards Accession, Brussels, 13.11.2001. p. 23.

[133] The Regular Reports recurrently make references tot he documents, recommendations adopted within the OSCE or the Council of Europe. The requirements formulated by these organisations were also reinforced in the Association Agreements (Europe Agreements) stipulated with Estonia and Latvia, asking the two countries to fulfill their commitments made in OSCE

formulated in the regular reports was the ratification of the FCNM by candidate states. Accession to the FCNM was seen as giving teeth to commintments on minority protection by accepting an international monitoring procedure to regularly evaluate the situation of minorities.[134] However, in the case of Poland, the delay in ratifying the Framework Convention did not change the positive assessment of Poland's performance on minority rights protection. Even when the Commission "urged"[135] Latvia to ratify FCNM, accession got the green light even while this requirement was still missing.

In principle, the European Commission has sought to escape the conceptual debates regarding the situation of minorities. The regular reports are silent on the lack of a consistent definition of minorities, the denial of the existence of minorities (Bulgaria), or the constitutional reinforcement of the dominance of national majority over minorities (Slovakia, Romania). The Commission attempted to focus on practical issues instead of questioning the constitutional structure of candidate states. The situation of minorities in Bulgaria was an outstanding example in this regard. The Bulgarian Constitution does not recognize the existence of minorities as it would contradict to the definition of Bulgaria as a unified national state. In this way, the only legislative measures relevant for minorities are based entirely on the general non-discrimination principle. The Commission usually overlooks the lack of specific minority rights and the overall situation of Turkish minority. The regular reports only recurringly state that Turkish minority "is integrated into political life through elected representation at national and local levels and through increasing representation in public administration,"[136] ignoring the fact that

regarding the improvement of human and minority rights. *Official Journal* L 68, 9 March 1998, 3. és *Official Journal* L 26, 2 February 1998, 3–4.

[134] Author's interviews with European Commission Enlargement DG officials, November 2013.

[135] 2002 Regular Report on Latvia's Progress towards Accession, Brussels, 9.10.2002. p. 30.

[136] 2003 Regular Report on Bulgaria's Progress towards Accession, Brussels, 5.11.2003. p. 25.

this is not a result of specific legal guarantees but rather of a delicate political modus vivendi.[137]

In regard to Romania, the Commission welcomed the elaboration of a draft law on the rights of minorities that included a special form of cultural autonomy. The Romanian government started to work on the draft law in 2004-2005 and presented it to the Parliament in 2005.[138] The draft law offered a relatively coherent structure for minority rights, which partly responded to the claims of Hungarian minority representatives to autonomy. The accession treaty was signed with Bulgaria and Romania in 2005 under the condition that the Commission continues the monitoring of compliance with accession criteria (Co-operation and Verification Mechanism) for a transitory period until 2007. In this period, both the Commission and the European Parliament were concerned about the adoption of the law on minority rights. The Parliament expressed its "disappointment over the continued delay in the adoption of the law on minorities; […]" and its wish "to see the law on minorities approved as soon as possible, respecting the political criteria."[139] In its 2006 report, the Commission stated that the parliamentary debate on the law "needs to be followed closely."[140] This law was seen as an important element in meeting the political criteria of accession, but in its final evaluation, the Commission did not expressly mention this[141] and Romania gained membership without

[137] Martin Brusis: ‚The European Union and Interethnic Power-sharing Arrangements in Accession Countries' in: *JEMIE* 2003/5. p. 7.

[138] Cf.: D. Cristopher Decker – Aidan McGarry: *Enhancing Minority Governance in Romania, the Romanian Draft Law on the Status of National Minorities: Issues of Definition, NGO Status and Cultural Autonomy*. ECMI Report#54, Flensburg, ECMI, 2005.

[139] European Parliament resolution on the extent of Romania's readiness for accession to the European Union (2005/2205(INI)) para. 26.

[140] European Commission Monitoring Report, May 2005. p. 12. see at <http://ec.europa.eu/enlargement/pdf/key_documents/2006/monitoring_report_ro_en.pdf>

[141] Commission of the European Communities Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania Brussels, 26.9.2006 COM(2006) 549 final p. 6.

adopting the final law. The law still has yet to be adopted. Here again it seemed to be evident that the Commission, facing political resistance from candidate states, prefers to drop specific requirements and as long as the general principle of non-discrimination is respected, it does not regard specific minority rights as an issue of great concern.

European Union minority protection conditionality to South-Eastern European states

Following the 2004 "big-bang" enlargement and the adoption of the Lisbon Treaty, EU member states and the European Commission adopted a more progressive enlargement strategy vis-á-vis the potenatial South-East-European (SEE) candidate states. As early as 1997, the European Council opted for a "graduated approach" and underlined that in the EU's relations with SEE states, "to the extent possible, conditions are broken down into operational, verifiable elements (Annex). The Council will monitor and evaluate the progress made in meeting conditionality requirements, using all mechanisms at its disposal and taking into account reporting from international organisations/bodies in the region such as UN, OSCE and Office of High Representative (OHR). Progressive implementation of conditions will lead to progressive improvement of relations subject to a continuous and comprehensive political and economic assessment in which each country will be judged on its own merits." This "graduated approach" was translated into different levels of conditionality: the first level, offering preferential commercial relations, does not refer to minority protection. The second step, the accession to the PHARE financial aid programs, was conditioned by "compliance with obligations under the peace agreements, including those relating to cooperation with the International Tribunal in bringing war criminals to justice. (…) It would also require respect for human and minority rights and the offer of real opportunities to displaced persons (including so called 'internal migrants') and

refugees to return to their place of origin."[142] At the third level of the graduated approach, conditionality is explicitly described as an "evolutionary process." The start of negotiations is only possible if the country at stake fulfills 10 general conditions.
These conditions include the "[c]redible offer to and a visible implementation of real opportunities for displaced persons (including so called 'internal migrants') and refugees to return to their places of origin, and absence of harassment initiated or tolerated by public authorities," the "[a]bsence of generally discriminatory treatment and harassment of minorities by public authorities," and the "[a]bsence of discriminatory treatment and harassment of independent media." The concession to start accession negotiations requires "a lower level of compliance than the conclusion of the agreements. At each stage, including after the conclusion of agreements, the situation should be monitored and, in accordance with the relevant articles of the agreement, its application could be suspended in case of serious non-compliance." An Annex to this kind of Conditionality-Decalogue provides the European Union with "[e]lements for the examination of compliance" with the different criteria. With respect to the protection of minorities, three elements are mentioned explicitly: the "[r]ight to establish and maintain ... own educational, cultural and religious institutions, organisations or associations," "[a]dequate opportunities for ... minorities to use their own language before courts and public authorities," and "[a]dequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority."[143]
This new and 'fine-tuned' approach to enlargement was also

[142] 2003rd Council meeting General Affairs Luxembourg, 29/30 April 1997, Press Release <http://europa.eu/rapid/press-release_PRES-97-129_en.htm?locale=en> Council Conclusions on the Application of Conditionality with a view to developing Coherent EU-Strategy for the Relations with the Countries in the Region, *Bulletin EU*, (1997) 4. 137.

[143] *Ibid*. See also Gabriel Toggenburg: *A Remaining Share or a New Part? The Union's Role vis-á-vis Minorities After the Enlargement Decade*, EUI WP LAW 2006/15 (Firenze, EUI Department of Law, 2006)

seen as a second generation of conditionality.[144] Toggenburg argues that this renewed enlargement strategy was more outspoken about the situation of minorities and minority protection requirements and that more attention was paid to heal the consequences of wars: co-operation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the appropriate treatment of internally displaced persons.

The most visible change was the addition of a new chapter (23) "on judiciary and fundamental rights" to the list of accession negotiation chapters. The first time this separate chapter was introduced was when the negotiations started with Croatia. Here, fundamental rights (covering also the protection of minorities) were not regarded anymore as a prerequisite of starting accession negotiations – as Art. 49(1) TEU would suggest – but they can be considered as an integral part of the *acquis* and thus as a legal commitment of candidate states in their legislative harmonization with EU law.

These changes demonstrate that the European Commission went through a policy learning process and has made efforts to put political conditionality on a more objective, normative basis. On the other hand, it also reveals that despite the improved monitoring mechanism, substantial political dilemmas related to the implementation of conditionality could hardly change.[145]

Measuring the impact of EU enlargement

This chapter focuses on the EU's influence on the development of specific minority rights in candidate states. Nevertheless, it should be acknowledged that the EU seemed to be successful in changing anti-discrimination legislation. Based on the legal requirement to implement EU law in candidate states, the transposition of the Racial Equality Directive in national

[144] *Ibid.*

[145] This problem was already highlighted by Dimitris Papadimitriu and Eli Gateva: Between Enlargement-led Europeanisation and Balkan Exceptionalism: an appraisal of Bulgaria's and Romania's entry into the European Union *GreeSE Paper No 25 Hellenic Observatory Papers on Greece and Southeast Europe.* London School of Economics, April 2009.

legislations was a strict condition of accession. In his analysis of the legislative changes in this field during the "big-bang" accession, Schwellnus concluded that "the formal adoption of anti-discrimination legislation as a result of EU pressure can be considered a success, the results regarding the implementation of legal rules are so far mixed."[146]

There is not an evident positive outcome in the field of specific minority rights. Even if a more detailed and gradual approach was adopted towards SEE states, it does not mean that the Commission's normative arguments have become more consistent in regard to minority rights. It was an important procedural step when the European Commission confirmed that Chapter 23 (Judiciary and fundamental rights) – relevant also to the evaluation of minority rights protection - , and Chapter 24 (Justice, freedom and security), have to be opened early and closed late. The European Commission also reaffirmed that political criteria and human and minority rights issues in particular are very important parts of accession conditionality.[147] But this political conditionality has not been better translated into consistent normative requirements, except for in anti-discrimination legislation.

In the context of political criteria of accession, the EU defines the goals, not the instruments and means to achive them. For example, the 2006 European Partnership for Croatia prescribes implementation of the Law on Minority Rights both as a short- and medium-term priority through "improvement of minority rights, in particular ensuring that equitable representation of minorities in local and regional self-government units is achieved as well as in the state administration and judicial bodies and in the bodies of public administration."[148] For Macedonia, the 2006 Partnership requires "equitable representation of minorities as a

[146] Guido Schwellnus: Anti-discrimination legislation in: Bernd Rechel (ed.): *Minority Rights in Central and Eastern Europe*. London, Routledge, 2009. p. 42.

[147] European Commission Enlargement Strategy and Main Challenges 2012-2013. Brussels, 10.10.2012. COM(2012) 600 final. p. 5.

[148] Cf.: *A guide to minorities and political participation in South-East Europe*. Brussels, King Baudoin Foundation, 2009.

medium-term strategy."[149]

Regarding the normative requirements formulated towards candidate states, the regular reports follow the Commission's strategy developed over the years: special focus is on the situation of Roma, on the implementation of non-discrimination laws, and on the use of minority languages in education. However, in some cases the Commission highlights the importance of participatory rights of minorities. For example, in the case of Montenegro, the regular reports recurrently evaluated the cooperation between the government and minority councils[150] and criticized the inadequate representation of Roma in public life.[151] But on the other hand, the Commission refrained from evaluating the restrictions introduced by the Serbian Constitutional Court's decision, substantially degrading the competencies of National Minority Councils.[152] This means that the Commission prefers to refrain from declaring or requiring a specific level of minority rights protection, but focuses only on existing politically less delicate issues (representation of Roma in Montenegro) and on the implementation of existing legislation (both in the case of Montenegro and in the case of Serbia regarding the implementation of Constitutional Court's decision).

Conclusions

As it was pointed out, it is rather difficult to assess the effects of EU enlargement on domestic policy changes.[153] Both candidate

[149]Former Yugoslav Republic of Macedonia 2006 Progress Report, Brussels, 08.11.2006 SEC (2006)1387 p. 19.

[150] Commission Opinion on Montenegro's application for membership of the European Union Brussels, 9.11. 2010 COM(2010) p. 670; Montenegro 2011 Progress Report, Brussels, 12.10.2011. SEC(2011) 1204 final p. 20.

[151] Montenegro 2013 Progress Report, Brussels, 16.10.2013 SWD(2013) 411 final. p. 43.; Montenegro 2014 Progress Report, Brussels, 8.10.2014 SWD(2014) 301 final. p. 47. Montenegro 2015 Report, Brussels, 10.11.2015 SWD(2015) 210 final p. 61;

[152] Serbia 2015 Report Brussels, 10.11.2015 SWD(2015) 211 final. pp. 57-58.

[153] Bernd Rechel: Introduction in: Bernd Rechel (ed.): *Minority Rights in Central and Eastern Europe*. London-New York, Routledge, 2009. 3-7.

state governments and EU officials inclined to overstate the impact of EU influence. Moreover, on many occasions it is also difficult to separate the impact of different international organisations, the EU, the CoE, or the OSCE on formulating the same or very similar demands for policy change. The picture becomes even more complicated when we take into account the role of domestic actors and their interplay with international actors. Minorities, opposition political parties, and NGOs may all have an impact on domestic minority politics. Politics and policy preferences may also change if a minority party is strong enough to influence government coalition agreements or if kinstates lobby for their kin-minorities.

We may conclude that EU membership conditionality was effective in those cases when it changed (or contributed to a change in) domestic policies and induced legislative measures affecting minorities, which was the case in the adoption of anti-discrimination laws.[154] But the EU leverage was much less visible in stabilising or reinforcing specific minority rights. Moreover, experience shows that long-term stability and appropriate implementation of these laws after accession remains fragile.[155] The effect of conditionality policy has been unbalanced: in the field of combating discrimination, the ability of EU bodies to rely on the *acquis communautaire* has led to the adoption of rather consistent laws and policy strategies. Nevertheless, the adopted anti-discrimination measures are often not implemented in a "minority conscious" way and the European Commission could not and did not want to push candidate states in that direction.

As a final conclusion, we may also see that the EU's regular monitoring of minority rights in CEE and SEE has not brought a coherent approach to international minority rights standards and could not even strengthen existing CoE principles.

[154] Guido Schwellnus: Anti-discrimination legislation in: Bernd Rechel (ed.): *Minority Rights in Central and Eastern Europe*. London-New York, Routlegde, 2009. pp. 32-45.

[155] Petra Roter: Minority Rights in the Context of the EU Enlargement: a Decade Later in: *Treatises and Documents Journal of Ethnic Studies* 73/2014 p. 5-27.

Galbreath and McEvoy point out that in an overall European context, three international organisations — the OSCE, the CoE, and the EU — formulated minority rights protection during the enlargement process as a "means to securing regional security, democratization and the future of European integration." They make strong arguments that the whole European minority rights regime "1) is not asking how can it improve the role of minorities in Europe, but instead how it can reduce the likelihood of regional instability; 2) tries to 'satisfice' rather than maximize the role of minorities in European political communities; and 3) pushes protection over empowerment as a solution to the 'minorities' problem in Europe."[156]

[156] David Galbreath and Joanna McEvoy: European organizations and minority rights in Europe: On transforming the securitization dynamic in: *Security Dialogue* 43(3) 2012, p. 268.

Maria Dicosola

The Rights of National Minorities in Croatia: Beyond European Conditionality?

1. Introduction

National minority rights issues have always been of major concern in Croatia due to the regional context surrounding the country. It is rather well known that Croatia was recognized only recently as an independent state, after the end of an ethnic conflict that, led to the collapse of the Federal People's Republic of Yugoslavia (FPRY).
As it is widely known, the war of the 1990s was due in part to the failure of the experiment to keepdifferent national groupstogether in the same territory. Indeed, as a multicultural region, where a number of peoples, nations, and minorities have always lived together, since the fourteenth to the end of the twentieth century, the Yugoslav peninsula was governed by multinational states–the Ottoman Empire[157], the Austro-Hungarian Empire[158], and the FPRY.[159] However, all of these forms of constitutional organizationlackeda

[157]In fact, the Ottoman Empire was a multinational decentralized State based on the *millet* system. On its history and organisation, see L. Missir de Lusignan, *La multinationalité ottomane (éléments de réflexion)*, in O. Audéod, J.-D. Mounton, S. Pierré-Caps (edts.), *L'Etat multinational et l'Europe*, Presses Universitaires de Nancy, 1997, pp. 117-122 ; N. Beldiceanu, *L'organisation de l'Empire ottoman (XIVe-XVe siècles)*, in R. Mantran (edt.), *Histoire de l'Empire ottoman*, Libraire Arthème Fayard, 1989, pp. 117-138.

[158] The Austro-Hungarian Empire was a confederation whose people was divided in "historical" and "non-historical nations". On the history and political administration of the Austro-Hungarian Empire see, J. Bérenger, *A History of the Habsburg Empire: 1700-1918*, Longman, London, 1977; R.A. Kann, *A History of the Habsburg Empire, 1526-1918*, University of California Press, 1974; A.J.P. Taylor, *The Habsburg Monarchy, 1809-1918: A History of the Austrian Empire and Austria-Hungary*, University of Chicago Press, 1976.

[159]On the "Tito formula" in the Federal People's Republic of Yugoslavia, see H. Poulton, *Linguistic Minorities in the Balkans (Albania, Greece and the Former Yugoslavia)*, in C. Bratt Paulston, D. Peckam (edt.), *Linguistic Minorities in Central and Eastern Europe*, Multilingual Matters Ltd., Clevedon – Philadelphia – Toronto – Sydney – Johannesburg, 1998, pp. 41-44; A. Liebich, *Les minorities nationales en Europe centrale et orientale*, Georg Editeur, Chêne-Bourg/Genève, 1997, pp. 93-96; J. Krulic, *Le devenir des peuples de la Yougoslavie et des Balkans*, in *Les minorités de l'Est européen. A la lumière des récents changements de régimes et leur impact sur l'immigration en Europe*. Actes du colloque organisé par le « Groupment pour les droits des minorités » des Communautés européennes les 25 et 26 mars 1992, pp. 86-89; L. Cohen, P. Worwick, *Political Cohesion in a Fragile Mosaic. The Yugoslav Experience*, Westview Press, Boulder, Colorado, pp. 163-166 *(Appendix A: The Ethnic*

strong and unitary national identity and proved to be particularly weak. Therefore, soon after the death of Josip Broz Tito – and the end of his authoritarian and charismatic leadership – a dramatic ethnic conflict broke out.

Soon after the war, two parallel yet opposite processes beganin Croatia, as well as in almost all of the countries of former Yugoslavia. On the one hand, a new independent state was established. In this context, nation-building played a fundamental role. In contrast with the (failed) tradition of multinational states, it followed the model of a unitary national state. On the other hand, the country was engaged in the process of European integration. This process was in sharp contrast with the ideology of nationalism, requiring this new state to renounce part of its recently conquered sovereignty with the aim of being admitted to this 'prestigious' club, including not only the European Union (EU), but also the Council of Europe (CoE).

Independence and European integration were deeplyinterconnected. Indeed, the process of Croatian independence was deeply influenced by the CoE. In fact, the declaration of independence itself was adopted under the auspices of the CoE Parliamentary Assembly that on 21 September 1991 recognized the right of dissociation of the former Yugoslav Republics. Soon after international recognition, on 4 May 1992 Croatia obtained the status of a "special guest" with the Council of Europe. On 11 September 1992, Croatia submitted an application to the CoE and was admitted on 6 November 1996.[160]

In the early 2000s, soon after the death of the authoritarian leader FranjoTuđman, Croatia was engaged in the process of democratic transition,[161]as well as in the negotiation process to join the European Union. Indeed, Croatia officially applied to the EU on21 February 2003 and was recognized as an applicant country in June 2004. The negotiations, which opened in the European Council on 16-17 December 2004, had been postponed in order to wait for a more effective cooperation with the International Criminal Tribunal for the former Yugoslavia. They re-opened on 3 October 2005. The negotiations were closed on 30 June 2011, and after the referendum held on 22 January 2012, Croatia became the 28th member of the

Composition of Yugoslavia); M. Paunović, *Nationalities and Minorities in the Yugoslav Federation and in Serbia*, in J. Packer, K. Myntti (edt.), *The protection of Ethnic and Linguistic Minorities in Europe*, Institute for Human Rights, Åbo Akademi University, 1993, pp. 145-165.

[160] For a chronology of Croatia's admission to the Council of Europe, see the website of the Croatian Ministry of Foreign and European Affairs: http://www.mvep.hr/en/foreign-politics/multilateral-relationsold/council-of-europe-(ce)/relations-between-croatia-and-the-council-of-europe-/#1.

[161] On this issue, see S. P. Ramet, D. Matic (edts.), *Democratic Transition in Croatia. Value Transformation, Education, and Media*, Texas A&M University Press, 2007.

EU on 1 July 2013.[162]
Considering the historical and social background of Croatia, at the time of application to the CoE as well as theEU, the institutions of both organisations decided to exercise a strict scrutiny in respect to democratic standards, with a particular focus on the rights of national minorities. As a result, the Croatian processes of independence and democratization were deeply conditioned by a "wide" European conditionality, involving not only the EU but also the CoE and the Venice Commissionin particular.[163]
The Eastern enlargement of both the CoE and the EU required the introduction of standards that were – and still are – considered to be binding in order to fulfill the admittision requirementsof these organisations. The standards for the admission to the CoE have been formalised on the basis of the expansive interpretation of Articles 3 and 4 of the CoE Statute.[164] As a result, new members can be admitted to the Council of Europe provided that theyfulfilla geographical standard (the country must belong to Europe[165]) and a set of political standards: the commitment to democracy, the rule of law, the separation of powers, and human and minority rights.[166]
As to the standards for the admission to the EU, at the European Council held in Copenhagen in 1993 it was declared that the associated countries of Central and Eastern Europe can become members of the EU provided that they respect a set of conditions.As it was stated, they include the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market

[162]For a chronology of Croatia's admission to the European Union, see the website of the Croatian Ministry of Foreign and European Affairs: http://www.mvep.hr/en/croatia-and-the-european-union/.

[163] I explored the effects of the "wide" European conditionality on the democratic transitions of the countries of Central and Eastern Europe in M. Dicosola, *Transizioni costituzionali e condizionalità politica europea*, in *Le trasformazioni costituzionali del secondo millennio: scenari e prospettive dall'Europa all'Africa*, Maggioli, Rimini, 2016, pp. 57-80.

[164]Indeed, according to art. 3, the fundamental principles of the Council of Europe are the rule of law and the respect of fundamental rights and freedoms, while, according to art. 4, «Any European state which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers».

[165] The concept of Europe is considered much wider than the European continent, as demonstrated by the admission of Russia. See the report of 16 June 1992, *On the Enlargement of the Council of Europe* (doc. n. 6629).

[166]J.-F. Flauss, *Les conditions d'admission des pays d'Europe central et orientale au sein du Conseil de l'Europe*, in *European Journal of International Law*, 1994, pp. 1-24.

forces within the Union."[167] The Copenhagen criteria now have a normative value due to their formalization of Article 49 of the Treaty on the European Union, as amended by the Lisbon Treaty.[168]

Since the 1990s, the development of national minority rights legislation in Croatia has been strongly supported by the impact of European conditionality. However, this process, though it fostered the adoption of extensive legislation, was not able to reduce the clash between "law in the books" and "law in action,"or the adverse effects of minority right legislation adopted with the formal aim to comply with European standards.

In this paper it is argued that, notwithstanding the limits of European conditionality, the current issue of minority rights in Croatia should no longer be considered one of major concern. This is due in particular to the progressive case law of the Constitutional Court, which, going beyond the limits of European conditionality, is driving Croatia towards democratic consolidation.[169]

2. Nationalism vs. European conditionality

Croatian nationalism has origins long before the wars of the nineties. Indeed, amongthe nationalistic movements that emerged between the First and the Second World Wars, a conflict opposing the Croatian and Serbian peoples, both claiming the right to establish their own independent national State, emerged.[170]

These aspirations were stifled during the World Wars and later the rule of ethnic federalism in the FPRY and dramatically re-emerged after the death of Tito, when Yugoslavia proved to be a fragile mosaic. In fact, in 1986 in Serbia, Slobodan Milošević was elected as leader of the League of Communists, with a political program aiming, first of all, to build 'Greater Serbia.' In an effortto achieve this, he supported the the Serbian Academy of Science's publication of a memorandum stating that Serbian national identity was born during the 1389 battle in Kosovo. In order to foster Serbian

[167]European Council in Copenhagen, 21-22 June 1993, Conclusions of the Presidency, SN 180/1/93 REV 1, in particular par. 7.A.iii.

[168] For a general overview on European "internal" conditionality, see for example: K.E. Smith, *The Evolution and Application of EU Membership Conditionality*, in M. Cremona (edt.), *The enlargement of the European Union*, Oxford University Press, Oxford, 2003, pp. 105-139; P. Nicolaides, *Enlargement of the EU and Effective Implementation of Community Rules: An Integration-Based Approach*. Maastricht, EIPA Working Paper, 3 December 1999 (http://www.eipanl).

[169]Indeed, according to the 2016 Freedom House Report, Croatia is currently a "free country", with a score of 87/100.

[170]J. Krulic, *La perception de l'Etat-nation par les Croates, les « Musulmans » bosniaques et les Serbes*, in S. Cordellier (edt.), *Nations et nationalismes*, La Découverte, Paris, 1995, pp. 108-113.

nationalism, he denied most of the rights of non-Serbian peoples and suspended the autonomies of Kosovo and Vojvodina. In 1990 in Croatia,Franjo Tuđman was elected as President of the Republic. His political program intended to affirm the identity and sovereignty of Croats and to reduce Serbs' superiority in Yugoslavia. In this context, together with Slovenia, Macedonia, and Bosnia-Herzegovina, Croatia seceded from FPRY. The conflicting nationalisms emphasized the cultural, political, and economic differences among the republics, differences thaterupted in a dramatic escalation of violence.[171]

The 1991 Constitution of Croatia was adopted in this context and its preamble – which is, with slight amendments, still in force – explicitly defines Croatia as a national state, referring to "the millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty."[172] History, therefore, is considered as the main identification factor of the Croatian nation.The preamble of the Constitution, in fact, is called *Izvorišneosove* (historical foundations). Furthermore, the same text summarizes the main historical facts supporting, in the seventh century, the determination of the people to establish Croatia "as a sovereign and democratic state in which equality, freedoms and human rights are guaranteed and ensured, and their economic and cultural progress and social welfare promoted."[173] On these bases, Croatia is defined as the "*national state* of the Croatian nation and the *state* of the members of its national minorities."[174] It follows the list of recognised national minorities including "Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others who are its citizens and who are guaranteed equality with citizens of Croatian nationality and the exercise of their national rights in compliance with the democratic norms of the United Nations and the

[171]On the escalation of nationalism and the grounds for the conflict of the nineties, see F. Roth, *Les raciness historiques de la crise yugoslave*, in O. Audéod, J.-D. Mounton, S. Pierré-Caps (edts.), *L'Etat multinational et l'Europe*, Presses Universitaires de Nancy, 1997, pp. 55-62. In the same book, see also: M. Gjidara, *Radioscope d'un échec: la Yugoslavie (Bilan d'un désastre annoncé)*, pp. 75-81; S. Milacic, *L'ex-Yugoslavie: radioscopie d'un échec analytique (L'épistémologie des auteurs dans le rétroviseur)*, pp. 83-93; and in particular on Milošević politics P. Garde, *L'ambigüité de l'état yougoslave*, pp. 63-66.

[172] Preamble, 1st sentence.

[173] Preamble, 3rd paragraph.

[174] Preamble, 2nd paragraph.

countries of the free world."
Despite referenc to minorities in the preamble of the Constitution, only citizens are considered members of the nation, as confirmed by Article 1 of the Constitution, which states,"power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal *citizens*."[175]
Ethnic nationalism seems to be the ideology inspiring the whole text of the preamble of the Croatian Constitution.[176] Therefore, as anticipated, it comes as no surprise that during the negotiations for the admission to European organisations, a strong emphasis was devoted to the rights of national minorities with the aim to restrain this nationalistic attitude.[177]In particular, both the EU and the CoE required:
a) To restore the suspended 1991 Constitutional National Minority Rights Act (CNMRA) – that, adopted in 1991, was nevertheless suspended in 1995 during the war – and to amend it with the aim of including non-citizens amongst the subjects who might benefit from its application
b) To amend the preamble of the Constitution.
With reference to the constitutional law, in 1999, the Parliamentary Assembly of the Council of Europe requested, by a resolution, to amend the 1991 suspended law.[178] Following the resolution, in 2000 the law was amended and

[175] Art. 1 par. 2.
[176] It has been argued that while the theory of civic nation has been implemented in the countries of Western Europe, the theory of ethnic nation has been welcomed in the countries of Central and Eastern Europe, including Yugoslavia. See in this sense the pivotal study of H. Kohn, *The Idea of Nationalism. A study on its origins and Background*, New York, MacMillian, 1994. Accordingly, it is possible to distinguish between a "Western model" and an "Eastern model" of protection of minority rights in Europe, as pointed out by C.A. MacCartney, *National States and National Minorities*, Russel & Russel, New York, 1968. This distinction, however, has been subject to critics. See: T. Kuzio, *The Mith of Civic State: A Critical Survey of Hans Kohn's Framework for Understanding Nationalism*, in *Ethnic and Racial Studies*, 2002, vol. 25, n. 1, pp. 20 ff.
[177]See for example the opinion on the application of Croatia to the EU: *Croatia's Application for Membership of the European Union*, COM (2004) final, released on 14 April 2003, where a particular emphasis is put on the rights of national minorities. On the effects of EU conditionality on minority rights in Croatia, see A. Petričušić, *Croatia*, in E. Lantscher, J. Marko, A. Petričušić (edts.), *European Integration and its Effects on Minority Protection in Europe*, Nomos, Baden-Baden, 2008, pp. 167-187. See also S. Tatalović, *Exercise of National Minority Rights in Croatia and European Integration*, in *Prospects of Multiculturality in Western Balkan States*, Ethnicity Research Center, Friedrich Ebert Stiftung, 2004, pp. 111-135.
[178] Parliamentary Assembly of the Council of Europe, resolution n. 1185 (1999), *Honouring of obligations and commitments by Croatia.*

in 2002 the new CNMRA was adopted.[179] Finally, new amendments were introduced in 2010, a few years before the final admission of Croatia to the EU.

As to the preamble of the Constitution, the Venice Commission recommended that Croatia deleteits list of national minorities in order to reduce cases of discrimination.[180]The preamble was amended only in 2010. However, the list of national minorities, instead of being deleted, was only expanded upon.

During the negotiations for the admission to both the EU and the CoE, all Croatian legislation on national minorities was constantly supervised by European institutions, including not only "official" supervising and advisory bodies, such as the European Commission (through progress reports) and the Venice Commission,[181]but also additional bodies exercising a soft pressure on the candidate countries, such as the Advisory Committee on the Framework Convention on Minority Rights.

Therefore, the Croatian legislative framework on national minority rights that isin force today is extremely detailed. This is the direct result ofEuropean organisations conditionality policies. However, this does not exclude cases of discrimination that derive from lack of implementation of legal provisions and adverse effects, as it will be pointed out in the following paragraphs.

3. National Minority Rights. Basic principles

The Croatian Constitution does not provide for a catalogue of minority rights.[182] However, the protection of the rights of people belonging to minorities has always been guaranteed dueto the interpretation of some fundamental constitutional principles.

First of all, as already anticipated, the nationalistic attitude within the

[179] Const. Law n. 155, 19 December 2002. For a comment, see A. Petričušić, *Constitutional Law on the Rights of National Minorities in the Republic of Croatia*, in *European Yearbook of Minority Issues*, 2002/3, vol. 2, p. 607-629.

[180] Venice Commission, *Draft Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia*, CDL (2001) 6.

[181] Indeed, the Venice Commission, established with final aim of elaborating a set of European common values, through the dissemination of human rights as well as the principles of democracy and rule of law, proved to be a major subject of the CoE conditionality. See in this sense G. Malinverni, *The Contribution of the European Commission for Democracy through Law (Venice Commission)*, in L.-A. Sicilanos (edt.), *The Prevention of Human Rights Violation*, Ant. N. Sakkoulas Publishers, Athense Martinus Nijoff Publisher, The Hague – New York – London, 2001, pp. 123-137; Id., *La reconciliation à travers l'assistence constitutionnelle aux paix de l'Est: le role de la Commission de Venise*, in *Les Cahiers de la paix*, n. 10, 2004; J. Jowell, *The Venice Commission: Disseminating Democracy through Law*, in *Public Law*, 2003, pp. 675-683.

[182] On the contrary, a catalogue of minority rights is provided, within the countries of former Yugoslavia, by the Serbian and Montenegrin Constitutions.

preamble of the Constitution is moderated by the statement according to which "Croatia is hereby established as the nation state of the Croatian nation and the state of the *members of its national minorities*."[183] It follows the list of the recognised national minorities that was expanded upon (but not deleted)in the 2010 amendment, as required by most of the supranational bodies supervising Croatian performance in the field of minority rights.
The rights of national minorities are based on the principle of non-discrimination.[184]According to Article 15 of the Constitution, members of all national minorities have equal rights that shall be regulated by constitutional law. Article 15 points out that the law shall recognise general electoral rights, as well as the special right of the members of national minorities to elect their representatives into the Croatian Parliament. Moreover, the same article recognises the right of national minorities to express their nationality, the freedom to use their languages and scripts, and cultural autonomy.
Article 15 was implemented by the previously mentioned 1991 Constitutional National Minorities Rights Act and was replaced by the 2002 constitutional law, which was last amended in 2010. An issue of major is that the constitutional law refers only to Croatian citizens as the subjects of the rights provided thereof. As a consequence, since national minority groups living permanently in Croatia but lacking citizenship are excluded by the application of the law, the denial of citizenship has often been used to discriminate against the Serbian minority.[185] Despite the recommendations made by several supranational bodies, the reference to citizenship has never been deleted.

4. Linguistic and cultural rights

According to the Constitution, the official language of the Republic of Croatia is Croatian with Latin scripts. However, another language and the Cyrillic or some other scriptmay be introduced in individual local units under conditions specified by law.[186]On the basis of this principle, the constitutional National Minority Rights Act guarantees the use of minority languages through several provisions.
In particular, the right to use first and family names in the minority language as well as the right to have the names officially recognised through entry in registers or other official documents is recognised. Accordingly, identity card

[183] Preamble, 2nd paragraph.
[184] Provided by art. 14 Const.: «Everyone in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, color, gender, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics. All shall be equal before the law».
[185] See in this sense J. Yacoub, *Les minorities. Quelle protection?*, Desclée de Brouwer, Paris, 1995, pp. 147-155.
[186] Art. 12 Const.

forms can be printed and completed in the minority language and script.[187] Moreover, the right to use minority languages and scripts both privately and in public and ondisplay signs, inscriptions, and other information is recognised.[188]

The constitutional law also recognises the right to education in minority languages.[189] To this aim, special programs are provided in public schools[190] and the right toestablish preschools, primary and secondary schools, and higher educational institutions are recognised for the purposes of minority education.[191]

The right to use minority languages is also guaranteed at the local level, in local self-government units in places wheremembers of a national minority compose a minimum of one third of the population. In this case, the use of minority languages is regulated according to the charters of local or regional self-government units.[192]

As to cultural rights, the right to use insignia and symbols of national minorities,[193] the right to establish associations with the aim of preserving, developing, promoting, and expressing minority culture and national identity,[194]and the right to maintain contact with people sharing the same national affiliation and who live in the'homeland' are recognised.[195] Finally, local and national radio and television stations have to produce and/or broadcast programmes with the aim of preserving minority cultures.[196]

5. Political rights

The protection of political rights of national minorities, both at the national and local levels, is particularly detailed dueto the CNMRA and the implementing electoral law.[197]

[187] Art. 9 CNMRA.
[188] Art. 10 CNMRA.
[189] Art. 11 CNMRA. On this right, with particular reference to the Italian minority, see E. Ferioli, *Sistema educativo pubblico e tutela della minoranza italiana in Croazia e Slovenia*, in V. Piergigli (edt.), *L'autoctonia divisa. La tutela giuridica della minoranza italiana in Istria, Fiume e Dalmazia*, Cedam, Padova,2005, pp. 365-374.
[190] Art. 11 (2-7) CNMRA
[191] Art. 11 (8) CNMRA.
[192] Art. 12 CNMRA.
[193] Art. 14 CNMRA.
[194] Art. 43 Const. and law on the associations, Off. Gazz. n. 70/1997, 88/2001.
[195] Art. 16 CNMRA.
[196] Art. 18 CNMRA.
[197] According to an Italian scholar, the constitutional law on national minorities can be considered as a framework law on political rights of national minorities: C. Casonato, *La rappresentanza della comunità italiana in Italia e Croazia*, in V. Piergigli (edt.), *L'autoctonia divisa*, *supra* at note 32, pp. 313-338.

The right to representation is provided first through the mechanism of reserved seats in legislative bodies. Indeed, at the national level, "a minimum of three seats in the Croatian Parliament shall be reserved for representatives of those national minorities which … account for more than 1.5 percent of the population."[198] At the local level, national minorities are provided with the right to be represented in the representative bodies of local and regional self-government units, which is regulated in detail by Article 20 CNMRA. Moreover, specific rules can be provided with reference to those national minorities not representing the majority of the population by the local charters.[199]

In addition to the right of representation in legislative assemblies, minority representation is guaranteed in the executive bodies of local self-government units.[200]Additionally, the right to be represented in public administration and the courts according to special legislation as well as employment policy papers of those bodies is recognised.[201]

The right to national minority representation is also guaranteed by collective bodies thatmainly perform advisory functions, as well asthe right to legislative initiative,"in the interest of advancement, preservation and protection of the status of national minorities in society."[202] In particular, constitutional law provides Councils of National Minorities, which are non-profit legal persons[203] elected by the members of a national minority representing, in self-government units, more than 1.5 per cent of the population, in local self-government units, more than 200 persons, and in regional self-government units, more than 500 persons.[204] According to Article 31(1) CNMRA, "National minority councils in self-government units shall be entitled to:

– propose to the bodies of self-government units measures to improve the position of the respective national minority nationally or in a specific area, including proposals for general ordinances to regulate issues relevant to that national minority;

[198] Art. 19 CNMRA.
[199] Art. 21 CNMRA.
[200] Art. 22(1) CNMRA.
[201] Art. 22(2) CNMRA.
[202] Art. 23 CNMRA.
[203] Art. 25(1) CNMRA.
[204] In particular, according to art. 24 CNMRA, municipal national minority councils shall be composed by 10 members, city national minority councils by 10 members, and county national minority councils by 25 members. The candidates for membership in those bodies are nominated by national minority associations or groups of citizens who are members of national minorities being not less than 20 in the territory of a municipality, 30 in a city and 50 in a county. The members of national minority councils shall be elected by direct secret ballot for a four-year term, according to the procedure for the election of the representative bodies of local self-government units.

– nominate candidates for posts in the civil service and the bodies of self-government units;
–be kept apprised of any issue to be discussed by the committees of the representative bodies of a self-government unit that are relevant to the status of that national minority;
– provide opinions and submit proposals pertaining to local and regional radio and television broadcasts intended for national minorities or addressing minority concerns."
. The Councils have a right to be consulted during the process for the adoption of local exectuve orders. Indeed, when drafting orders concerning rights and freedoms of national minorities, the executive authorities of self-government units shall consider their opinion.[205] The Councils also have special *ex post* functions, including in particular the right to notify the ministry in charge of general administrative affairs on all executive orders deemed to be in contrast with the provisions of the Constitution or of the constitutional Law on National Minority Rights.[206]
Special bodies are in charge ofcoordinating national minority councils. Since the 2010 constitutional reform, they have been recognized legal personality.[207]
At the national level, Article 15 CNMRA provides for the National Minorities Advisory Board, appointed by the national government for a fouryear term,[208]to be in charge with considering and proposing "modes for the regulation and resolution of matters pertaining to the exercise and protection of minority rights and freedoms."[209] To this end, the Advisory Board cooperates with councils of national minorities, as well as with other bodies performing functions related to minority rights.

6. European conditionality and minority rights in Croatia. From (lack of) implementation to compliance?

Despite the detailed legal framework introduced dueto the pressure of European conditionality, the implementation of legal normsin Croatia is often far from satisfactory.[210] Indeed, the recommendations requiring Croatia to delete the list of national minorities in the Preamble of the Constitution as well as the reference to citizens only in the CNMRA have never been considered.

[205] Art. 32(1) CNMRA.
[206] Art. 32(2) CNMRA.
[207] Art. 4 Constitutional Law 18 June 2010.
[208] Art. 36 CNMRA.
[209] Art. 15 CNMRA.
[210] The gap between law in the books and law in action in the field of minority rights is a general shortcoming of European conditionality, not only in Croatia. See in this sense: L. M. Letschert, *The Impact of Minority Rights Mechanism*, Cambridge University Press, Cambridge, 2006, in part. pp. 6 ff.

Moreover, as recently pointed out by the Committee of Ministers of the Council of Europe,[211]even withthe positive developments in the protection of minority rights since the adoption of the Framework Convention for the Protection of National Minorities, cases of discrimination and ethnically-motivated incidents against persons belonging to the Serbian and Roma minorities are still frequent. In addition, a number of elderly returnees belonging to national minorities – including Serbians, Bosniaks, and the Roma – are still facing difficulties to be recognized with citizenship status. As a result, the constitutional provisions on the rights of national minorities remain inapplicable for these groups. Also, the functioning of the Councils of National Minorities is unsatisfactory in many respects. Indeed, the cooperation between the councils and local authorities is still weak, their democratic legitimization is undermined by the low turnout, and the funding remains inadequate. Finally, the right to political representation of national minorities would need, according to the Committee, further implementation.

Lack of implementation is not the only concern when dealing with minority rights in Croatia. Indeed, as observed with reference to the effects of political conditionality, it is possible that, after the accession toEuropean organizations, without the "steak and carrot" instrument, the standards for the protection of human rights are dramatically lowered.[212] There was a case of "regressive conditionality" in Croatia, with reference to Article 12 CNMRA, which provides the right to use national minority languages at the local level in local self-government units where national minorities represent at least one third of the population.

Indeed, the implementation of this right proved to be particularly problematic in those local units where the memory of the ethnic war of the 1990s is still vivid. This was the case in Vukovar, a Croatian city whose population, according to the 2011 census, was more than one third Serbian. The Serbian minority was thereforeentitled, according to Article 12 of the Constitutional law, to display signs and symbols in Serbian with Cyrillic scripts. However, the decision to implement this right in late 2013 fuelled violent protests, led by the group *HQs for defence of Croatian Vukovar*, arguing that, due to the events of the Vukovar Battle,[213] the city had to be exempted by the application

[211] Resolution CM/Res CMN(2011)12 on the implementation of the Framework Convention for the Protection of National Minorities by Croatia (Adopted by the Committee of Ministers on 6 July 2011 at the 1118th meeting of the Ministers' Deputies).

[212] Indeed, the serious constitutional crisis that are taking place in Hungary and Polonia are examples of a serious "regressive conditionality". In this sense, some scholars talked about the failure of EU to disseminate its values: see D. Kochenov, *The Issue of Values*, University of Groningen Faculty of Law Research Paper Series, n. 19, 2013.

[213]During the war of the 1990s, the Croatian city of Vukovar was occupied for 87 days by the Yugoslav People's Army supported by various paramilitary Serbian

of the provision.[214]

The protests also acquired a legal dimension. With the support of the groups protesting against the application of the law, on 13 December 2013, a referendum question was submitted to the Parliament with an aim to amend Article 12 CNMRA. Indeed, the referendum question was formulated as follows:

"Do you support that Article 12.1 of the Constitutional Act on the Rights of National Minorities (Official Gazette nos. 155/02, 47/10, 80/10 and 93/11) be amended to read: "Equal official use of the language and script used by members of a national minority shall be realised in the area of a unit of local self-government, state administration and the judiciary, when members of an individual national minority comprise at least half the population of such unit"?"

In a nutshell, the aim of the referendum was to introduce, in the wake of the protests, stricter conditions for the exercise of minority language rights in all local units in Croatia. The aim, therefore, was not only to introduce an exception considering a special local case, but to introduce a higher threshold for the exercise of linguistic rights of any minority group in Croatia. It is more than evident that the referendum, if successful, would have resulted in an unjustified infringement of the rights of all national minorities and in particular the rights of Serbians, thus jeopardising the most basic principles of the Croatian Constitution.

Besides cases on the lack of implementation and post-accession regressive conditionality, there is also the possibility of adverse effects of legislation adopted to implement European standards. This was the case with the Croatian Constitutional Reform Act of 2010, which, with the formal aim of improving the standards for the protection of national minority rights, introduceda new political right for national minorities. In particular, according to Article 1 of the reform act, a new clause had to be added to Article 19 of the CNMRA, stating that "national minorities which account for less than 1.5% of the population of the Republic of Croatia shall, in addition to their right to exercise universal suffrage, be entitled to the special right to vote enabling them to elect five deputies belonging to such national minorities from within their own special constituencies." In other words, the law intended to add to the system of reserved seats in favor of national minorities

forces. Indeed, before the war Vukovar was a multiethnic city with a mixed Croatian-Serbian population. The Vukovar battle proved to be one of the worst episodes in the Balkan war or the 1990s. The city was destroyed and its non-Serbian population ethnically cleansed by the army led by S. Milošević.

[214] The international press extensively reported the protests. See for example *Croatians tear down Serbian signs*, BBC News, 2 September 2013,retrieved 6February 2016; *Croatia plans Cyrillic signs for Serbs in Vukovar*, BBC News, 3 January 2013, retrieved 6February 2016.

a right to double vote in order to recognizethe smallest minority groups.
The introduction of the above mentioned provision represented, at least formally, the implementation of the recommendations of the European institutions in the context of conditionality.[215]The Office for National Minorities of the Croatian Government, in presenting the reform to the OSCE, pointed out its relevance in order to of reinforce the rights of the smallest national minorities, particularly for Roma people.[216]Accordingly, in the 2010 report, the European Commission positively evaluated the new measures.[217]
However, when looking not only at the law in the books but also in action, the possible adverse effects of this legal norm are clear. Indeed, the double voting system is a special mechanism of representation of national minorities that, due to its potential problematic effects, is not particularly common in comparative law.[218] As pointed out by the Venice Commission, double voting is an exceptional measure, to be adopted only when mechanisms that are betterin compliance with the principle of equality, such as electoral systems based on proportional representation or providing for reserved seats, are not effective. Therefore, double voting systems can be introduced, provided that the principle of proportionality is strictly respected.[219]
All of these shortcomings emerged clearly in the Croatian case, where the implementation of the right to double vote jeopardized the principle of equality amongst minorities. In fact, the only minority representing more than 1.5 per cent of the population in Croatia is the Serbian minority. In theory, this would not be a problem. However, when considering the cases of violence against the Croatian and the Serbian communities, it was evident that the concrete implementation of this law could add 'legal' cases of discrimination to the already existent cases of 'factual' discrimination.
Each of the mentioned cases confirm the opinion according to which the adoption of a legislative framework under the pressure of European conditionality can be a first step in the process ofhuman and minority rights improvement, but with the need for a constant process of monitoring and adaptation. However, this lesson seems to have been learned by Croatian

[215]In particular, the Advisory Committee on the Framework Convention on Minority Rights had frequently required reinforcing the political rights of national minorities in its Reports on Croatia.

[216] See the statement of Mr Branko Sočanak, Head of the Office for National Minorities, Government of Croatia, at the OSCE Review Conference on Human Dimension, Session 7, Warsaw, 6 October 2010.

[217] Commission Staff Working Document, *Croatia 2010 Progress Report*, Brussels, 9 November 2010, SEC(2010) 1326, in particular p. 6.

[218] An important case of implementation of this mechanism is Slovenia, where a right to double voting is recognized to the Hungarian and Italian minorities.

[219] Venice Commission, *Draft Report on Dual Voting for Persons Belonging to National Minorities*, 4 June 2008, available at http://www.venice.coe.int/docs/2008/CDL-EL(2008)002rev2-e.pdf.

institutions and in particular by the Constitutional Court in its progressive case law concerning both linguistic and political rights of national minorities.
With reference to the right to use minority languages in local-self government units, on 12 August 2014the Constitutional Court declared therequest for referendum on Article 12 CANMR unconstitutional.[220] In particular, according to the Court, the Constitution – though it does not provide any explicit prohibition to raise the threshold for the exercise of minority linguistic rights –establishes some fundamental values, such as the rule of law and the protection of human rights. Therefore, the threshold might be raised, provided that it is "justified exclusively by reasons which may be said to stem from a democratic society founded on the rule of law and the protection of human rights."[221]In the opinion of the Court, any change in the threshold could be admitted provided that it has a "clear and rational basis and objective justification." In other words, in order to be in compliance with the Constitution, raising the threshold has to be justified in terms of proportionality. In the words of the Court, "raising the threshold must have a clearly expressed legitimate aim in the public/general interest, and it must be necessary in a democratic society, which is strictly proportionate to the legitimate aim it is seeking to achieve. In other words, there must be an urgent social need to raise the existing threshold."[222]
On these bases, the Constitutional Courtconsidered thatincreasing the threshold in this case did not meet the above-mentioned conditions, and it thus declared the proposed referendum unconstitutional.
The Constitutional Court was even more progressive in the case concerning national minorities' right to double vote. The Constitutional Reform Act introducing this right in favour of the smallest minorities was challenged before the Constitutional Court by a number of claimants including, besides several Serbian political parties and associations, the non-governmental organization GONG as well as the Croatian Helsinki Committee. The Court delivered its opinion on 29 July 2001,[223] declaring the constitutional reform act to be inconsistent with the principle of equality of national minorities[224]and the right to equal suffrage.[225]
The opinion of the Court is of particular relevance with reference to the limits of European conditionality and the possibilities for solutions through legal means. The Court recognizes that the duty to protect national minorities is founded not only in the Croatian Constitution and legislation, but that it is also

[220] Constitutional Court of Croatia, decision n. U-VIIR-4640/2014.
[221]Constitutional Court of Croatia, decision n. U-VIIR-4640/2014, para. 13.2.
[222] Constitutional Court of Croatia, decision n. U-VIIR-4640/2014, para. 14.
[223] Constitutional Court of Croatia, nos. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, U-I-994/2011, 29 July 2011.
[224] Art. 15 Const.
[225] Art. 45 Const.

imposed by the EU and the CoE. As a result, the Court "controls the realisation of constitutional, but also of European legal values."[226] In the case at stake, the Court, considered to be competent to evaluate the compatibility of the reform act not only with the Constitution but also with European values, declared the law to bein contrast with the principle of proportionally as provided by the Venice Commission. According to the Court, the law lacked any explanation about reasons for the introduction of the measure, and considering that the law already provided for a system of reserved seats, the double voting system "excessively infringes on the equality of suffrage in a democratic society."[227]

In a nutshell, according to the Court, the standards of European conditionality shall not be considered as a 'mantra' to be respected without any exception. On the contrary, they should be subject to discussion, evaluation, and in the case of a declaration of unconstitutionality, subject to consideration of the possible adverse effects of their concrete implementation. The aim of the Constitutional Court in its progressive case law, therefore, is not an a-critical implementation of external rules, but the substantial compliance of the internal legal system with European values.

7. Final Remarks

The case of minority rights in Croatia demonstrates how deeplyEuropean conditionality can influence national legal drafting processes. Since the 1990s, the constitutional and legal framework on national minority rights is particularly wide and complete.

With reference to the theoretical framework supporting these reforms, it is possible to state that the civic concept of nation seems to replace the ethnic one. Nevertheless, when looking not only at the 'law in the books' but also at the 'law in action,' it becomes evident thatthe legislative framework often does not correspond to the reality. As it has been described in the previous paragraphs, national minorities are often still discriminated against, and in several cases, their rights are denied in favor the idea that the national state is founded upon the ethnic nation. This is due not only to the lack of implementation of legal texts, but also to cases of 'regressive conditionality' after accession and'adverse effects' of legislation formally in compliance with European standards.

In Croatia – a country whose national identity has been denied for centuries – finding a balance between nation-building and the protection of the rights of minority groups is a very complex task. However, as it has been pointed out in this paper, national institutions, and in particular the Constitutional Court, are in a special position to reconcile these two extremes.

[226] Constitutional Court of Croatia, 29 July 2011, point 28.1.
[227] Constitutional Court of Croatia, 29 July 2011, points 47-48.

Stevo Pendarovski, Ivan Dodovski and Marina Andeva

Fearing Endless Demands and Learning to Negotiate the Change: Minority Representation in the Republic of Macedonia

1. Introduction

In the early 1990s, the Republic of Macedonia entered a process of social transition and as a newly independent state faced a denial of its identity from the outside as well as amended identity definitions from within.[228] Despite being the only former Yugoslav republic to make a peaceful transition to statehood, Macedonia encountered challenges that questioned its stability. One major test was the development of a framework to accommodate the needs and rights of its minorities. The 1991 constitutional preamble asserted that Macedonia is

> "established as a national state of the Macedonian people, in which full equality as citizens and permanent co-existence with the Macedonian people is provided for Albanians, Turks, Vlachs, Romas and other nationalities living in the Republic of Macedonia."[229]

The Constitution included few provisions guarantying basic minority rights.[230] Rather than using the term 'minority,' the distinct groups were identified as 'nationalities.' Macedonia's mixed population structure (see Table 1) comprises ethnic Macedonians as a dominant group and ethnic Albanians as another large group, alongside a few smaller ethnic communities. Following the country's independence, tensions between ethnic Macedonians and ethnic Albanians manifested in different forms. The

[228] *Dodovski*, "Pride and Perplexities: Identity Politics in Macedonia and Its Theatrical Refractions", 92.

[229] Constitution of the Republic of Macedonia, "Preamble" (Official Gazette n. 52 of 22.11.1992).

[230] Art. 7: use of nationalities' language in the units of local self-government; Art. 8: free expression of national identity as one of the fundamental values of the constitutional order; Art. 48: free expressing of nationalities' identity and attributes and right to instruction in nationalities' language in primary and secondary education; Art. 56: protection, promotion and enhancement of nationalities' historical and artistic heritage; Art. 78: Council for inter-ethnic relations (within the parliament).

Albanian parties called for autonomy and pressed demands for greater political participation and representation rights.[231] The frictions went along with the political processes of democratization and state building, but culminated in violence in 2001. The conflict was put to an end with the signing a peace accord dubbed the Ohrid Framework Agreement (OFA). The accord resulted in a new constitutional setting designed to advance minority representation. The constitutional amendments deriving from the OFA introduced changes to the terminology by replacing 'nationalities' with 'peoples' and 'ethnic communities.' The country was essentially re-defined as a state shared by ethnic Macedonians and other constituent peoples (ethnic groups) who benefit from the various instruments of representation and protection of their rights at the national and local levels.

Table 1: Population structure according to declared ethnic affiliation, by censuses.[232]

	1991		**1994**		**2002**	
TOTAL	2 033 964		1 945 932		2 022 547	
Macedonians	1 328 187	65.30%	1 295 964	66.60%	1 297 981	64,18 %
Albanians	447 987	22.03%	441 104	22.67%	509 083	25,17 %
Turks	77 080	3.79%	78 019	4.01%	77 959	3, 85%
Serbs	42 775	2.10%	40 228	2.07%	35 939	1,78 %
Roma	52 103	2.56%	43 707	2.25%	53 879	2,66 %
Boshniaks	-	-	6 829	0.35%	17 018	0.84%
Vlachs	7 764	0.38%	8 601	0.44%	9 695	0,48%

This chapter presents a comprehensive analysis of minority representation in Macedonia since its independenc and focuses on all constitutionally recognized minorities on its territory. First, the legal framework and the institutional setting are explicated. A twofold approach depicts the participation of ethnic Albanians and then discusses the struggles of smaller ethnic communities for greater involvement in the decision-making processes. Minority representation is assessed from several perspectives: 1) representation and participation in the parliament; 2) representation in the government; and 3) representation in the units of local self-government. The chapter offers insights into the performances of minority political parties and

[231] See more in *Andeva*, "Challenging National Cultural Autonomy in the Republic of Macedonia.", 215-216.

[232] *Republic of Macedonia State Statistical Office*, Statistical Yearbook of the Republic of Macedonia, 56. Last population census is performed in 2002.

the extent to which they succeeded in ensuring an effective representation of their communities. In particular, the chapter considers the coalition dynamics and main challenges encountered by small-in-size minorities in their endevours for an effective voice.

2. Minority representation in complex power-sharing arrangements

Peaceful minority-majority relations can be achieved if minorities feel that the state in which they reside is also 'their' state—that it 'belongs to them'—and if they are prepared to integrate fully into that state and its structures. Effective participation is another *conditio sine qua non*.[233] Each group within the state is essentially important to the existence of peaceful relations and structures of governance are based on the necessary division and sharing of power between the groups.[234] Two different forms of power-sharing are distinguished: consociationalism (consociational democracy)[235] and 'integrative'[236] power-sharing. The former can be partially or entirely based on a territorial principle (segmental autonomy), and it can include grand coalitions, proportional representation, and veto rights. Another important aspect of a power-sharing arrangement is the functionality of the system - be it equivalent or proportional.[237] The former treats equally all constitutive groups within the composition of the state organs and the decision-making process, whereas the latter is based on minority representation following their numeric consistency.

Where does Macedonia stand on this matter? Bieber and Keil[238] argue that the entire Western Balkan region has been a laboratory of power-sharing instruments with rather mixed results. In Macedonia, power-sharing was a consequence of peacebuilding and conflict resolution efforts; however, it also had some negative side effects. According to Bieber and Keil, despite many

[233] *Hofmann*, "The Future of Minority Issue in the Council of Europe and the Organization for Security and Cooperation in Europe", 171.

[234] See more on self-governance and contemporary power-sharing arragements and questions in divided societies in Weller, M., & Wolff, S., *Autonomy, Self-governance and Conflict Resolution. Innovative approaches to institutional design in divided societies,* 1-43*;* McEvoy, J., & O'Leary, B. (Eds.). *Power sharing in deeply divided places*, 231-364.

[235] *Lijphart*, Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*,* 23-42.

[236] *Horowitz*, Ethnic Groups in Conflict, 563-681.

[237] *Palermo and Woelk*, Diritto Costituzionale Comparato dei Gruppi e delle Minoranze, 127-161.

[238] *Bieber and Keil*. "Power-Sharing Revisited: Lessons Learned in the Balkans?", 337-360.

similarities, Macedonia cannot be categorized as a fully-fledged consociational democracy. They refer to Wolff's typology of the political systems with 'complex power-sharing' arrangements.[239] They argue that Macedonia relies on informal power-sharing based on a partially territorial principle, as "[t]here are no territorial solutions to ethnic issues"; this is a system of proportional representation with electoral districts designed to ensure minority participation in the state legislature and minority veto rights according to the Badinter principle (as explained below).[240] The element missing for a complete Lijphart consociational democracy is the grand coalition. There is no mandatory constitutional requirement for an executive grand coalition,[241] and *de jure,* there have not been 'grand' coalitions in Macedonia, because not all significant parties of all significant ethnic communities have been regularly represented.[242] Macedonia, *de facto*, has been governed by changing coalitions between mostly Macedonian and Albanian parties.

The Macedonian power-sharing arrangements include several instruments for minority representation: 1) Badinter double-majority voting; 2) equitable representation; 3) proportional electoral model; and 4) special representation bodies at the state and local levels (Committee for Interethnic Relations and Commissions for Inter-Community Relations, respectively).

Ethnic communities in Macedonia do not enjoy full veto rights; however, after 2001, they have a right to double voting on laws that concern their identity interests. Parliamentary adoption of laws relating directly to minorities must follow the Badinter principle, which requires a majority vote of deputies representing ethnic minorities. The aim of this principle is to protect ethnic minorities in parliamentary decision-making, meaning that laws with a significant impact on minority ethnic communities may not be adopted by a simple majority but require a 'double' majority, including a majority among political representatives of the communities. The Badinter majority

[239] *Wolff*, "Complex Power-Sharing and the Centrality of Territorial Self-governance in Contemporary Conflict Settlements", 29.

[240] The principle is named after the French constitutional scholar and former Minister of Justice Robert Badinter, who served as a consultant during the Ohrid negotiations in 2001.

[241] *Spirovski*, "Separation of Powers and Consociational Power Sharing in Republic of Macedonia: Developments and Perspectives", 1-17.

[242] 'Grand coalition government' is the one in which several political parties cooperate, reducing the dominance of any one party within the coalition. The only grand coalition in Macedonia, which also included opposition parties, was created during the conflict in 2001 and it lasted only for several months (13 May – 23 November).

principle is also used for adopting legislative acts in the units of local self-government, although such arrangements do not derive from the OFA.[243]

The principle of equitable representation is determined by the Constitution as a fundamental value[244]: "equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life" derives from the OFA (Section 4.2). The OFA does not call for strict ethnic quotas in public administration. Nevertheless, the obligation to implement equitable representation has been one of the most important state priorities. It is included in numerous laws and by-laws that regulate different areas of social life. The principle applies to the relations between ethnic communities in the country and their representation in the public administration workforce. In particular, it refers to employing civil and public servants at state and local level and staff in state institutions. One of the main goals is to gradually reach a percentage of employed members of the ethnic communities in accordance with the results of the country's last population census.[245] Table 2 illustrates a comparative overview of the application of this principle by presenting the sum of percentages of the total number of employees in all public and state institutions.[246]

Table 2: Comparative overview of the implementation of the equitable representation for the period 2007-2014, expressed in percentages of the total employed staff.[247]

	Macedonians	**Albanians**	**Turks**	**Roma**	**Serbs**	**Vlachs**	**Boshiaks**
2014	74,8	18,6	1,9	1,4	1,6	0,7	0,4
2013	75,3	18,1	1,8	1,3	1,5	0,7	0,4
2012	75,2	17,8	1,8	1,3	1,6	0,7	0,5

[243] The Badinter principle is accepted and specifically regulated in the statues of the municipalities. However, there are examples when the principle has been ignored or used for political manipulation. For instance, the names of four primary schools in the municipality of Chair in the city of Skopje have been changed without taking into account the votes and opinions of the representatives of ethnic Macedonians, who are in numeric minority in this particular municipality.

[244] Added with Amendment VI as addition to line 2 of the Constitutional Article 8.

[245] *Government of the Republic of Macedonia*, Strategy for equitable representation of communities that are not majority in the Republic of Macedonia, 12.

[246] According to its constitutionally established authority, the Ombudsman monitors annually the implementation of the principle of equitable representation by collecting data from the authorities, though several annual reports note that some institutions have refused to give data.

[247] *Ombudsman Office 2015*, Report on the Realization of the Principles of Equitable Representation for 2014, 2.

2011	76,3	17,2	1,7	1,3	1,6	0,7	0,4
2010	77,23	16,92	1,62	0,7	1,59	0,69	0,31
2009	79,92	14,05	1,29	0,8	1,88	0,76	0,37
2008	81,49	12,76	1,22	0,78	1,87	0,66	0,3
2007	83,72	10,78	1,09	0,78	1,76	0,68	0,34

The data presented in Table 2, particularly the percentages from 2013 and 2014, indicate that the representation of all communities is approximately the same as in previous years, with a slight increase in the percentage of ethnic Albanians, and that there is still an insufficient representation of smaller communities.[248]

2.1 Minorities representation in the legislative and executive bodies

In multi-ethnic democracies, minorities can be included in the election and decision-making processes through their ethnic parties. They can be also included in mainstream parties (non-ethnically defined parties). The latter option seems less favorable to minorities. Bigger parties dominate the competition and their leadership has all the power to decide on the level of inclusion of ethnic community members in the electoral lists. This form of inclusion was used for smaller ethnic communities in Macedonia.

Furthermore, minority representation is highly dependent on the electoral system employed. The ethnic structure of electoral districts, the electoral rules, and the intensity of electoral competition are also particularly relevant. The majoritarian system was strongly supported in the parliamentary elections in 1994. However, the principle of 'one person, one vote' was considered unfavorable for the Albanian political party PDPA/NDP.[249] Some scholars argue that the majoritarian system is insensitive to minorities. Such arguments are in favor of the changes brought by the OFA in 2001.[250] The mixed

[248] The percentages differ in separate ministries, public bodies and agencies. For example, the representation in the government (General Secretariat, Secretariat for Legislation, Secretariat for European Affairs, Secretariat for the implementation of the Ohrid Framework Agreement) in 2014 included 56, 4% of ethnic Albanians, 9,0% of Turks, 6,0% of Roma, 1,6% of Serbs, 0,8% of Vlachs and 1,4% of Boshniaks. By contrast, in the Commission for Protection against Discrimination, the Albanian community is represented with 38,4%, the Turkish, Roma and Vlach communities with 9,1% for each community and there are no employees from the Serbian and Boshniak ethnic communities.

[249] *Maleska*, "Multiethnic Democracy in Macedonia: Political Analysis and Emerging Scenarios", 1-27.

[250] *Maleski*, "The Causes of a War: Ethnic Conflict in Macedonia in 2001".

(majoritarian/proportional) model (used since the second parliamentary elections) was changed to a purely proportional one before the 2002 elections as a consequence of the principle of proportionality as defined in the OFA. The pure proportional system significantly increased the number of competing parties,[251] as well as the number of MPs belonging to the Albanian, Turk, Roma, and other ethnic communities.

Nevertheless, there are visible differences when comparing the representation of the Albanian ethnic community on the one hand, and smaller ethnic communities (Roma, Turks, Serbs and Boshniaks) on the other. In parliamentary elections, political parties have two options: to join pre-electoral coalitions or to stand alone before the electorate. The political participation of smaller communities in the Macedonian parliament was continuously secured through pre-electoral coalitions. Faced with the inability to command a majority of support, these communities were regularly forced to seek executive power through entering different forms of coalition.[252] To illustrate the representation of ethnic communities in the parliament, Table 3 presents the number of MPs representing an ethnic political party.

Table 3: Number of MPs from ethnic communities and political parties in the Parliament (1991-2018)

		Political Party	**1991 - 1994**	**1994 - 1998**	**1998 - 2002**	**2002 - 2006**	**2006 - 2008**	**2008 - 2011**	**2011 - 2014**	**2014 - 2018**
Ethnic Comunity	Albanian	Party for Democratic Prosperity (PDP)	17	13	10	2	3			
		Democratic Party of the Albanians (DPA)		4	10	7	11	5	8	7
		Peoples Democratic Party (later National Democratic Revival) (NDP)	5+1			1			2	
		Democratic Union of		1						

[251] From 19 in the first round in 1990 to 23 in 1998; in 2002 there were 55 competing political parties.

[252] *Andeva*, "Minorities in Coalition-Building: the Case of the Republic of Macedonia", 7-26.

		Albanians								
		Democratic Union for Integration (DUI)				15	13	18	14	20
		New Democracy						4		
		New Democratic Forces				1				
	Roma	Party for Full Emancipation of the Roma (PCER)	1	1					1	
		Union of Roma (SRM) –			1		1	1	1	1
		United Party of Roma				1				
		United Party for Emancipation (OPE)					1			
		Democratic forces of Roma					1			
		Movement for National Unity of Roma							1	
	Serbian	Democratic Party of Serbs in Macedonia (DPS)				1	1	1	1	1
		Serbian Progressive Party (SRPM)							1	
	Turkish	Democratic Party of Turks in Macedonia (DPT)		1		3	2	1	1	1
		Party for the Movement of Turks in Macedonia (PDTM)				1	1		1	
	Bos hnia	Democratic League of Boshniaks				1			1	

		Party for Democratic Action in Macedonia (SDAM)						1	1	1
		Party of Democratic Action (PDAM) (Boshniak)							1	
		Party for European Future (PEI)					1	1	3	

Source: Published mandates available on the official web site of the Parliament of the Republic of Macedonia at http://sobranie.mk/, retrieved October 2015.
Note: From 1991 to 1994, NDP shared five seats with PDPM (Party for Democratic Prosperity in Macedonia). During the 2011-2014 term, NDP was renamed to National Democratic Revival. Though PEI was founded as a multi-ethnic party, its elected MP declared himself as 'Torbesh.'

It is important to note that there are no guaranteed mandates for ethnic communities in the parliament. Attempts to introduce such mandates date back to 2005.[253] The Democratic Party of the Turks presented a proposal to ammend the Law on Election of MPs by which eight to twelve seats would be reserved for the smaller ethnic communities and distributed proportionally depending on the number of votes at parliamentary elections. In the following year, smaller ethnic communities again insisted on guaranteed quotas in the parliament, as well as a Ministry for minority issues and a Constitutional law on the rights of ethnic communities.[254] There were discussions on whether the distribution of guaranteed seats should be done proportionally or if each community should be entitled to one seat, while the rest of the seats is distributed to those who win the majority of votes at elections. .[255] Eventually, there was another proposal to limit the guaranteed seats to five.[256] In 2010, the issue resurfaced with a proposal by the Social Democratic Union of Macedonia (SDUM) to amend the electoral code and introduce ten guaranteed seats. Initially, the Albanian party DUI was against the proposal, arguing that it would jeopardize the Badinter principle; however, the party later declared

[253] *Selmani*, "Izborni matematiki so etnichkite malcinstva".
[254] *Utrinski vesnik*, „Malite etnichki zaednici so ultimatum do Gruevski"; *Utrinski vesnik*, "Pomalite etnikumi baraat garantirani mesta vo parlamentot".
[255] *Selmani*, "Sobranie so 133 pratenici".
[256] *Cangova*, "Garantiranite mandati ne se reshenie za izlez od kjorsokakot".

its support, but only if the proposed ammnedments do not affect this principle.[257]

Minority participation in the decision-making process is also guaranteed through specific parliamentary bodies. The 1991 Constitution introduced a Council for inter-ethnic relations within the parliament. It was composed of the president of the parliament and the following representatives: two Macedonians, two Albanians, two Turks, two Vlach, two Roma and two members of other ethnic communities in Macedonia. With the 2001 constitutional amendments, the Committee for inter-ethnic relations was recomposed to include 19 members—seven Macedonians, seven Albanians, and one member from each of the communities of Turks, Vlachs, Roma, Serbs and Boshniaks, elected by the parliament. Its work was further specified in the Law on the Committee for Interethnic Relations, adoped in 2007. The main task of the Committee is to monitor, discuss, and give suggestions to the parliament on the manners of advancement of interethnic relations. In addition, the Committee is entitled to make decisions on the manner of voting in the event of questioning if a proposed legislation should be voted accoring to the Badinter principle. Moreover, the work of the Committee includes scrutinizing drafted and existing legislation, reviewing of information prepared by the government and the ministries upon Committee's request, and overseeing the implementation of laws and other legal provisions. This body seemed to be the highlight of the development of inter-ethnic relations in Macedonia and potentially a crucial agent for the promotion of minority rights. In reality, however, it had little, if any, effect on the advancement of interethnic relations.[258]

A distinctive mark of Macedonian politics is the recognition that the inclusion of minorities is crucial to state stability. All governments elected by the Macedonian parliament since 1991 were coalition governments in which one of the parties of the Albanian community acted as a coalition partner and held several ministerial positions (see Table 4). Other ethnic communities did not participate in such arrangements, although they too managed to secure their places in over-size government coalitions, usually through negotiations with bigger political parties forming 'voluntary' executive power-sharing.[259]

[257] *Neskova*, "Ustavot ne dava Badenter da se deli"; *Radio Slobodna Evropa*, "Sredbata na Ahmeti so pomalite etnichki partii".

[258] *Petkovski*, "The Effects of the Work of Committee and Commissions on Interethnic Relations in Republic of Macedonia.", 140-156.

[259] *Spirovski*, "Separation of Powers and Consociational Power Sharing in Republic of Macedonia: Developments and Perspectives", 4.

Table 4: Number of ministerial posts per ethnic community in Macedonian governments (1991-2016)

	Albanian	**Roma**	**Turks**
I - 1991 (23 posts)	3	-	-
II - 1992-1994 (22 posts)	5	-	-
III - 1994-1998 (20 posts)	4/5/4	-	-
IV - 1998-2002 (17 to 17 posts)	5/5/4/6	-	-
V - 2002-2004 (18 posts)	5	-	-
VI - 2004 (18 posts)	5	-	-
VII - 2004-2006 (19 posts)	6	-	-
VIII - 2006-2008 (21 posts)	5	-	1
IX - 2008-2011 (22 posts)	6	1	1
X - 2011-2014 (23 posts)	7	1	1
XI - 2014-2016 (26 posts)	8	1	-

The main Albanian party, Party for Democratic Prosperity (PDP), participated in all Macedonian governments from 1991 to 1998. It held three ministerial posts (deputy prime minister, labour, and minister without portfolio) in the interim government of 1991 whose main goal was to constitute the Republic of Macedonia as an independent state. The government that formed in 1992 was the first ever to be formed by a ruling majority and to have an opposition. Within this government, PDP held several ministerial positions: deputy prime minister, finances, labor and social policy, science, and minister without portfolio. In 1994, a coalition government was formed by SDUM and PDP in which, initially, four ministerial posts were taken by PDP.[260] In the 1998-2002 government led by the political party VMRO-DPMNE (Internal Macedonian Revolutionary Organization - Democratic Party for Macedonian National Unity), the number of ministerial posts allocated to the Albanian coalition partner - the Democratic Party of Albanians (DPA) - varied from four to six.[261] In the period between 2002 and

[260] This government had two reconstructions: in 1996, with five ministerial posts for PDP; and in 1997, with four ministerial posts for PDP.

[261] In 1998 DPA held five ministerial positions: labor and social policy, science, information, local self-government, and minister without portfolio. In 1999, DPA again held five positions, swaping the minister of science for a minister of justice. In 2000, there were two reconstructions of the government; in the first one DPA held four ministerial positions: justice, labor and social policies, local self-government, and one without portfolio. In the 2001 reconstruction, DPA held two deputy prime minister positions, along with those of justice, economy and local-self-government.

2006, there were six coalition governments between one Albanian and two Macedonian political parties (Democratic Union for Integration, DUI, SDUM, and Liberal Democratic Party, LDP). In the 2006-2008 government, the coalition led by VMRO-DPMNE formed a government with DPA, giving the latter four ministerial portfolios (health, education, culture, and environment).[262] During this period, the Albanian opposition party DUI had more parliamentary seats than DPA and practically requested to be in the government since it was the true representative of the will of the majority of Albanians in Macedonia. In 2007, VMRO-DPMNE began negotiations with DUI and reached the so-called "May Agreement," which resulted in dissolution of the parliament, the first premature elections in 2008, and a new government coalition between VMRO-DPMNE and DUI.[263] This was also the first government since the country's independence with a ministry position assigned to one of the smaller ethnic communities.[264] Two subsequent governments were based on coalitions between VMRO-DPMNE and DUI, but ministerial positions were also assigned to representatives of the Roma and Turkish ethnic communities. The representation of minorities in the 2014-2018 government comprises eight ministerial posts assigned to DUI and one position (minister without portfolio) to the Union of Roma.[265]

2.2 Participation and representation at local level

In its Basic Principles, the OFA declared: "The development of local self-government is essential for encouraging the participation of citizens in democratic life, and for promoting respect for the identity of communities."[266] Decentralisation sought to offer limited autonomy to Macedonia's ethnic Albanians, compatible with the principles of consociationalism, whilst shying away from granting them full or formal autonomy.[267] Declaring that "there are

[262] In this specific case, the executive coalition was not formed on the basis of ethnic proportional representation because the winning party (VMRO-DPMNE) formed a government with an Albanian party (DPA) that did not win the largest number of votes.

[263] The ministerial portfolios held by DUI were economy, labor, health, local self-government, enivironment and one deputy prime minister responsible for the implementation of the OFA.

[264] The position of a minister without portfolio was given to a member of the Party for the Movement of Turks in Macedonia.

[265] *Andeva*, "Minorities in Coalition-Building: the Case of the Republic of Macedonia", 19.

[266] "Ohrid Framework Agreement", point 1.5.

[267] *Lyon*, "Municipal Decentralisation in the Republic of Macedonia: Preserving a Multi-Ethnic State?", 31-41.

no territorial solutions to ethnic issues," the OFA introduced the concept of decentralization as a fundamental element: roughly two-thirds of the seventy laws that have been adopted or revised as a result of the OFA (in the first couple of years after the agreement) relate specifically to it. Ripiloski and Pendarovski argue that by addressing the longstanding demand for a greater administrative autonomy at the local government level, the Macedonian side reasoned it would obviate a future Albanian push for a formal federalization.[268] In fact, when drawing municipal borders in December 2003, some parts of the country were defined accoring to political and ethnic interests rather than economic and socio-geographical ones. Within a total of 85 municipalities, ethnic Albanians constitute a majority in 16, while 79.3% of all members of the Albanian ethnic community reside in Albanian-majority municipalities.[269]

Even though the OFA does not explicitly foresee most of the mechanisms for minority protection and representation at the state level to be also applicable at the local level, the practice proves to the contrary. For example, both equitable representation of municipal employees and the Badinter principle of voting in municipal councils are applied at the level of local self-government units. Moreover, there is a specific representation form at the local level; the 2002 Law on Local Self-Government forsees the formation of commissions for inter-community relations in municipalities where at least 20% of the total population are members of an ethnic community.[270] The role of the commissions[271] is to enable institutional dialogue among the ethnic communities at the local level, and to act as an instrument for enabling direct citizen participation within the municipal decision-making processes. According to this law, the commissions review issues referring to the relations among local ethnic communities and provide opinions and proposed

[268] *Ripiloski and Pendarovski*, "Macedonia and the Ohrid Framework Agreement: Framed Past, Elusive Future", 135-161.

[269] *Kreci and Ymeri*, "The Impact of Territorial Re-Organisational Policy Interventions in the Republic of Macedonia", 279; cited in Ripiloski, Sasho & Pendarovski, Stevo. "Macedonia and the Ohrid Framework Agreement: Framed Past, Elusive Future", 135-161.

[270] Art. 55, para. 1. Following the condition prescribed by law such commissions are foreseen to be established in 20 municipalities in the Republic of Macedonia including the City of Skopje. In all these municipalities, at least one ethnic community comprises 20% (or more) of the total population within the municipality.

[271] A distinction should be made between the Parliamentary Committee for Inter-Ethnic Relations and the commissions (often called committees) for inter-community relations at local level.

resolution to problems that may arise among them.[272] However, there seem to be different interpretations of the commission's role and of its work in various municipalities.[273] This is mainly due to ambiguities in the law that cause difficulties in its implementation. The commissions' role is considered to be crucial for resolving the issues pertinent to non-majority communities. In particular, this applies to issues requiring the adoption of special voting procedures, given that municipal councils are obliged to consider and make decisions based on the commissions' opinions.

Commissions for inter-community relations can be also established in municipalities where the representation of ethnic communities is less than 20%. There are ethnic communities that do not have a representative in the municipal council who could present their stands and opinions. This is because the members of the local council are elected at local elections according to the election results.[274] Still, the law stipulates that regardless of their individual numbers in the municipality, ethnic communities should be equally represented in the commissions. Consequently, if smaller communities do not manage to elect their representative in the municipal council (either from a party-affiliated or independent list), their stands and opinions are nonetheless conveyed before the municipal council through their representative in the commission.[275]

3. Effective representation: dynamics and outcomes

Badinter majority voting has brought very few positive results, whereas disputes and debates around its misuse have multiplied. The lack of a 'double majority,' i.e. a majority of representatives of the minorities as well as an overall parliamentary majority, affects the implementation of the OFA as well as the government's ability to enact its legislative program.[276] Ethnic Albanians have continuously pushed for ever greater legislative areas to be covered by double majority voting, including the appointing of the National

[272] Art. 55 of the Law on Local Self-government.

[273] *Koceski*, Se shto sakam da znam za komisiite za odnosi megju zaednicite: iskustva i preporaki, 11.

[274] *Koceski*, Se shto sakam da znam za komisiite za odnosi megju zaednicite: iskustva i preporaki, 10-12.

[275] For example, there is no councilor representing the Turkish ethnic community in the Council of the municipality of Tetovo. Still, in the municipal Commission for inter-community relations there is a representative who can convey the stands and opinions of the Turkish community.

[276] *European Commission*, "The Former Yugoslav Republic of Macedonia 2010 Progress Report.", 7.

Bank governor, the adoption of the national budget, and the internal decision-making procedures of the Constitutional Court. On the other hand, ethnic Macedonians have generally been unwilling to discuss these new demands. Given the respective numbers and the level of parliamentary representation of ethnic Albanians, the Badinter majority gives undue sway to ethnic Albanians at the expense of others. While the provision on double majority voting applies to all ethnic communities, achieving a majority among the representatives of non-Macedonians is solely dependent on the votes of ethnic Albanian MPs. This is due to the paucity of seats held by smaller communities - a situation that effectively sidelines the political voice of non-Macedonians and non-Albanians and that further embeds bi-nationalism.[277]

Equitable representation has been one of the most contested issues as well as one of the most sensitive elements stemming from the OFA. It has been benefitial mostly for the members of the Albanian community, leaving smaller ethnic communities underrepresented. In particular, the number of Turks and Roma in civil service remains low.[278] Moreover, there are a large number of employees who receive salaries, but do not hold actual posts, thus burdening the payroll.[279] The European Commission reported on the continuous trend of recruiting employees on a quantitative basis without regard to the real needs of the institutions; also, the procedure remains vulnerable to undue political influence.[280] The last progress report issued by the European Commission highlights the need for reforms to ensure full implementation of the merit principle.[281] An opinion prevails that the employment in the state administration has been an unsuccessful project because the equitable representation principle has been misused to authorize employment without adequate qualifications as a means of securing support

[277] *Ripiloski and Pendarovski*, "Macedonia and the Ohrid Framework Agreement: Framed Past, Elusive Future", 135-161

[278] *European Commission*. "The Former Yugoslav Republic of Macedonia 2009 Progress Report.", 21; European Commission, "The Former Yugoslav Republic of Macedonia 2010 Progress Report.", 22; European Commission. "The Former Yugoslav Republic of Macedonia 2015 Progress Report.", 10.

[279] The State Secretary in the Ministry of Information Society and Administration has announced recently that there are around 1600 employees on a payroll who nonetheless have no work placements. Telma, " Sedat doma, a zemaat plata 1600 "ramkovni" administrativci".

[280] *European Commission*. "The Former Yugoslav Republic of Macedonia 2011 Progress Report.", 10.

[281] *European Commission*. "The Former Yugoslav Republic of Macedonia 2015 Progress Report.", 10.

for the ruling parties.[282] Members of ethnic communities are being employed because of their political party affiliation. Hence, the enforcing of equal representation usually means lack of meritocracy.[283] Recent studies note the prevailing perception that the objectives of the OFA, have not been met, particularly around equitable representation. At the institutional level, the implementation of this principle was to be monitored through annual plans for equitable representation. Due to a lack of legal mechanisms for control, such plans are either not prepared regularly or not by all institutions. Unlike in the first years of its implementation, equitable representation came to be perceived as an element of coalition agreements whereby coalition partners compete to employ staff from their ethnic communities. The main coalition parties of ethnic Macedonians and ethnic Albanians dominate this 'game,' while smaller communities remain largly overlooked.[284]

One can also question the work of the commissions for inter-community relations at local level. Some twenty multi-ethnic municipalities that were legally oblidged to establish commissions have done so, while according to data collated by the Association of the units of local self-government (ZELS) at the end of 2010, more than fourteen other municipalities have formed commissions on a voluntarily basis.[285] Nevertheless, citizens remain generally uninformed of their existence,[286] whereas assesments suggest that these commissions "convene for the sake of demonstrating that they have done so, and they rarely provide advisory, preventive or reactive recommendations."[287] Although most of the municipalities comply with the rule of having an equal number of representatives from the communities, there are still municipal commissions that do not fullfil this criterion.

4. Reviewing the achievements and failures

[282] *Velickovska*, Implementation of the Principle of Adequate and Equitable Representation: Perception of Citizens, 80.

[283] *Risteska*, "Ten years after the Ohrid Framework Agreement"; See also the interview with Ismail Kadriu in *Klekovski*, Ohriski Ramkoven Dogovor: Intervjua, 81.

[284] *EPI*, "Views on the implementation of the principle of equitable representation in state administration: Working Paper".

[285] A map was created presenting the municipalities which formed commissions within the project Bona Mente, implemented by the Center for Intercultural Dialogue and the Association of the units of local self-government, available at http://www.komz.mk/index.php/en/.

[286] *Tomovska and Neziri*, "Commissions for inter-community relations", 19.

[287] *UN*. Programme to Enhance Inter-Ethnic Dialogue and Collaboration. Results of a Participatory Assessment National and Local Capacities for Strengthening Inter-Ethnic Dialogue and Collaboration, 5.

Some see the OFA and the subsequent modification it brought to Macedonia's minority framework as a completed process. Others, however, suggest that there is room for improvement and that the OFA has not been fully implemented. There have been diverse calls for revision of the OFA and even demands for a completely new agreement. In 2009, DPA suggested that the OFA should be succeeded by an agreement for federalization of Macedonia in which a vice presidential office will be assigned to a member of the Albanian community.[288]

To this date, there has been no comprehensive academic study that objectively assesses whether minorities have been successfully accomodated in multi-ethnic Macedonia. Analyses carried out by scholars and non-governmental organizations focus on limitted aspects of the implementation of the OFA. In principal, extant assessments immensely depend on the political situation and the assessor's political inclination. Also, the need to officially evaluate the implementation process has been always followed by political bargaining.

The Macedonian government launched a review of the OFA in 2011.[289] It was followed by a report on the implementation of the OFA in 2012 that focused only on quantitative data, presenting mainly *de facto* undertaken activities and lacking an analysis of the quality of operation in the established institutions and of the quality of application of the adopted laws.[290]

Another review of the OFA was launched in the second half of 2015. It focused on social cohesion and the government considered it as a tool that will "help to see what has been achieved in the past and to create policies that will improve inter-ethnic relations as a prerequisite for the country to move closer to the European Union."[291] For this review, the Macedonian government signed a memorandum of understanding[292] with the European Institute of

[288] *Ripiloski and Pendarovski*, Macedonia and the Ohrid Framework Agreement, 141.

[289] In August 2011, Musa Xhaferi, the Deputy Prime Minister in the Government and head of Secretariat for Implementation of the Ohrid Framework Agreement (SIOFA), and the British Ambassador to Macedonia Christopher Yvon have signed a Memorandum of Understanding to carry out this two-year project with British aid.

[290] *SIOFA*, "Izvestaj po odnos na sostojbata za implementacija na site politiki sto proizleguvaat od Ohridskiot ramkoven dogovor ".

[291] *SIOFA*, "Xhaferri: analiza na Ramkovniot dogovor zaradi kreiranje podobri politiki".

[292] *SIOFA*, "Memorandum of Understanding (MOU) on the review of implementation of the Ohrid Framework Agreement".

Peace (EIP), represented by Pieter C. Feith.[293] The results and recommendations were supposed to be delived before the end of 2015. However, the fact that this review was launched amidst the political crisis after the 'Przino Agreement'[294] and before the parliamentary elections scheduled for April 2016 calls into question the delivery of an impartial and relevant qualitative analysis of the subject.

In fact, represenatives of the ethnic Albanian community have used the negotiations over the Przino Agreement to inflate their old demands and to announce new ones. The latter included an amendment to the Constitution in regards to the official use of the Albanian language and consensual decisions on the issues of: budget allocation, government election, state symbols and names, as well as rotation of one of the three state functions—prime minister, president of the state, and president of the parliament—with a guaranteed position for the ethnic Albanians.[295] These demands engendered media spinning and reculcitrant speculations over 'federalization' of the country.[296] Furthermore, aledged draft recommendations stemming from the second review of the OFA leaked to the media caused additional expecations and concerns on the part of ethnic Albanians and ethnic Macedonians, respectively. Leaked information discussed the introduction of a constitutional preamble with a civic rather than ethnic connotation, making of the Albanian language a second official language of the state, imposing of the Albanian language in schools, stipulating the knowledge of minority languages as a standard for employment in public administration, and expanding the application of the principle of equitable representation to big companies with state interest.[297]

5. Conclusion

Koinova argued that Macedonia advanced minimally in the area of respect for human and minority rights despite high EU involvement in the country after 2001.[298] Nonetheless, power-sharing arrangements of 2001 and subsequent developments in the political life succeeded in preserving peace and stable

[293] Feith was one of the mediators in the 2001 Ohrid negotiations.
[294] *European Commission*, "2 June 2015 Agreement".
[295] *Telma*, "DUI bara albanskiot jazik da bide oficijalen na site nivoa"; *Kapital*, "DUI: I megjuetnichkata rotacija na klucnite drzavni funkcii ke bide na masa pri sproveduvanjeto na dogovorot za izlez od politichkata kriza".
[296] *Gerovski*, "Ajde da zboruvame za federacija, zosto da ne?!"
[297] *Alsat M*, "Nacrt verzija na preporakite od analizata na Ohridskiot dogovor".
[298] *Koinova*, "Challenging Assumptions of the Enlargement Literature: The Impact of the EU on Human and Minority Rights in Macedonia", 807-832.

inter-ethnic relations in Macedonia. Despite many rises and falls, the country has managed to keep a balance in the distribution of political power established by the OFA.

The implementation of the OFA, however, has been a sensitive and challenging process. The development of Macedonia's minority protection model has mainly depended on the dialogue between the Macedonian and Albanian ethnic communities, whereas smaller ethnic communities have received less attention. The representation of the latter remains dependent on the political will of the largest and most influencial political parties. The partial use of the instruments ensuring communities' representation and participation, specifically Badinter voting at the local level and the work of the commissions for inter-community relations, supports the conclusion that not all ethnic communities are being accommodated equally.[299] Informal sharing of power through negotiations and bargaining among the leaderships of the main Macedonian and Albanian political parties sometimes replaces the constitutionally defined forms of the political process. Power-sharing arrangments at the local level involve similar difficulties.

Fifteen years after the establishment of the OFA, debates on the status of its implementation evolve around an image of Macedonia as a state that gives substantial rights to the Albanian community while often neglecting smaller communities.[300] Some undescore that the OFA has changed the context and the concept of the state by creating a multi-ethnic Macedonia where communities, primarily the Albanian community, play a key role in its survival.[301] The last developments concerning the calls for revision of the OFA indicate once more that the shape of the Macedonian minority's protection model depends entirely on the demands of the Albanian political parties and the outcomes of the negotiations with their Macedonian counterparts in power.

[299] *Lyon*, "Municipal Decentralisation: Between the Integration and Accommodation of Ethnic Difference in the Republic of Macedonia.", 105.
[300] *Bieber*, "Introduction.", 12-28.
[301] *Sulejmani*, "Independent Republic of Macedonia, Historical Context", 59-67.

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Ivan Vuković and Filip Milačić

Minority Representation in Montenegro: Defying Balkan Standards

Throughout the last quarter century, political development of Montenegro has been extremely turbulent and, considering the multi-ethnic character of its society, particularly challenging it terms of maintenance of internal political stability. In a region caught in the fire of the post-Yugoslav wars, in a state federation dominated by Serbia's Slobodan Milošević, and in a country pressed by a long-unresolved statehood issue, it was seemingly impossible to preserve peace and reconcile political interests of Montenegrins, Serbs, Bosniaks, Muslims, Albanians, Croats and other national groups. Against all odds, Montenegro turned out to be the only Balkan state constitutionally defined as "civic," which did not see an armed conflict on its soil, in which not a single strong nationalist party has emerged to date, and whose ethnic/national minorities predominantly endorsed civic political organizations and the idea of state independence. In an aim to contribute to a better understanding of this political phenomenon, this chapter analyzes the status of ethnic/national minorities in Montenegro prior to and after the 2006 referendum on independence.

8. Why no constitutional nationalism in Montenegro?

The end of the 1980s brought about the culmination of a decade-long political crisis in the Socialist Federal Republic of Yugoslavia (*Socijalistička Federativna Republika Jugoslavija* – SFRJ). Clearly visible in most of its six republics, the dominance of nationalist ideas fueling the worsening of political relations within the federation were particularly striking in the biggest republics of Serbia and Croatia. This was reflected not only in the results of the elections that took place around this time but also in the constitutional changes put into effect by the new political elites. As noted by Hayden, "various nationalist governments [in Yugoslavia] had based their election campaigns largely on chauvinism… each promised to deal firmly with the local minorities and to institute programs that would affirm each of their several republics as the nation-state of its dominant, ethnically defined nation (*narod*)" (1992: 655).

In March 1989, the Serbian Parliament passed amendments to the Republic's Constitution abolishing the political autonomy of its provinces, Vojvodina and Kosovo, which had been granted by the 1974 Yugoslav Constitution. This was in line with the promise of a 'unified Serbian state' on which Slobodan Milošević rose to power two years earlier. Most importantly, it significantly degraded the political status of the Kosovo Albanians, the biggest ethnic

minority in Serbia and a vast majority in the population of its southern province.[302] Serbia's transformation into a unitary state was formalized with the adoption of the new Constitution in September 1990.[303] By removing constitutional mechanisms for the minorities' self-rule, the Constitution "afforded scope for the establishment of a nationalist regime" (Ibid: 660). Three months later, Milošević and his Socialist Party of Serbia (*Socijalistička partija Srbije* – SPS) won landslide victories in the first multiparty general elections.[304]

Similarly, the nationalist Croatian Democratic Union (*Hrvatska demokratska zajednica* – HDZ) easily secured a majority of seats in the April/May 1990 parliamentary election in Croatia.[305] At the core of its political success was another promise – to create an independent Croatian state made the party leader, Franjo Tuđman. In December 1990, the new Croatian Constitution was promulgated, defining Croatia as "the national state of the Croatian people and a state of members of other nations and minorities who are its citizens."[306] Serbs, the largest national minority in Croatia,[307] thus lost their constitutive nation status. Their status was further aggravated by a series of constitutional provisions such as the one stating that "the official language and script of Croatia are 'the Croatian language and Latin script' (Article 12), [and] thus excluding the Serbian dialects and the Cyrillic alphabet customarily used to write them" (Ibid: 657). In April 1992, nearly a year after Croatia proclaimed independence and the war in this country broke out, Tuđman and the HDZ won the general elections by a large margin.[308]

On the other hand, the Parliament of Montenegro passed a new Constitution in October 1992, after the collapse of the socialist Yugoslavia.[309] Like in Serbia and Croatia, the constitution-making process was controlled by the

[302] According to the 1981 Yugoslav population census, Kosovo had 1.58 million inhabitants, more than 77% of which were ethnic Albanians.

[303] The document is available at: http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019071.pdf.

[304] Milošević became the President of Serbia, winning an impressive 65.3% of the vote. His party won 46.1% of the vote and, because of a majority election system, thus secured 194/250 seats.

[305] The HDZ won 41.9% of the vote and, due to an electoral formula, as many as 55 out of 80 Parliament seats.

[306] The text of the Constitution is available at: http://www.constitution.org/cons/croatia.htm.

[307] The last population census in Yugoslavia, conducted in 1991, showed that Serbs participated in the total population of Croatia with 12.2%.

[308] Tuđman won 57.8% of the vote in the presidential election whereas the HDZ won 44.7% of the vote (85/138 seats) in the parliamentary election.

[309] The full text is available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL(2005)096-e.

ruling party, the Democratic Party of Socialists (*Demokratska partija socijalista* – DPS), which succeeded the League of Communists of Montenegro (*Savez komunista Crne Gore* – SKCG). After winning the December 1990 parliamentary elections by a landslide, the party also held an absolute majority of seats in the Parliament.[310] Yet, contrary to the "constitutional nationalism" of the Serbian and Croatian political elites, "based on the [idea of] sovereignty of an ethnic group rather than on that of the equal citizens of the state" (Ibid: 656), the Montenegrin incumbents opted for a "civic state" concept. The preamble of the new Constitution did stress the "historical right of the Montenegrin people to have its own state, which was acquired through centuries-long struggle for freedom." However, the Constitution vested sovereignty in "all of the citizens of the Republic of Montenegro" (Article 2). At that time, Montenegrans represented nearly 62 per cent of the overall population.[311] Nonetheless, they were made to be equal with members of any other ethnic/national group in Montenegro. In the December 1992 general elections, the DPS once again won the parliamentary election by securing 42.7% of the vote (46/85 seats), while its leader Bulatović won another presidential term.

Furthermore, the character of the system of government established by the Montenegrin Constitution – a parliamentary system with "president" (Shugart, 1993) – was conducive to promoting the political interests of the national/ethnic minorities. Although he was directly elected, the president was not provided with significant constitutional powers, which is why Goati (2001) characterizes this type of government as "classical parliamentary system." While systems with strong presidents tend to polarize ethnically heterogeneous societies even deeper by favoring zero-sum games and weakening incentives for the formation of coalitions and agreements to solve social problems (Rüb, 1994), parliamentary systems offer more possibilities for ethnic/national minorities to exert political influence and avoid becoming political minorities, too.

On the contrary, in Serbia and Croatia, the constitutions established president-parliamentary systems (Shugart, 1993) by placing much of the executive power in the hands of their presidents.[312] According to Milošević, a strong

[310] Running under the SKCG name, the party won 52.6% of the vote and 83/125 parliament seats. In the concomitantly organized presidential election, its candidate, Momir Bulatović became the first democratically elected President of Montenegro.

[311] The largest minorities in Montenegro, according to the 1991 census, were: Muslims (14.5%), Serbs (9.3%), Albanians (6.5%), Yugoslavs (4.2%), and Croats (1%). For an analysis of the impact of the population censuses on the political dynamics of Montenegro, see: Vuković (2016).

[312] According to the Serbian Constitution, the President was to be elected directly (Article 86); his acts did not have to be ratified in the Parliament, could not be challenged by the Constitutional Court (quoted in Nikolić, 1994: 327), and did

presidential office – which he was expected to be soon voted into – was necessary "to confirm the political changes that prioritized national interest and unified Serbia" and "to preclude political instability which characterized classical parliamentary systems" (quoted in Thomas, 1999: 71). In effect, the main purpose of the Serbian constitution was "to provide the basis for his one-man rule" (Hayden, 1992: 660). Similarly, after his party's decisive victory in the 1990 election, Tuđman was in a position to tailor-make the new Constitution to his own political ambitions. In his mind, "it was he himself who, as the [future] Father of his country, could best be trusted to know what should be done and what was in Croatia's interest" (Ramet, 2010: 259). And, indeed, endowed with vast constitutional powers and triumphant in the 1991-1995 War on Croatian Independence, Tuđman represented throughout the decade a sort of "republican monarch" (Kasapović, 2001).

In comparison to the experiences of other republics of the then collapsing Yugoslav federation, the outcome of the process of the early 1990s constitutional engineering in Montenegro was substantially different. The reasons behind such divergence relate primarily to the political ambitions of the elites that were in charge of these processes. As indicated above, the introduction of multiparty competition in Serbia and Croatia was preceded by a period of an intense ethno-nationalist mobilization. Spurred by their intellectual elites and religious circles, the sense of discontent among Serbs and Croats concerning their economic and political status in Yugoslavia mounted steadily throughout these years. By the end of the 1980s, in Serbia and Croatia alike, "the stage was set for the emergence of a political figure that would channel the energy accumulated in the populace towards fulfillment of given national goals" (Vuković, 2014: 219). By pledging to "return the sense of national dignity" to their compatriots, Milošević and Tuđman thus managed to ascend to and soon monopolize power. From that moment on, all of their political endeavors came at the expense of the political rights of ethnic/national minorities.

The reaction of the Montenegrin communist elite to the worsening political situation in the socialist federation was quite different. Both politically and

not have to be counter-signed by the Government (quoted in Jovičić, 1992: 37). Moreover, he was given wide powers to introduce the state of emergency in which his decisions would have legal force (Article 83). Contrary to most post-communist European countries in which the cases where the president could exercise this power were strictly defined, the Serbian had a great freedom to decide for himself the reasons for such a decision (Kutlešić, 1994: 358). Similarly, the Constitution of Croatia granted directly elected President the authority to appoint and relieve of duty the Prime Minister of the Republic of Croatia, deputy prime ministers and government members; to dissolve the Parliament; to pass decrees with the force of law and take emergency measures in the event of a state of war […] or when government bodies are prevented from regularly performing their constitutional duties (Article 101).

economically, Montenegro traditionally represented the most favored Yugoslav republic.[313] Accordingly, at the moment when throughout the country "the political rhetoric of national interests and nationalism increasingly framed public debate and participation" (Woodward, 1995: 89), the highest representatives of the League of Communists of Montenegro stood up against all sorts of nationalism and in favor of the political status quo.[314] "Hoping for the continuation of a system that they rightly believed had worked greatly to their advantage" (Roberts, 2007: 426), they were ousted in January 1989 by a group of younger generation party officials dissatisfied with political and socio-economic results of their long governance. However, most party policies, including the negative stance on the rising nationalism in Yugoslavia, would actually not change. The maintenance of the federation built on the idea of unity of various ethnic/national, religious, and linguistic identities was still at the top of the SKCG political agenda.

In the course of the constitution-making procedure, such attitudes of the Montenegrin ruling party's elite gave birth to an ethnically/nationally inclusive concept of civic state. Largely due to that fact that throughout the following period, "the co-existence of minorities and the majority society in Montenegro has been considerably better than in most parts of former Yugoslavia" (Šistek and Dimitrova, 2003: 177).[315] The maintenance of good inter-ethnic relations in Montenegro was particularly challenging not only

[313] On the account of a major role they played in the 1941-1945 National Liberation War, which led to the formation of the socialist Yugoslavia, Montenegrins managed to "colonize the federal bureaucracy" and, using strong clientelistic networks, for decades remain overly represented in the Yugoslav political institutions (Lampe, 1996: 303). The amount of power of Montenegro's political representatives at the federal state level was most clearly reflected in a disproportionate share of funds allocated from the Yugoslav budget to the smallest republic to support its socio-economic development (Vuković, 2014: 97). All taken into account, it is fair to say that the years in Yugoslavia were "the best in Montenegro's entire history" (Roberts, 2007: 393).

[314] Back in 1974, in view of the growing nationalist tendencies across Yugoslavia, the SKCG Sixth Congress thus condemned "all sorts of nationalism, regardless of the form and dimension, [as] equally dangerous". As stated in the final document of the Congress, this primarily related to "the Greater Serbian nationalism which, often from centralistic positions, denies Montenegrin nation and culture, [and] challenges Montenegro's political, economic, and cultural equality", but also to "the Separatist [Montenegrin] nationalism which aims at creating boundaries between the Republics, economic and cultural closing as well as stirring up disbelief and mistrust among our peoples" (quoted in Vrbica , 1974: 179-180).

[315] By the "majority society" the authors mean the Christian Orthodox segment of Montenegro's population including Montenegrins and Serbs. The debate on the identity difference between the two national groups, then considered almost indistinguishable, would later play a major role in the country's political development and the 2006 renewal of its state independence.

because of the wars raging in the neighborhood but also due to the fact that, unlike other "Yugoslav" peoples opting for state independence, Montenegrins voted in the March 1992 plebiscite to form a state federation with Serbia, where Milošević's nationalist agenda was well underway.[316]

Interestingly, this was the time of the hybrid (semi-authoritarian) regime in Montenegro. Behind the democratic façade created with the introduction of political pluralism, the SKCG/DPS continued using the mechanisms of power inherited from the communist period. With an absolute control of state institutions, financial resources, and media, it skewed the playing field to the extent that the opposition was, in effect, rendered politically uncompetitive. Just like those in Serbia and Croatia, the ruling party in Montenegro did not act as one of many equal participants in the multiparty contest but as a hyper-privileged "state party" (Darmanović, 2003). However, when it comes to policies on the ethnic/national minorities and the level of their members' support for the ruling parties in the three former Yugoslav republics, the SKCG/DPS's political record could not differ more from those of the SPS and HDZ.

When asked why, in this regard, the Montenegrin political system was more inclusive compared to those in the neighboring countries, Momir Bulatović, former President of Montenegro (1990-1997) and former head of the DPS, claimed that the party's leadership sought to politically integrate ethnic-national minorities "out of democratic principles and with the aim to preserve peace" (*Interview*, July 2014). Yet Živko Andrijašević, former advisor to the Prime Minister (2012-2014) and History Professor at the University of Montenegro, asserted that such strategy was a result of "pure political cost-benefit calculus and not beliefs" (*Interview*, July 2014). In his words:

> Unlike, for example, Serbia and Croatia, a strong nationalism was not necessary for maintaining power in Montenegro. It was much more politically opportunistic [for the ruling party] to profile itself as a moderate force between two poles. The formula for staying in the office was therefore the following one: occupy the center and, by frightening voters with the right and left extremes, remain attractive in the eyes of those belonging to ethnic-national minorities. (Ibid).

Whatever the guiding principle was, such policies of the Democratic Party of Socialists ensured political stability, and to a great extent, contributed to the fact that Montenegro was the only ex-Yugoslav republic that did not see a war on its soil following the collapse of the socialist federation.

9. Minority political representation in Montenegro (1990–2006)

Ten articles of the 1992 Constitution of Montenegro defined "Special Rights

[316] The two-member state federation was named the Federal Republic of Yugoslavia (*Savezna Republika Jugoslavija* – SRJ).

of National and Ethnic Groups," including: protection of identity (Article 67); the right to use their mother tongue and alphabet as well as the right to education and information in their mother tongue (Article 68); the right to establish educational, cultural, and religious associations with the material assistance of the state (Article 69); the right to a proportional representation in public services, state authorities and in local self-government (Article 73); et cetera. The establishment of the Republican Council for Protection of Rights of National and Ethnic Groups "for purpose of preservation and protection of the[ir] national, ethnic, cultural, linguistic and religious identity," to be headed by the President of the Republic, was also envisaged by the Constitution (Article 76). And while these provisions represent more or less standard normative mechanisms for minority rights protections, the practice of political representation of Albanians, Bosniaks/Muslims,[317] Croats, and other ethnic/national minorities in Montenegro turned out to be rather peculiar, especially when juxtaposed against the political experiences of neighboring countries. In brief, as demonstrated in the remainder of this section, most members of these minorities would support civic rather than national political parties in each of the subsequently organized elections.

In August 1990, the Montenegrin parliament passed the constitutional amendments (no. 64 to 82) which abolished the existing delegate model of political representation and paved the way towards direct multiparty elections. A few weeks earlier, the new Bill on Political Association (*Zakon o udruživanju građana*) was adopted, which "legalized" political organizations

[317] In the former Yugoslavia, Serbo-Croatian-speaking adherents of Islam were recognized as Muslims (*Muslimani*, with capital "M"). Concentrated mainly in Bosnia and Herzegovina, their separate ethnic identity was acknowledged by the 1969 constitutional reform and, for the first time, appeared in the 1971 Yugoslav population census. Following the collapse of the socialist federation, a group of Bosnian Muslim intellectuals put forward the term Bosniak (*Bošnjak*) which they considered more appropriate. As noted by Šistek and Dimitrova, "a designation based purely on the traditional religion was not seen as fitting in modern society since many members of the Muslim nation could, at the same time, be atheist or religiously indifferent; [and] the relationship between the term 'Bosniak' and the land of Bosnia as the 'mother country' (*matična država*) of all Bosniaks was also evident" (2003: 168). In Montenegro, as shown by the last population census conducted in 2011, there were 8.6% of Bosniaks and 3.3% of Muslims. The fundamental difference between the two identities relates to what Bosniaks and Muslims in Montenegro understand as their "mother country". For the former camp, it is Bosnia and Herzegovina. In this regard, those who self-identify as Bosniaks claim to belong to a broader Bosniak ethnic body that, adjacent to Bosnian Muslims, comprises Islamic population of Montenegro and Serbia. In contrast, Montenegrin Muslims consider themselves an indigenous people of Montenegro which, accordingly, they regard as their mother country. For more on the Muslim/Bosniak identity issue, see: Bringa (1995) and Larise (2015).

created in the course of 1989.[318] In addition to those, two dozen parties were established prior to the December general elections. As the nationalist tensions grew across Yugoslavia, newly founded parties throughout the federation widely used national denomination in order to emphasize the 'national' character of their organizations. In Montenegro, most Bosniaks/Muslims and Albanians – the two biggest ethnic minorities – resided in a small number of its 20 municipalities. In some, like Ulcinj, Plav, and Rožaje, they represented a majority population. With that in mind, one might have expected that the adoption of a proportional electoral system with 20 districts (municipalities) and 4% threshold would generate similar political trends in Montenegro. Instead, a number of multi-ethnic (civic) political parties/coalitions, such as the Liberal Alliance of Montenegro (*Liberalni savez Crne Gore* – LSCG) and the Democratic Coalition (*Demokratska koalicija*) formed and were strongly endorsed by the minorities (Goati, 2015: 52). As a result, the only national party that secured seats in the first convocation of the multiparty Montenegrin Parliament was the Serb nationalist People's Party (*Narodna stranka* - NS).[319]

As mentioned above, the next general elections were held in December 1992. Previously, the electoral law was amended and, this time, the entire territory of Montenegro represented a single electoral district (Pavićević, 2007). Once again, members of the ethnic/national minorities voted predominantly for the civic parties, the Democratic Party of Socialists, the Liberal Alliance of Montenegro, and the Social Democratic Party of Reformists (soon to be renamed the Social Democratic Party – *Socijaldemokratska partija*, SDP).[320] The Democratic Alliance in Montenegro (*Demokratski savez u Crnoj Gori* – DSCG), the single national Albanian party running in the election, failed to surpass the electoral threshold.[321] Winning 20 per cent of the vote in total, the People's Party and the extremely nationalist Serbian Radical Party (*Srpska radikalna stranka* – SRS) were the only national parties to find a way into the Montenegrin parliament.

Another electoral law reform took place prior to the November 1996 parliamentary election, dividing Montenegro into 14 voting districts. The ruling party's gerrymandering turned out to be profitable for the national parties as well.[322] Although none of them reached 4 per cent of the vote, two

[318] These were: the Democratic Alternative, the Democratic Party, the Association for Yugoslav Democratic Alternative, and the Association for Improvement for Democratic Processes.

[319] The NS won nearly 13% of the vote and gained 17 out of 125 seats.

[320] The Liberals won 13 and the Social Democrats garnered another four seats.

[321] The result of the DSCG was 3.85% of the vote.

[322] The DPS triumphed again, this time winning an absolute majority (51.2%) of the vote. On the other hand, albeit winning more than 4% of the vote in total, the Social Democratic Party (5.5%) and the Serbian Radical Party (4.3%) failed to enter the Parliament.

Albanian parties representing the Muslim minority – the Democratic Alliance in Montenegro and the Democratic Union of Albanians (*Demokratska unija Albanaca* – DUA) and the Party of Democratic Action of Montenegro (*Stranka demokratske akcije Crne Gore* – SDA CG) – were voted into Parliament.[323] In an attempt to put an end to the DPS's non-democratic rule, the LSCG and the NS, the two biggest – and ideologically completely different – parties formed a highly unlikely coalition.[324] However, winning merely 19 out of 71 seats, their People's Accord (*Narodna sloga*) failed to even threaten the ruling party's political dominance.[325]

However, just a few months after its electoral triumph, two political camps – led by Bulatović, and his vice-president and the Prime Minister, Milo Đukanović – started emerging within the ruling party's structures. The leading political figures in Montenegro came to openly disagree over the issue of political relations with Slobodan Milošević. While Bulatović was determined to maintain political partnership with the Serbian strongman despite extremely negative consequences of his governance, Đukanović decided to turn back on him and take a new, pro-Western political course. The latter's party faction prevailed. Subsequently, Bulatović and a significant number of his followers left the DPS, which consequently lost a great deal of political influence in Montenegro and, most importantly, its hyper-privileged position over its political rivals. The hybrid regime which the two had built together was collapsing and a genuine democratic transition involving truly competitive elections was about to begin in Montenegro (Vuković, 2014: 218).[326]

In September 1997, at the peak of the conflict in the ruling party, the Montenegrin Parliament adopted a special document called "The Agreement on the Minimum Principles for the Establishment of a Democratic Infrastructure in Montenegro" (*Sporazum o minimum demokratskih principa*

[323] Their results were as follows: the SDA CG (3.5% of the vote / three seats), DSCG (1.8% / two seats), and DUA (1.3% / two seats).

[324] The civic Liberal Alliance of Montenegro was the first party to openly advocate the idea of Montenegro's independence. Quite the contrary, the nationalist People's Party stood at the position of transformation of the Serb-Montenegrin federation into a unitary state.

[325] To a great extent, this was a result of the character of the election which could hardly be called competitive. Thus for instance, using the uncompromised monopoly of power, the ruling party conducted an extremely lavish campaign, "this time beating the opposition in terms of money spent by a margin of 10:1" (Bieber, 2003: 28).

[326] This was obvious from the results of the October 1997 presidential election. In the first round, Bulatović prevailed over Đukanović with 0.7% of the vote margin, but failed to win the necessary 50%. In the second, Đukanović triumphed by less than 5,500 out of 344,000 votes cast. For the first time since the 1990 introduction of political pluralism, one could not foresee an outcome of an electoral process in Montenegro.

za razvoj demokratske structure u Crnoj Gori) that was supposed to lay the groundwork for the organization of free and fair elections and which, in one section, touched upon the status of minorities. It envisaged the use of a new designation of "minority nations" (*manjinski narodi*) for Albanians, Bosniaks, Croats, and Muslims in Montenegro, with the aim "to emphasize that the three groups have been autochthonous in parts of its territory, and to thus distinguish them from ethnic minorities which have resulted from migration (Roma and small groups such as Macedonians, Hungarians and Slovenes)" (Šistek and Dimitrova, 2003: 160). Based on this document, the Ministry for Protection of the Rights of National and Ethnic Groups was established within the next government of Montenegro, with the aim "to protect and preserve rights of persons belonging to national and ethnic groups according to the Constitution and international documents that relate to the same issues, and in accordance with the democratic goals to which Montenegro strives" (CERD Report, 2008: 7).[327]

Furthermore, prior to the May 1998 parliamentary election – the first democratic balloting since the introduction of political pluralism (OSCE/ODIHR Report, 1998) – another reform of the electoral law took place. It lowered the threshold to three per cent and inaugurated a separate electoral district from the areas predominantly populated by the Albanian minority (the town of Ulcinj and parts of the cities Podgorica and Bar), in which five out of 78 MPs were to be elected.[328] New possibilities for the promotion of minority political interests and, arguably, for strengthening of the national political parties were created as a result.

However, it turned out that the democratic changes taking place in Montenegro and the 1998 modification of the electoral system actually increased the level of minority nations' political support for the DPS and other civic political organizations. The ruling party's program, based on the notions of multi-ethnicity, tolerance, economic reform, and greater political autonomy from Belgrade, "appealed to the Bosniaks-Muslims, who overwhelmingly voted for Đukanović and the DPS-led coalition in the 1997/1998 presidential and parliamentary elections as well as in several subsequent elections" (Šistek and Dimitrova, 2003: 165). Therefore, neither the SDA nor any other Bosniak-Muslim party won a single seat in the 1998, 2001, and the 2006 parliamentary elections. At the same time, Albanian national parties benefited

[327] In 2006, it was renamed the Ministry for Human and Minority Rights Protection (*Ministarstvo za ljudska i manjinska prava*). The report is available at: http://www.uniset.ca/microstates/me_minorities_16.pdf.

[328] The OSCE/ODIHR Election Observation Mission criticized this solution as "artificial". Accordingly, its main recommendation was "not to repeat the arrangement for voters of the Albanian minority, as it was implemented for these elections" (1998: 5). The report is available at: http://www.osce.org/odihr/elections/montenegro/15101?download=true.

to a certain extent from the special electoral treatment "which ensured the participation of Albanian deputies in the Montenegrin parliament" (Ibid: 170). In each of the future elections, at least one of them managed to secure parliamentary status. However, albeit showing "more preference for minority parties than Bosniaks-Muslims," the Albanians also kept "favoring multi-ethnic parties over ethnic ones" (Ibid: 171). Thus, even in the special electoral district, Albanian parties could not win a majority of seats until the 2006 election. In 1998 and 2001, the Democratic Alliance in Montenegro and the Democratic Union of Albanians won one mandate each; the DPS-led coalition won the remaining three. In the 2002 parliamentary election, the two Albanian parties and the DPS's political alliance split four seats.

10. Minorities in the post-referendum Montenegro

The next few years of Montenegro's political development were dominated by an all-encompassing debate on the issue of its statehood. The 1997-1998 pro-/anti-Milošević political schism served as the basis for the creation of pro-independence and pro-union political blocs. The referendum on Montenegro's state independence took place on 21 May 2006. By the will of 55.5 per cent of those who voted, the country restored full sovereignty.[329]

Given the results of the 2003 population census, which showed that Montenegrins, relative to Serbs, were only a relative majority (43.2% vs. 32%) in Montenegro, it was clear that "the appeal to minorities would be crucial in the quest for Montenegrin independence" (Džankić, 2012: 41). And indeed, a vast majority of Bosniaks, Albanians, and Muslims sided with the pro-independence camp in view of the previously elaborated political transformation of the Democratic Party of Socialists, its main political force. In the project of the pro-Western, multi-cultural and civic state of Montenegro, they saw their political future. Accordingly, the political platform of the independence movement served as "the setting stone in establishing the constitutional and legal frameworks for minority protection in Montenegro after the country became independent in 2006" (Ibid).

A month before the referendum on independence, Montenegrin Parliament passed The Law on Rights and Freedoms of Minorities (*Zakon o manjinskim pravima i slobodama*). As stated in the European Commission Progress Report on Montenegro, the new law "provided for a general framework for the protection of minorities and affirmed the multi-ethnic character of Montenegro and Montenegrin society" (2006: 15).[330] It guaranteed the

[329] Internationally recognized as an independent state in the 1878 Berlin Congress, Montenegro ceased to exist in 1918 as a result of Serbian military occupation which preceded the creation of the first "Yugoslav" state, the Kingdom of Serbs, Croats, and Slovenes.

[330] As noted in the Report, this included "nondiscrimination of ethnic and other minorities, use of language, free association and participation of minorities in

protection of rights for "any group of citizens of the Republic of Montenegro which is numerically less represented than majority population, which has common ethnic, religious and linguistic characteristics and firm historical bonds with Montenegro, and is incited by a desire to express and maintain national, ethnic, cultural, linguistic and religious identity."[331] Compared to the previous legal practice, this represented a novelty in a sense that the term 'minority' (*manjina*) "no longer included only the non-Christian Orthodox population or autochthonous minorities, but also Serbs, Roma, and other people not covered by earlier definitions of 'minority'" (Ibid: 42). In terms of their political representation, the law envisaged *a priori* allocation of seats by which members of those minorities that, according to the latest population census, constituted one to five per cent of total population in Montenegro would have one seat in the Parliament, whereas those who constituted more than five per cent would be guaranteed three seats. Nonetheless, following a motion launched before the Constitutional Court, these provisions of the new law were annulled (Ibid).

As one could have easily predicted in light of the referendum result, the DPS-led coalition won the September 2006 parliamentary election by a large margin (48.6% of the vote; 41/81 seats). In the special-Albanian electoral district, the coalition secured two seats, while the remaining three were won by Albanian national parties. Founded in February 2006, the Bosniak Party (*Bošnjačka stranka* – BS) entered the Parliament by winning three seats in a coalition with the Liberals. Under the name "Serb List," an alliance of six Serb national parties won 12 seats. Pursuant to the pre-referendum joint political endeavor guided by the idea of renewal of Montenegro's independence, the DPS welcomed the national parties of minorities (except the Serb) in the government as a way to solidify the multi-ethnic foundation of the new state. The same situation repeated after the parliamentary elections in 2009 and 2012, both won by DPS-led coalitions.

A crucial step forward in the process of state-building and the minority rights protection in Montenegro was made in October 2007 when the Parliament adopted a new Constitution. It created "legal guarantees for the establishment of a multiethnic environment" (Džankić, 2012: 45). In this regard, the preamble emphasizes that "the commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of

public and social life [... and] the establishment of minority National Councils, as well as a Republican Fund for Minorities" (Ibid). In particular, the law guaranteed "proportionate representation of members of minorities in public services, public authorities and local government" (Youth Initiative for Human Rights Report, 2007: 11).

[331] The text of the Law is available at: http://minoritycentre.org/sites/default/files/law-minority-rights-me.pdf.

law," and that "the determination that we, as free and equal citizens, members of peoples and national minorities who live in Montenegro: Montenegrins, Serbs, Bosniaks, Albanians, Muslims, Croats and the others, are committed to democratic and civic Montenegro."[332] The first Article of the Constitution defines Montenegro as "civic, democratic, ecological, and the state of social justice, based on the rule of law." Article 2 states that the "bearer of sovereignty is the citizen with Montenegrin citizenship." Such a civic understanding of the nation, also visible in Article 13 ("Language and Alphabet") of the Constitution, which adjacent to "the official language" (Montenegrin) lists Serbian, Bosnian, Croatian, and Albanian as languages "in the official use," reflects a social reality "rather unique in the Balkans" (Bieber/Winterhagen 2009).

Furthermore, the Fifth Paragraph (Articles 79 and 80) of the Constitution defines special rights of the members of minority groups in Montenegro. It guarantees the protection of their identities ("Persons belonging to minority nations and other minority national communities shall be guaranteed the rights and liberties, which they case exercise individually or collectively with others"), and the prohibition of their assimilation ("Forceful assimilation of the persons belonging to minority nations and other minority national communities shall be prohibited; The state shall protect the persons belonging to minority nations and other minority national communities from all forms of forceful assimilation"). And while most of these provisions are in line with the international norms of minority rights protection, those regulating mechanisms of political representation of the Montenegrin minorities were adjusted to the domestic political context.

Namely, the Constitution envisaged the right to "authentic representation" of minorities in the Parliament of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population (Article 79/9), and the right to "proportionate representation" in public services, state authorities, and local self-government bodies (Article 79/10). This led to a big debate in Montenegro over how to define and implement "authentic representation" in practice. According to Džankić, integration into the country's legal system of such a vague notion was politically motivated as "the legislator deliberately refrained from relating it to proportional representation because of the respective share of different minorities, particularly Serbs, within the overall population" (2012: 45-46). The question of "whether or not 'authentic representation' meant representation by parties representing national identities, or whether it implied that minorities could 'authentically' be represented through non-ethnic parties as well" (Ibid) was at the core of the political discussion which led to an electoral reform in November 2011.

[332] See the full text of the Constitution at: https://www.constituteproject.org/constitution/Montenegro_2007.pdf?lang=en.

Moreover, the need to bring the Montenegrin electoral system in full compliance with the Constitution was constantly encouraged by important international organizations. In the OSCE/ODIHR official report on the 2009 parliamentary election in Montenegro, the following is stated: "The parliamentary elections were regulated by a comprehensive legal framework that generally provided an adequate basis for the conduct of democratic elections. However, outstanding issues relating to the reform of the electoral framework remain, including harmonizing the election law with the Constitution, removing inconsistencies and ambiguities, [etc.]" (2009: 1).[333] In the official Opinion of the European Commission on Montenegro's application for membership of the European Union,[334] the country is urged to "improve the legislative framework for elections in line with the OSCE-ODIHR recommendations" (2010: 11).[335]

The 2011 Amendments to the Law on the Election of Representatives and Deputies (*Izmjene i dopune zakona o izboru odbornika i poslanika*)[336] abolished the special electoral district that was introduced in 1998. Previously reserved solely for Albanians, the affirmative action principle concerning electoral representation was now applied to the members of every "minority nation or a minority national group in Montenegro" (Article 43).[337] To "the political parties or the groups of permanent residents" representing minorities, the three per cent electoral threshold would here from not apply. Instead, "if none of them meets [that] requirement, and individually they gain no less than 0.7% of valid votes [they] shall acquire the right to take part in allocation of seats as a single – collective list of candidates with the total number of valid votes won, provided that adding up that ensures winning up to three seats" (Article 94/2). This right shall be exercised "by candidate lists representing a specific (the same) minority nation or a specific (the same) minority national community with the share up to 15% in the total population in the electoral

[333] See the report at: http://www.osce.org/odihr/elections/montenegro/37521?download=true.

[334] The candidate status was granted to Montenegro in December 2010. Two years later, the country has opened the accession negotiations with the EU.

[335] The document is available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf

[336] The text of the Law is available at: file:///C:/Users/admin/Downloads/Montenegro_Law_on_elections_of_councillors_and_representatives_1998_am2011_en%20(1).pdf.

[337] This was consistent with the joint Venice Commission-OSCE/ODIHR opinion which underlined that, by the existing Election law, "protected minority status was extended only to Albanians in Montenegro at the exclusion of other groups" (2010: 7). The document is available at: file:///C:/Users/admin/Downloads/Joint%20Opinion%20on%20Draft%20Law%20on%20Amendments%20of%20Elec%20Law%208%20June%202010%20.pdf.

district, according to the data from the latest population census" (Article 94/3). Finally, "in case none of the candidate lists for election of MPs of Croatian national members meets the [3% threshold] requirement […], the most successful one, with no less than 0.35% of valid votes shall acquire the right to one MP seat" (Article 94/2).[338]

On the account of the new legal provisions, three national political groups – two Albanian and, for the first time, one Croatian – were voted into the Parliament in the October 2012 election. Winning 4.2 per cent of the vote, the Bosniak Party managed to surpass the electoral threshold and secure three seats. By tradition, the non-Serb national parties joined the DPS's "Coalition for European Montenegro" in forming the current Government of Montenegro. And while reaffirming the principles of a multi-cultural and multi-ethnic Montenegro, their continuous participation in government and the demands for a "higher level of the minority peoples' integration into the democratic processes in the society"[339] bear certain risks for preservation of the country's civic political identity. As noted by Vuković, "it is hard not to notice the collision between the basic legal norm and the increasingly applied practice, defining the character of the political system" (2016: 138). How the two will be reconciled in the future, considering the complicated process of constitutional revision in Montenegro and the EU integration-related growing demands for minority rights protection, and how the country will manage to preserve the most valuable political legacy, its inter-ethnic harmony, remains to be seen.

11. Concluding remarks

During the last quarter century, Montenegro has, against all odds and against the dominant political practices in the region, managed to preserve peace, political stability, and multi-ethnic harmony as well as to create strong legal and political foundations for the development of a genuine civic state. The lack of an articulated national program and the ensuing ethnically/nationally "inclusive" political agenda of the ruling Democratic Party of Socialists have greatly contributed to such course of political events. As a result, minority peoples in this country were able to politically identify with and support the DPS. Likewise, most of those Albanians, Bosniaks/Muslims, and Croats who throughout this period remained in opposition to the party in power endorsed other civic political organizations.

[338] The 2011 population census showed that Croats make up around 1% of Montenegro's population

[339] Under this condition, written in the joint political platform with the DPS's coalition, have the minority parties agreed to enter the incumbent government. The platform (in Montenegrin) is available at: http://dps.me/images/stories/dokumenta/Sporazum_o_zajednickom_politickom_djelovanju.pdf.

On the other hand, only after the renewal of state independence would national parties in Montenegro gain a certain level of political prominence. At the same time, for the reasons previously elaborated, most of these parties were invited to join the DPS in forming each of the three post-2006 governments. This has allowed their representatives to take an active part in the processes of democratization and Europeanization of Montenegro which, in return, has brought about their very positive outlook on the political status of the country's national minorities. As recently pointed out by Rafet Husović, Bosniak Party leader and Vice President of the Montenegrin Government:

> The status of Bosniaks in Montenegro could be analyzed against two criteria – their representation in the state institutions and the level of respect for the internationally recognized minority rights. In both fields, the progress we have made is obvious. We have demonstrated that Montenegro is a positive example in the region.[340]

In contrast, there are a few smaller Albanian national parties whose representatives – left out of the power-sharing political arrangements – tend to be very critical vis-à-vis the status of this particular minority group in Montenegro. Their political argumentation is largely based on the 2011 abolishment of the separate electoral unit for Albanians, their low representation in the Montenegrin state institutions, and the thus far failed expectations concerning the transformation of Tuzi – a predominately-Albanian populated area within the Podgorica (state capital) region – into a separate municipality.

It is hard to tell which of the two minority perspectives will prevail in the future. Montenegro has celebrated its tenth anniversary of independence as a widely-praised positive example of politically stable and ethnically-nationally inclusive Western Balkan state. And whether that will still be the case in a decade from now depends primarily on the way its minorities see themselves within Montenegro's future.

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[340] An interview (14 January 2016) for the Montenegrin daily "Pobjeda", available (in Montenegrin) at: http://www.cdm.me/politika/husovic-vlada-ce-dobiti-vecu-podrsku-nego-2012

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bla3

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Recognition, representation and reproach: new institutional arrangements in the Hungarian multiculturalist model

1. Terminologies

1.1. From ethnic to national minorities

The new 2011 Hungarian Constitution and the subsequently newly adopted Act on the Rights of Nationalities[341] re-labeled Hungarian minorities from "national and ethnic minorities" *("nemzeti és etnikai kisebbségek"*) to "nationalities" ("*nemzetiség*"). There is no evidence (in parliamentary debates or government documents, for example) that this shift in terminology was based on overarching theoretical or conceptual reasoning, or that it would will be accompanied by a paradigm shift in political commitments. It is not clear what the legislator's problem was with the previous definition of "national and ethnic minority." Presumably the constitution-maker neither disputed that "nationalities" constitute a numerical minority within society, nor that they suffer from certain disadvantages (which the minority law is designed to redress by setting forth minority rights). Furthermore, putting aside the difficulty of differentiating between "national" and "ethnic" minorities, nothing supports the understanding (and even the Hungarian legislator failed to make this claim) that a "nationality" could or would be regarded as a greater set comprising both. Thus the most accurate description would be that it is synonymous with "national minority." It is no coincidence that the terminology used in international documents also employs this distinction, and that the original draft of the Fundamental Law talked of "nationalities and ethnic groups."

During the drafting of the new constitution in 2011, the Croatian[342] and the Ruthenien[343] minorities, represented by their respective national minority self governments (to be described below), welcomed the change in terminology, which was also recommended by the minority rights ombudsman, because for an unexplained reason, they considered the term

341 Act CLXXIX of 2011 on the Rights of Nationalities.

342 *http://www.parlament.hu/biz/aeb/info/horvat_onk.pdf.*

343 *http://www.parlament.hu/biz/aeb/info/ruszin_onk.pdf.*

"minority" to be demeaning. It needs to be added that only four national minority self-governments took the effort to comment on the draft constitution, as requested by the parliamentary committee in charge. The largest, the Roma minority self-government, also remained silent.

The preamble of the new constitution (which is is repeated in Article XXIX), proclaiming that "the nationalities living with us form part of the Hungarian political community and are constituent parts of the State," needs interpretation and clarification. Though it is a restatement of the previous constitution's relevant provision (not a verbatim reiteration, but substantially the same), despite several Constitutional Court decisions[344] seeking to construe its meaning, it remains ambiguous. It would not raise interpretational questions if minorities were constituent elements of the nation/the political nation, but the semantic connotations of minorities or nationalities that are constituent parts of the state is rather confusing outside of the context of a Bosnian-style ethnic federation. All in all, it appears therefore that members of the Hungarian nation, who are giving themselves a constitution, share public power with the nationalities that live here. Incidentally, these nationalities are not subjects of the constitution (the preamble of the Fundamental Law states that it is authored and framed by members of the Hungarian nation), even if there may be, and in fact there have been, members of parliament (even some governing party MPs) who were citizens of Hungary but were not ethnically Hungarian, but members of one of the national minorities/nationalities. The 2011 nationalities act practically left the previous legislation intact, and a separate legislation introduced the parliamentary representation of all nationalities.

1.2. Minority representatives (election procedures, legal framework)

After several unsuccessful legislative attempts and a two-decade long political debate, for the first time since the 19898 political transition, as part of a sweeping reorganisation of electoral law, the Orbán government

[344] *1041/G/1999 AB határozat* (Constitutional Court decision), AB Közlöny: Vol. IX., No. 8–9, *35/1992. (VI. 10.)* and *24/1994. (V. 6.) AB határozat* (Constitutional Court decision).

adopted and actually implemented legislation that set forth the parliamentary representation (or at least, presence) of minorities.

The Fundamental Law does not contain any express provisions concerning the parliamentary representation of nationalities; it merely states that the participation of nationalities in the work of Parliament must be ensured. The detailed regulations are laid down in two acts of parliament, one approved in 2011 and the other in 2013, on the electoral system.[345] Nationalities are entitled to win preferential seats in the 199-member Parliament as part of the contingent of 93 seats that are distributed based on national lists. If any of the nationality lists win a preferential seat, then the seats that must be allocated between party lists will be reduced by the corresponding amount. Nationality lists can only be nominated by national-level nationality self-governments. In other words, the parliamentary representation of minorities is based upon representation through minority self-governments, which implies that other players, such as parties for example, have no influence on the composition of the list and cannot nominate candidates. Only a single preferential seat can be won by each national minority; to win more than one seat, a nationality list can compete for additional seats based on the general election rules that require securing enough votes to take the five per cent threshold. A citizen can choose to vote either for a party list nominated according to the general election rules or, if she is registered in the nationality voter roll, for one of the nationality lists. One can only enrol in one minority register. Thus, the expression of multiple identities is not supported in electoral law.

According to the 2013 Act XXXVI on Electoral Procedures, the rules for registering in the nationality voter rolls are not different from the rules applicable to nationality self-government elections – essentially, a principle of free and unfettered self-identification prevails in this context.[346] According to the 2011 Act CCIII on the Election of the Members of Parliament, a national list can be nominated either as a

[345] Act CCIII of 2011 on the Election of the Members of Parliament Articles 7-18. §, Act XXXVI of 2013 on Electoral Procedure Articles 86-87. §, 255-257. §.

[346] According to Act XXXVI of 2012 on the National Assembly Section 86, requests for registration as a nationality voter shall contain: a) an indication of the nationality; b) a declaration by the voter, in which the voter professes to belong to said nationality; c) an indication of whether the voter also requests to be registered as a nationality voter with regard to the election of Members of Parliament.

regular party list or a nationality list. Nationality lists can be nominated by national-level nationality self-governments, and such a nomination requires the endorsement of at least one per cent of nationality voters enrolled in the central registry, though the maximum necessary number is 1,500 endorsements. A candidate on the list must be someone who is also enrolled in the central registry as a person affiliated with the given national minority, and, moreover, a list must contain at least three candidates. An important condition is that two or more national (level) nationality self-governments cannot nominate a joint list. All organizations representing minority interests are excluded from the possibility of nominating lists for the parliamentary election. The law also provides for a minimum number of votes necessary to win a seat. These effectively imply that some 20,000 to 25,000 votes are needed for parliamentary representation. This number is considerably less than what would be needed based on the generally applicable rules,[347] yet, as we will see below in part two, given the demographics of minorities in Hungary, only the Roma and the German minorities have a chance at actually succeeding in passing this threshold. Therefore, the nationality advocate is likely to remain the dominant legal institution in the case of the other 11 minorities.

[347] According to Act XXXVI of 2012 on the National Assembly Section 16, Mandates which may be won from a national list shall be distributed in the following procedure: 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; If the number of votes for a particular nationality list exceeds or is identical to the preferential quota, the particular nationality list shall win one preferential mandate; one national minority list may win one preferential mandate; the number of allocated preferential mandates shall be deducted from the number of mandates which may be won on the national list; Mandates remaining after the procedure described above shall be distributed among party lists entitled and nationality lists which won preferential mandates, where the number of votes reaches a certain number.

1.3. Nationality advocates (election procedures, legal framework)

According to Article 18 of the Act on the Elections of Members of Parliament, "(1) Any nationality, which drew up a nationality list, but failed to win a mandate by such list, shall be represented by its nationality advocate in Parliament. (2) The nationality advocate shall be the candidate who ranked first on the nationality list."

Let us review the legal status of the nationality advocate (who, just like a member of parliament representing a nationality, cannot be the president or member of a nationality self-government, even though she was to be nominated by the latter). According to the 2012 Act XXXVI on Parliament, the advocate may speak during plenary sessions – if the House Committee (the committee in charge of parliamentary procedures) assesses that a given issue pertains to the rights or interests of nationalities. Indeed, she may even submit proposals for a decision to Parliament, submit questions to the government, members of the cabinet, the Prosecutor General, the president of the National Audit Office, or the Commissioner of Fundamental Rights on issues pertaining to the rights and interests of nationalities.

Although it has not (yet) been documented to have occured, the fact that the House Committee (which is made up of the Speaker of Parliament, his/her deputies, and the leaders of the parliamentary factions) is entitled to decide whether a given item on the agenda pertains to the rights and interests of nationalities constitutes an inherent limitation of the advocate's powers.[348] It may even decide that such an issue does not exist.

[348] According to Act XXXVI of 2012 on the National Assembly Section 11, Within the framework of the provisions of the Rules of Procedure, the House Committee shall …specify the items on the orders of the day affecting the interests or rights of nationalities. … Section 13 holds that the chair of the committee representing the nationalities or, if he or she is prevented from acting, the deputy chair of the committee delegated by the chair, may attend the sitting of the House Committee… The chair of the committee representing the nationalities may initiate with the Speaker the convening of the House Committee in the interest of the House Committee identifying an item on the orders of the

Parliament is also under obligation to set up a parliamentary committee that represents nationalities. This committee submits initiatives and proposals that serve the interests and rights of national minorities, issues opinions on relevant proposals, and is also involved in monitoring the government's work relating to nationalities.[349] This is the only

day as an item affecting the interests or rights of nationalities. The Speaker shall decide on convening the House Committee.

[349] Act XXXVI of 2012 on the National Assembly Section 22 (1) The committee representing the nationalities shall be an organ of the National Assembly acting in the field of the interests and rights of nationalities, in charge of putting forward initiatives, making proposals, delivering opinions, and contributing to supervising the work of the Government, exercising the powers specified in the Fundamental Law, in Acts, in the provisions of the Rules of Procedure laid down in a resolution and in other resolutions of the National Assembly. (2) The committee representing the nationalities shall take a position on the report prepared by the Government on the state of the nationalities, and on the annual report of the Commissioner for Fundamental Rights. (3) The members of the committee representing the nationalities shall be the Members obtaining mandate from a nationality list, and the nationality advocates. (4) After considering the motions put forward by the Members obtaining mandate from a nationality list and by the nationality advocates, the Speaker shall make a proposal to the National Assembly concerning the name, the adaptation of the functions, the persons of the chair and deputy chair of the committee representing the nationalities. (4a) The costs incurred in relation to using mother tongues by the Members belonging to a nationality, the Members obtaining mandate from the list of nationalities, and the nationality advocates shall be borne by the relevant targeted expenditure of the committee representing the nationalities. … Section 15 (4) The … committee may discuss, at the request of the National Assembly or in its discretion, any question concerning its functions, and may take a position on it. The … committee may present its position taken, together with

parliamentary committee in which the nationalities advocate is a voting member.[350] Apart from the limitations on his/her right to vote, and the fact that his/her competencies are limited to nationality affairs, the advocate and his/her status is equal to that of other members of parliament: she

sending it to the Speaker, in an information paper of the committee.

[350] Act XXXVI of 2012 on the National Assembly Section 29 (1) The nationality advocates shall have equal rights and obligations, they shall perform their activities in the interest of the public and the nationality concerned, and they shall not be given instructions in that respect. (2) The nationality advocate may speak at the sitting of the National Assembly if the House Committee considers that the item on the orders of the day affects the interests or rights of nationalities. In an extraordinary matter, following the debate on the items on the orders of the day, the nationality advocate may speak in the manner determined in the provisions of the Rules of Procedure laid down in a resolution. The nationality advocate shall have no right to vote at the sittings of the National Assembly. (3) The nationality advocate shall participate with a right to vote in the work of the committee representing the nationalities, and he or she may – on the basis of the decision of the chair of the standing committee or of the committee on legislation, or if the House Committee decides so in the framework of its decision according to paragraph (2) – attend, in a consultative capacity, the sittings of the standing committees or of the committee on legislation. (4) The nationality advocate may address questions to the Government, the member of the Government, the Commissioner for Fundamental Rights, the President of the State Audit Office and the Prosecutor General about matters within their functions and affecting the interests or rights of nationalities. Section 29/A (1) The nationality advocate shall be entitled to immunity. The rules pertaining to the immunity of Members shall apply to the immunity of the nationality advocate.

enjoys immunity, receives remuneration, has an expense account, et cetera.[351]

The nationality advocate, or a member of parliament who is a member of a nationality and obtained his/her seat as a nominee on a nationality list, may speak and submit bills and other documents in his/her native language. At the same time, if Parliament or one of its committees takes up his/her proposal, then it is debated in Hungarian.

1.4. Objectives and justifications

[351] Act XXXVI of 2012 on the National Assembly Section 98 (1) State authorities shall assist the Members in the fulfilment of their mandate and shall provide the Members with the information necessary for their work. Should the Member request in writing information from a person obliged to provide a report to the National Assembly, and the Member's question is related to a matter falling within the person's functions he or she is obliged under an act to provide a report on to the National Assembly, the person obliged to provide a report to the National Assembly shall reply to the Member in writing within fifteen days of the receipt of the request. …(4) The Member's ID card shall grant access to all public authorities as well as public institutes and public institutions. The Member shall also be entitled to enter … the territory operated by the Hungarian Defence Forces, the Military National Security Service, the law enforcement authorities and the customs authority of the National Tax and Customs Administration. …. Section 104 (1) The Member shall be entitled to receive a monthly remuneration from the date of his or her oath-taking until the termination of his or her mandate; the amount of the remuneration shall be equal to the remuneration of the Deputy State Secretary consisting of basic remuneration, remuneration supplement and executive supplement, as determined in the Act on Public Service Officials.

The introduction of the preferential representation of nationalities is rooted in several arguments in Hungarian political discourse.

One was a reference, reiterated and cited in numerous recommendations and reports by international organizations,[352] to a 1992 Constitutional Court decision, which held that a constitutional omission has occurred when such a solution failed to be enacted. The 1949 Constitution, in force until 2011, set forth that "The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. (2) The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages. (3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country."[353] In 1992, before the adoption of the comprehensive 1993 minority rights act,[354] the Constitutional Court decision declared the omission, and in 1994,[355] again, referred to its holding. However, the Court's position was not unambiguous. It did not explicitly mention "parliamentary representation," but referred to "general representation," thus, the legislation in question could be regarded as completed by 1993. The 1993 Act[356] stipulated parliamentary representation, but never actually instituted it, and since there was no direct constitutional language on the issue, the debate was never resolved. But Hungary was repeatedly criticized for not meeting its self-induced obligations. The issue was lingering and dozens of

[352] See for example, Legal Defence Bureau for National and Ethnic Minorities - Minority Rights Group International - Serbian Institute of Budapest: Submission to the 100th session of the Human Rights Committee: Shadow report to Hungary's fifth Periodic Report under the ICCPR, Parliamentary representation of minorities in Hungary: Legal and political issues, Project on Ethnic relations, Princeton, USA, 2001, Office for Democratic Institutions and Human Rights Republic of Hungary Parliamentary Elections 11 April 2010, OSCE/ODIHR Election Assessment Mission Report Warsaw 9 August 2010, ECRI Report on Hungary, (fourth monitoring cycle), Adopted on 20 June 2008 Published on 24 February 2009.

[353] Article 68.

[354] Act LXXVII of 1993 on the Rights of National and Ethnic Minorities

[355] Resolutions 24/1994. (V. 6.) and 35/1992. (VI. 10.).

[356] Article 20.

consultations and meetings were held over the two decades since the political transition.

Although it never really entered into effect because it was never fully specified in the form of concrete electoral law provisions, the May 25th, 2010 amendment to the constitution[357] actually instituted sui generis minority representation by setting forth that "the number of Members of Parliaments cannot be higher than two hundred. No more than thirteen Members of Parliament may be elected to represent the national and ethnic minorities." Henceforth, minority parliamentary representation could also have been interpreted as an established precedent and an acquired right.

During the constitution-making process, the recognized nationalities mostly remained silent – except for on the aforementioned issue of replacing the term "minority" with "nationality" and parliamentary representation. The National Croatian[358] and Ruthenian[359] Self-Governments each formulated their request for parliamentary representation, similarly to the Bulgarian National Self-Government[360] and the National Self-Government of Germans in Hungary.[361] The specialized minority commissioner (ombudsperson) supported these claims.[362]

The Jewish community in Hungary has been divided on the question of seeking recognition as a (national or ethnic) minority. In 2005, the Federation of Hungarian Jewish Communities (MAZSIHISZ) launched a popular initiative, but failed to build up support on behalf of the community.[363] Thus, they did not take a position on the issue during the debate on the new constitution or the electoral law. Despite the fact that back in 1990 the Jewish community was among the eight so-called co-opted minorities that were supposed to be provided a form of representation (Gypsies, Croatians, Germans, Rumanians, Serbs, Slovaks, and Slovenians) – according to another piece of legislation that was amended before actually being implemented.

357 http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK10085.pdf
358 http://www.parlament.hu/biz/aeb/info/horvat_onk.pdf
359 http://www.parlament.hu/biz/aeb/info/ruszin_onk.pdf
360 http://www.parlament.hu/biz/aeb/info/bolgar_onk.pdf
361 http://www.parlament.hu/biz/aeb/info/mnoo.pdf
362 http://www.parlament.hu/biz/aeb/info/jovo_memz_bizt.pdf
363 http://www.parlament.hu/biz/aeb/info/mazsihisz.pdf

2. General context: The place that the setup and approach occupies within the broader policies of diversity management, ideologically and institutionally. Parliamentary Representation as an extension of the unique Hungarian minority self-governments

The comprehensive 1993 Minority Rights Act enumerated 13 recognized minorities: Armenian, Bulgarian, Croatian, German, Greek, Polish Romanian, Ruthenian, Serb, Slovak, Slovenian, Ukrainian, and Roma. It set forth a complicated procedure to extend the list, which involves a popular initiative, an advisory opinion of the Hungarian Academy of Sciences, and a vote in the Parliament to amendi the act. None of these initiatives were successful. The act guaranteed cultural and linguistic rights for these groups, and contained provisions on the establishment and maintenance of minority education and established a unique Hungarian institution: minority self-governments (hereinafter MSG). Funded by the local authorities (or when concerning national bodies, by the state), MSGs operate at the local, regional, and national levels. They have special competences for protecting cultural heritage and language use, scheduling festivals and celebrations in the calendar, fostering the preservation of traditions, participating in public education, managing public theatres, libraries, and science and arts institutions, awarding study grants, and providing services to the community (legal aid in particular).[364] MSGs are elected bodies that function parallel to mainstream institutions, and they have certain rights regarding decision making in the areas of local education, language use in public institutions, media, and the protection of minority culture and traditions. MSG representatives have the right to provide input on public policy matters through their access to local council committee meetings.

Before delving into an assessment of the 1993 Act and the MSG system, it needs to be pointed out that debates and theories applied to multiculturalism in a diversity management context need to be adjusted accordingly when talking about Hungary. Two important demographic and political features need to be stated in the outset:

As for demographics, in the 2011 census, 6.5 per cent of the population declared that they belong to one of the minority groups. Immigration

[364] See Euromosaic on the European Commission site http://ec.europa.eu/languages/euromosaic/euromosaic-study_en.htm

figures are very low, and the overwhelming majority of immigrants are ethnic Hungarians from a neighbouring state who thus do not constitute a cultural minority. With an overall population of about 10 million, the immigration authorities recorded 213,000 foreigners living legally in Hungary in 2012.[365] Based on the 2011 census, the number of minorities living in Hungary is as follows: 3,571 Armenians; 6,272 Bulgarians; 315,583 Roma; 26,774 Croatians; 185,696 Germans; 4,642 Greeks; 7,001 Poles; 35,641 Rumanians; 3,882 Ruthenians; 10,038 Serbs; 35,208 Slovaks; 2,820 Slovenians; 7,396 Ukrainians. Roma constitute the largest minority group in the country. In the 2011 population census, about three per cent of the population identified as Roma,[366] but estimations suggest that the number is actually between 700,000-1,000,000.[367]

As for the political component: the starting point to understand contemporary Hungarian minority rights framework dates back in 1920, when in the post-WWI treaty,[368] Hungary lost two-thirds of its territory and its corresponding population. This left the formerly multinational state practically homogenous, but with about a third of ethnic Hungarians (cca.

365 , Council of Europe/ERICarts, "Compendium of Cultural Policies and Trends in Europe, 15th edition", 2014, http://www.culturalpolicies.net/web/hungary.php?aid=424. Also see Hungary, Central Statistical Office (2013), Országos adatok: 1.1.6.1 A népesség anyanyelv, nemzetiség és nemek szerint, (Population according to native language, nationality and gender) available in Hungarian at: www.ksh.hu/nepszamlalas/docs/tablak/ter uleti/00/1_1_6_1.xlsThe official English translation of the census questionnaire is available at: www.ksh.hu/nepszamlalas/docs/kerdoivek/szemely_angol.pdf

366 Hungary, Central Statistical Office (2013), Országos adatok: 1.1.6.1 A népesség anyanyelv, nemzetiség és nemek szerint, available in Hungarian at: www.ksh.hu/nepszamlalas/docs/tablak/ter uleti/00/1_1_6_1.xlsThe official English translation of the census questionnaire is available at: www.ksh.hu/nepszamlalas/docs/kerdoivek/szemely_angol.pdf

367 Council of Europe (2010), Statistics, available at: www.coe.int/t/dg3/romatravellers/default_en.asp, Document prepared by the Council of Europe Roma and Travellers Division, last updated in 2010

368 Treaty of Peace Between The Allied and Associated Powers and Hungary And Protocol and Declaration, Signed at Trianon June 4, 1920, http://wwi.lib.byu.edu/index.php/Treaty_of_Trianon

three million people) in the neighboring states. Since 1920, aspirations to reunite old glory and territorial integrity, or at least a responsibility for ethnic kins in the neighbouring countries, has always been a cornerstone of conservative domestic politics, and after the political transition in 1989, a constitutional responsibility and a foreign policy priority as well. Arguably,[369] the 1993 Act on National and Ethnic Minorities[370] was designed to provide a politically marketable example for neighbouring countries with a substantial Hungarian minority.[371]

Therefore, the 1993 and the subsequent 2011 minority rights laws and the MSG-system should be scrutinized with consideration of this background. The function and design of the MSG's (which, as we have seen are also instrumental in parliamentary representation) is quite ambiguous: political representation and empowerment, cultural competences, and a vague promise of social integration potential are bundled together. In 2006, the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) published a detailed report[372] that pointed to many problems within system. "These included unclear competencies, the lack of differentiation between various minority needs, deficiencies in

[369] See for example Pap, A.L. 'Minority Rights and Diaspora-claims: Collision, Interdependence and Loss of Orientation'. In Beyond Sovereignty: From Status Law to Transnational Citizenship, ed. O Ieda, 243-254. Sapporo, Hokkaido University Slavic Research Center, 2006.

[370] Hungary, Act NLXXVII of 1993 on the Rights of National and Ethnic Minorities *(1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól).*

[371] See András Bíró: The price of Roma integration, Will Guy (ed.) From victimhood to citizenship. The path of Roma Integration. A debate., Pakiv European Roma Fund- Kossuth, Budapest, 2013, p. 26.

[372] The Hungarian Minority Self-Government System as a Means of Increasing Romani Political Participation, National Democratic Institute Assessment Report, Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), September/October 2006.

financing, and voter enfranchisement regardless of ethnic affiliation."[373] According to the report, the institution is "tinkered with a fundamentally flawed concept that offers the illusion of political power rather than genuine inclusion.[374] … The MSGs tend to marginalize … issues by depositing them in a parallel, fairly powerless, quasi-governmental structure rather than addressing them through established governing bodies. … The MSG system is inaccurately named. The local and national MSGs fall far short of the range of competencies that the title 'self government' implies. They lack the authority to take action outside of a very limited scope of issues and function more like NGOs than elected governing bodies. The use of the term 'self-government' is not merely inaccurate, but actually damages the credibility and legitimacy of the entire system … as it raises unrealistic expectations on the part of constituents regarding what they can accomplish through the MSGs. In truth, the very design of the system prevents it from having a significant impact on issues of greatest concern to most … This is due in part to the fact that these were not the government's initial aims in creating the system. Rather, its goal was to give minorities a safeguard for preserving their distinct cultural and linguistic traditions, and … to provide the means for encouraging neighboring countries to allow Hungarian minority communities the same privilege."[375] The OSCE also points to flaws in funding, claiming that "MSGs lack adequate funding to carry out either socio-cultural projects, per the system's original intent, or additional projects to improve the living standards of community members. With a budget of approximately $3,000 per year, with no consideration for the size of the town… MSGs can not cover even a modest stipend for a part-time employee to coordinate the work of its elected representatives or implement projects.[376] … [MSGs] lack the authority to take action on problems outside of a limited scope of issues and have minimal funds to address the needs of their constituents… This lack of authority leaves MSGs as a 'half-way house' between a government institution and an NGO, with an undefined, under-funded mandate. Other than very limited government funding and the right to consent in issues of education, language, and cultural preservation, the MSGs have few advantages over

[373] Id. P. 5.
[374] Id. P. 4.
[375] Id, Pp 6-7
[376] Id.

NGOs. In fact, those MSGs that have the greatest impact function much like a local NGO, securing outside resources for small-scale projects. "[377]

In sum, the OSCE report pointed out that[378] "the government's stated purpose for creating the Minority Act was to assure the cultural autonomy of minorities and to fulfill international obligations regarding the protection of minority rights. However, another important factor in the development of the act was Hungary's desire to protect the rights of the large number of ethnic Hungarians living in neighboring countries. By developing the MSG system and other minority institutions, the government hoped to build leverage that it could use in bi-lateral negotiations with neighboring states on guaranteeing the rights of Hungarians abroad …

The new, 2011 minority rights law did not change the basic philosophy underlying the institution of self-governments. The new regulation failed to effect substantial change in terms of national minority elections. As compared to 2010, there was only a slight rise in the number of those on the voter rolls: There were 228,038 names in 2010, while in 2014 the number had risen to 241,030 persons. The Roma national minority was the only one that actually increased the number of those in its voter registry, from 133,492 to 158,101, by 18%. Most national minorities saw their rolls decline: 35% in the case of the Bulgarians, 33% for Slovenians and 30% for Serbs. In terms of participation, there were no substantial changes either: In 2006, turnout had stood at 63.81%, in 2010 it was 63.47% and in 2014 it reached 65.14%.[379] Nor did the results change appreciably: 2321 local national minority elections were held in 2010, and in 2014 this number increased to 2163.[380]

[377] Id, pp 22-25. Also see Molnár, Emilia and Kai A. Schaft: Preserving "Cultural Authonomy" or Confronting Social Crisis? The Activities and Aims of Roma Local Minority Self-governments 2000-2001, Review of Sociology of the Hungarian Sociological Association, Volume 9, Number 1, 28 May 2003 ,pp. 27-42 (15)

[378] Id. P. 10.

[379] http://www.kisebbsegiombudsman.hu/data/files/205796771.pdf

[380] http://valasztas.hu/hu/nemz2014/987/987_0_index.html, http://www.jogiforum.hu/hirek/23865, http://www.valasztas.hu//hu/onkval2010/576/576_0_index.html, Szalayné Sándor Erzsébet: A 2014. évi választások a magyarországi nemzetiségekért felelős biztoshelyettes szemszögéből (The 2014 elections as seen by the deputy-ombudsperson for nationalities)

We may conclude that building on the same institutional and conceptual structure, i.e. the definition of the minority communities and eligibility criteria for the right to vote, the newly established parliamentary representation is an extension of the minority self-governments.

3. Functionality: The role of minority political parties, legitimacy, influence on decision-making, performative functions, representation

3.1. Performative and functions and representation

A significant amount of criticism of the Hungarian model for minority parliamentary representation concerns its conceptual background and questions about the representative capabilities of the system. There are three basic recognized forms of minority representation and representation of their interests in legislative bodies: (a) through the second chamber of a bicameral legislature, i.e. a functionally distinct body within parliament; (b) through parliamentary representatives within a unicameral system; (c) legislative and political decision-making realized through specialized and particularized solutions.

Representation through minority MPs can be realized in one of three ways: through the election of minority parties and candidates based on the general rules of the election laws (majoritarian, proportional, or mixed); 'other' candidates nominated by competitive/majority parties but in some form of official alliance with minority organizations; and preferential procedures, e.g. quotas established for minority representatives or seats allotted in the form of delegation or cooptation. There are serious concerns about this last form of minority representation that stem from the theory of representation, briefly outlined as following: (i) a Member of Parliament represents only and exclusively the politically unitary nation which embodies sovereignty (which does not rule out and is not antithetical to the concept of a multinational or multicultural states) and performs his/her

duties in the interest of the public, safeguarded by the guarantees attached to a free mandate. (ii) A representative whose role is exclusively to represent a minority does not mesh well with a party system based on competing parties, because in debates on issues that are neutral to the needs of minorities, it would be difficult for an MP or a faction who won their seats exclusively to provide minority representation to justify their presence. Moreover, the votes they cast would be mired in the problem of lacking real legitimacy of representation, for they would have won their mandates outside regular political competition. (iii) In light of the fact that MPs who won a preferential seat cannot actually prevent anti-minority decisions, their presence in Parliament will end up being yet another symbolic gesture meant to provide media publicity. This symbolic act comes with significant costs, however, that stem from both constitutional theory and theory of representation.

Based on the electoral rules and the regulations on the actual legislative powers of the nationality representatives and their factions, the Hungarian model of parliamentary presence of nationalities creates a forum for the *presence* of the representatives of nationalities rather than a platform for actual representation.

3.2. Legitimacy

The draft constitution drawn up by constitutional scholar András Jakab[381] in 2011 explicitly rejected the idea of parliamentary representation for minorities. He argues:

> *(a) It is not clear why* nationality *should be treated as the one minority feature that ought to be afforded distinct parliamentary representation. (b) There is a risk that resentments against* national minorities *might increase. A situation when the parliamentary support of a government teeters on the brink of a majority could prove very awkward. If* national minority *representatives support the government in such a situation, then anti-*national minority *sentiments might surge on the opposition side; and if they side with the opposition, then resentments could rise among government party politicians. If they abstain or fail to vote, then they could be subject to the charge that they are indifferent towards national affairs, which*

[381] See Jakab, András: Az Alaptörvény keletkezése és gyakorlati következményei, (The origins and practical consequences of the Fundamental law) Bp. HVG Orac 2011..

could arouse the ire of both sides. (c) It is unnecessary for ensuring national minority *rights (survival, fostering culture). It would be considerably more effective to strengthen the school system, supporting cultural activities (be it through minority self-governments or outside the minority self-government system). (d) Finally, it is also unclear why* national minorities *would be politically united. In light of this, the parliamentary representation of minorities is something that at the time of regime transition was benevolently but nevertheless unfortunately incorporated into the Constitution, without studying the relevant foreign examples (the goal was to provide a model for the policies towards Hungarians in the neighboring countries, which has visibly failed to materialize).*

The legitimacy of the representatives of nationalities in parliament has been in the centre of severe criticism (a criticism that is more academic than political). These arguments concern four points: the overall conceptualization of the recognized minority communities, the lack of proper affiliation criteria for eligibility for minority rights (which include political participatory rights), the use of census data, and equating the active and passive right to vote.

3.2.1. The recognized minority communities

The 1993 Minority Act, copied by the 2011 law, defined national and ethnic minorities as groups that have been present in the territory of Hungary for over 100 years and that "constitute a numerical minority within the population of the country, whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own tongue, cultures and traditions, and who prove to be aware of the cohesion, national or ethnic, which is to aim at preserving all these and at articulating and safeguarding the interests of their respective historically developed communities." According to the Act, these minorities are: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Rumanian, Ruthenian, Serb, Slovak, Slovene, and Ukrainian; and in order to register a new minority group, a popular initiative signed by 1,000 citizens has to be submitted to the Speaker of the Parliament.

As mentioned above, the act, in addition to defining the two group constituting requirements, also contains an enumeration of the thirteen minority groups that are recognized by the act, which means that the Parliament will actually need to pass a formal amendment to these provisions for a new group to qualify. The House (which is sovereign),

however, is not obliged to vote affirmatively on the question. This is in sharp contradiction with the otherwise clearly defined requirements.[382]

3.2.2. Ethnocorruption: Who are members of the recognized minority communities?

Another, even more controversial element of the Hungarian framework relates to the lack of satisfying legal guarantees regarding minority affiliation. The Hungarian data protection law prohibits the handling of sensitive data, such as ethnic origin, without the concerned person's explicit permission.[383] This gives rise to what is commonly known as "ethno-business" or "ethno-corruption," the utilization and misuse of remedial measures for private means that are contrary to the legislators' intentions. In the Hungarian model, the exercise of minority rights is not dependent on minimal affiliation requirements. Consequently, several forms of ethno-corruption exist:

Deets documents how school officials pressure parents of Hungarian students to declare their children to be German: "[A]ccording to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs, which, by the census, was about 8,000 more than the number of ethnic Germans who are even in Hungary."[384] The Minority Rights Ombudsman's 2011 report drew attention to a school that advertises its German minority class as a "window to Europe," while not requiring either of the parents to even speak German, or requiring eligibility requirements for the students or an actual curricula on German ethnography or culture.[385] The Minority Rights Ombudsman also pointed out that in the 2001 census, 62,233

[382] A number of Parliamentary and Constitutional Court decisions have been passed on petitions of various ethno-national groups, like the Jews, Aegean Macedons, Russians, the Bunyevac, or Huns seeking recognition.

[383] Act No CXII of 2011 on Informational Self-Determination and Freedom of Information

[384] Deets, Stephen (2002). Reconsidering East European Minority Policy: Liberal Theory and European Norms, East European Politics and Society 16:1

[385] See A kisebbségi általános iskolai nevelés-oktatás helyzetéről (NEK-411/2011), OBH, Budapest, 2011. október 5., 78. p., <http://www.kisebbsegiombudsman.hu/data/fi les/217986220. pdf> p. 20.

people claimed to be German, while in 2011 there were 46,693 students (aged six to fourteen years) enrolled in the German minority education scheme.[386] The Ombudsman also drew attention to the fact that German minority education takes place in several municipalities, where neither the 2001 nor the 1944 census (which predated the mass expulsion of some 380,000 ethnic Germans from Hungary) indicated the presence of a German minority.[387] A similar trend can be seen when looking at minority education initiatives targeting Romani students. In most cases, financial incentives are the obvious reason for this, since schools receive additional public funding for minority education – which is often the only source of extra income for educational institutions in underdeveloped, poor regions or small villages. In order to secure this funding, school administration and teachers will do anything it takes: learning a language, getting training in Roma ethnography and culture, and pressuring parents to request minority education.[388]

Legal tools developed as instruments for minority protection can, in practice, be abused to promote members of the majority community. Minority protection schemes can also be used in a cynically abusive manner, particularly in relation to segregation: either when Roma parents are convinced or forced – without their informed consent – to request specialized minority education for their children[389] or when non-Roma

386 *Id* at 39.

387 *Id.*

388 *See also* Lakatos, Szilvia: A romani nyelv helyzete a magyarországi közoktatásban (The role of Romani education, PhD-dissertation), Pécsi Tudományegyetem „Oktatás és Társadalom" Neveléstudományi Doktori Iskola, Pécs, 2010, <http://nevtud.btk.pte.hu/fi les/tiny_mce/Romologia/Kutatas% 20-%20Fejlesztes/phd-doli-v%C3%A9gleges.rtf

389 See Lídia Balogh: "Minority Cultural Rights or an Excuse for Segregation? Roma Minority Education in Hungary." In Daniel Pop (ed.): Education Policy and Equal Education Opportunities. New York: Open Society Foundations, 2012. pp. 207-222 and Balogh, Lídia: "Jog a kultúra őrzésére – vagy ürügy a szegregációra? A roma nemzetiségi oktatás mint kétélű kard Magyarországon"(The right to protect culture or a reason for segregation?). Pro Minoritate 2012/Tavasz pp. 207-223. In its report on minority education the Parliamentary Commissioner for (Ombudsman) for Minority Rights pointed to several instances where the voluntary, informed

parents claim that they are Roma in order to justify and legitimize racial segregation.[390] Another scenario concerns cases where foundations of national minorities are helped to recreate their culture as a way to pressure neighboring states, so that the demand for minority rights is "fueled by supply."[391] Deets is correct in concluding that the Hungarian government has an interest in developing programs that offer incentives to local governments to 'create' minority children.[392]

Minority self-government elections have also been constant sources of fraud, as the decision to vote at these elections was left solely to the political culture and conscience of the majority. After repeated reports on permanent abuse of the electoral scheme, in 2005 a "soft" form of registration was implemented, in which minority voters need to sign up in

choice of parents can be seriously questioned, and evidence points to various forms of pressure in regards of requests for minority education. See Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi általános iskolai nevelés-oktatás helyzetéről (The minority rights' ombudpersons report on education) (NEK-411/2011), OBH, Budapest, 2011. október 5., 78. p.,<http://www.kisebbsegiombudsman.hu/data/fi les/217986220. pdf> pp. 20-22. The ombudsman reaffirmed these findings in his report on 2011 pre-school report in regards of Roma kindergartens. Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi óvodai nevelés helyzetéről (NEK-368/2010), OBH, Budapest, 2011. március, 28. p. <http:// www.kisebbsegiombudsman.hu/data/fi les/205104474.pdf>, p. 42. In one of the minority kindergartens, actually a completely different dialect was taught from what the Roma families spoke (or understood.) Id. p. 43. Also, Roma language is instructed in several kindergartens, where Romungo Roma live, who have been only speaking Hungarian for generations. Id. p. 44.

[390] For a detailed case description see Roma Rights 2003/1-2, pp. 107-108. In the summer of 2003 the Roma Press Center's fact finding revealed that at one point non-Roma parents signed a petition in which they too claimed to be Roma.

[391] See Andreea Carstocea: Ethno-business – the Manipulation of Minority Rights in Romania and Hungary In: Tul'si Bhambry, Clare Griffin, Titus Hjelm, Christopher Nicholson, Olga G. Voronina (eds.) Perpetual motion? Transformation and transition in Central and Eastern Europe & Russia, UCL, School of Slavonic and East European Studies, 2011, p. 19.

[392] Deets, *supr*a n. 187.

a special register even though no objective criteria or formal requirements for affiliation are set forth. The 2011 law has subsequently preserved this.[393] If they are willing to spend some time navigating the bureaucracy, Hungarian citizens, regardless of their ethnic origin, can vote for minority self-government candidates. Although the phenomenon is not widespread, this also enables members of the majority to abuse the system by taking over minority self-governments. For example, the non-Roma wife of the mayor of Jászladány – a village notorious for segregating Roma, primary through schools – held an elected office in the local Roma minority self-government.

According to a December 2012 poll by the think tank Századvég, 49 per cent of Hungarians heard about candidates running in minority elections without actually being a member of the given group.[394] Hungarian minority representatives also repeatedly claim that the fact that some candidates ran as "Gypsies" in one election and then later as Germans in the following term (which is permitted by both the law and the ideal of multiple identity-formation) proves the flourishing of local ethno-business.[395] Similarly, both the President of the National Romanian Minority Self-Government[396] in Hungary and the (Romanian) Secretary for Romanians Living Outside Romania found it worrisome that the 2002 local elections brought an increasing number of candidates for Romanian minority self-governments, while the number of those identifying themselves as Romanian in the national census is decreasing.[397] In their view, the answer lies in the fact that "Gypsies" and Hungarian immigrants who moved from Romania are running as Romanians.[398] According to

[393] Act CLXXIX of 2011 on the Rights of Nationalities

[394] http://www.szazadveg.hu/files/hirek/nemzetiseg_sajto.pdf

[395] See the minority-ombudsman's annual parliamentary reports or an interview with Antal Heizler, President of the Office for National and Ethnic Minorities, Népszabadság (the leading Hungarian daily), 2002.07.24.

[396] The President did not predict that more then 7 out of the 17 local self-governments running in the 2002 elections in Budapest (and some 30 out of the 48 registered nationally) would be "authentic Romanian." Out of the 13 local Romanian minority self-governments operating between 1998 and 2002, he estimated that only three have "real Romanian blood" running in their veins. See the summary of an interview with Kreszta Trajan, Népszabadság, 2002.08.21.

[397] See the statement of Doru Vasile Ionescu in Népszabadság, 2002.08.15. fix cite

[398] In 2005 the law was amended, introducing a self-assessment based registration requirement for the elections, but, according to analysts and the minority rights

political scientist Andreea Carstocea, the minority most affected by the phenomenon was the Romanian minority in Hungary, where non-Romanians were said to head approximately forty percent of the Romanian self-governments. [399]

In order to demonstrate the fallacies of the legal framework, some Roma politicians publicly decided to run under different labels (in most of the reported 17 cases, they ran as Slovakian). There are also several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.[400] Following the 2010 elections, several new members of both the Romanian and Ukrainian minority self-governments were accused of not being actual members of the minority community by other members of the newly elected self-government. A faction of the National Ukrainian Self-government failed to stand up during the Ukrainian national anthem, and claiming that they are Hungarian, requested that no Ukrainian be spoken during official sessions because they did not understand it.[401] Finally, in 2010, a Hungarian appellate court recognized the existence of ethno-business in minority self-government elections.[402] The defendant, an editor-in-chief of a minority newspaper, was brought up on libel charges for calling newly elected members of the Romanian minority self-government "ethno-business doers and not members of the Romanian minority community in Hungary."[403] The court acquitted him.[404]

These loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration of German football, for example, a small village's entire football-team registered as German minority-candidates for the election.[405] In 2010 the mayor of a marginalized village at the edge of bankruptcy and unable to finance its

ombudsman, no significant changes followed in electoral behaviour and results. See his report: http://www.kisebbsegiombudsman.hu/data/files/187663711.pdf

399 Carstocea, p. 20.

400 See Népszabadság, 2002.08.15.

401 *See, e.g, http*://index.hu/belfold/2011/02/05/megalakult_a_szerb_es_ukran_kisebbsegi_onkormanyzat/.; http://nol.hu/belfold/kakukktojasok__balhe_a_roman_kisebbsegnel

402 http://www.beol.hu/bekes/kozelet/nem-ragalmazas-az-etnobiznisz-letezik-335133

403 For purposes of this discussion, ethno-corruption and ethno-business can be understood as synonymous.

404 http://www.emasa.hu/print.php?id=6880

405 Interview with Mr. Heizler, supra n. 400.

public school requested all 13 students to declare themselves Roma and request minority education.[406] As previously discussed, this qualified the school for extra funding. No Roma officially lived in the village.[407]

Ethno-corruption is also prevalent in many other facets of collective rights. In 2010, the parliamentary commissioner for minority rights (a specialized ombudsman) published a lengthy report showing how members of the majority benefited from a government program designed to employ members of the Roma minority community.[408] As the above cases demonstrate, the institutionalized cynicism concerning preferential treatment for minorities may have far-reaching consequences. Besides obstructing and discrediting minority rights, there is also potential for electoral gerrymandering.

3.2.3. The issue of census data

Several concerns regarding the legitimacy of the system have been raised with respect to one of the major novelties of the post-2011 regulations: the use of census data in the context of national minority election rules and in the determination of levels of state funding and minority elections. Pursuant to Government Decree 428/2012. (XII. 29.) on the conditions of funding disbursed through budget allocations earmarked for national minorities,[409] "[t]he budgetary allocation to fund the operations of municipal national minority self-governments and some national minority self-government is defined as a proportion of the average funding available for all local national minority self-governments."[410]

406 Jozsef Nagy: Angyalok kertje, (Angels' garden) Népszabadság, 2010 July 7. http://nol.hu/lap/gazdasag/20100707-angyalok_kertje

407 Id.

408 http://kisebbsegiombudsman.hu/hir-526-rovid-osszegzes-nemzeti-es-etnikai.html. Also see , p. 19. Also see: Bogdan Aurescu: The June 2012 opinion of the Venice Commission of the Council of Europe on the act on the rights of nationalities of Hungary, Lex et Scientia Vol. 19. Issue 2. (2012), p. 173

409 Article 2. § (3)

410 According to the following formula: It amounts to a) 100% of the aforementioned average amount if the number of persons who belong to a national minority in the given municipality is at least 25 but no more than 50;

The issue is relevant in the context of voting, as according to Article 56 (1) of the new minority law, elections for new local national minority self-governments must be held when the number of persons who belong to the given minority in the municipality reaches 30. The number is determined by aggregating responses that indicate an affiliation with the given national minority in the most recent census questionnaire. Nevertheless, according to Article 242 (2), until 2024 25 persons will suffice to meet this requirement.

As the Commissioner for Fundamental Rights noted in his submission to the Constitutional Court, it is problematic that when the last census was compiled, respondents were unaware of the electoral implication of their responses to the question concerning their national minority identity, or specifically of the consequences of failing to identify themselves as belonging to a given minority group. Unfortunately, the Constitutional Court addressed these concerns with unprecedented cynicism in its decision,[411] in which it rejected the petition and held: "[36] The petition, the observations of certain national minority self-governments, and the

b) it is 200% of the average if the number of those who belong to a national minority exceeds 50 persons. The budgetary allocation to fund the operations of regional national minority self-governments is defined as the proportion of the average funding available for all local national minority self-governments, according to the following formula: It amounts to a) exactly the abovementioned average amount if the total number of municipal (including the districts of the capital) national minority self-governments and transformed national minority self-governments in the county (the capital) is fewer than ten; b) twice the abovementioned average amount if the total number of municipal (including the districts of the capital) national minority self-governments and transformed national minority self-governments in the county (the capital) is more than 10 but fewer than 20; c) four times the abovementioned average amount if the total number of municipal (including the districts of the capital) national minority self-governments and transformed national minority self-governments in the county (the capital) exceeds 20." Also see Móré, Sándor: Népszámlálási adatokhoz és konkrét létszámhoz kötöttség a nemzetiségi önkormányzatok szabályozásában (Connecting census to local governance), Új Magyar Közigazgatás 2014. évi 4. szám, p. 21. and Móré, Sándor: Új irányok a nemzetiségi önkormányzatok létrehozásában (New directions in electing nationality local governance), Jogtudományi Közlöny 2014/9.

411 41/2012. (XII. 6.) AB

documents of the Venice Commission[412] referenced here all emphasize the notion that respondents were not aware that the aggregated results would have an influence on whether a minority self-government would be established. [...] However, ...]already before the census was conducted, in 2010, the government had indicated that census data would play a far more substantial role than hitherto; that in essence it would use these as the starting point in charting its [minority policy] measures and in setting levels of funding."

As the minority commissioner noted: "By using census data they wish to prevent elections from being held in municipalities where the given community is not present at all, and voter rolls from becoming 'inflated' as a consequence of deliberate actions to abuse the system. But whether elections ought to be held cannot be determined solely on the basis of census data, since these also include persons who are not entitled to vote (e.g. children). Moreover, census data cannot be considered an accurate reflection of how large the national minority population of a given municipality is, for they rely on voluntary statements concerning sensitive information. That is why I think it is important that elections be held – in line with the prevailing regulations – in municipalities where the number of persons in the voter rolls indicates this. In my assessment, the current 30 person voter roll does not provide sufficient community legitimacy for establishing a representative body; it would be necessary to raise this number to ensure legitimacy."[413]

It is important to keep in mind Léna Pellandini-Simányi's observations about the census questions concerning ethnic identity: "This method only helps to measure how many people consider themselves Roma, which is nowhere near identical with how many people are identified as Roma by others. The two are not the same. Previous research shows that leaving it up to external observers – the interviewer, neighbors, etc. – to determine who is Roma will yield a Roma population that is up to 2.5 to 3 times larger than the numbers indicated by surveys based on self-identification. […] The results can be distorted by several factors. […A]ccording to earlier research, the data reveal fluctuations that cannot be explained by demographics [...] presumably because responses depend to a significant extent on the prevailing strength of racism, and on whether the respondent is confident that his/her answer professing his/her ethnic identity will not

412 Opinion No. 671/2012, CDL-AD (2012) 011. 10.

413 http://www.kisebbsegiombudsman.hu/hir-706-velemeny-keszulo-nemzetisegi-torveny.html

result in further discrimination. [...O]nly a third of persons who are identified as Roma by their social environment appear in these data."[414]

Nóra Chronowski points out that even though census data show that the number of citizens who are members of a national or ethnic minority has surged from 313,812 in 2001 to 555,507 in 2011,[415] since estimates suggest that the Roma minority alone makes up 5-10% of the entire population,[416] and since roughly a million and a half persons did not make a statement concerning their national or ethnic identity, these estimates cannot be regarded as exact."[417]

3.2.4. The active and passive right to vote

It is important to discuss the regulation of the right to vote and the right to stand as a candidate in minority elections (also relevant in the context of parliamentary representation), which are also handled in a problematic manner. Viewed from the perspective of representation theory, the rule mandating that minority representatives and candidates must belong to the minority is unfounded, for representation itself is but the exercise of the decision-making rights of a community of voters by a smaller and more operative body. Thus from a voting rights perspective, it appears unnecessary to limit the right to stand as a candidate to members of the minority community, since a representative does not need to share the

414 Mire (nem) jók a népszámlálás etnikai adatai?, http://www.ideaintezet.hu/sites/default/files/Mire_nem_jok_a_nepszamlalas_etnikai_adatai_Simanyi_IDEA.pdf

415 www.ksh.hu/nepszamlalas/tables_regional_00

416 MAGICZ András (2013): „Re-regulation of National Minority Rights" in HAJAS Barnabás – SZABÓ Máté (ed.): *Their Shield is the Law. The Ombudsman's Protection for Vulnerable Groups* (Budapest: Office of the Commissioner for Fundamental Rights 2013) 27.

417 Chronowski, Nóra: Alaptörvény és etnicitás – avagy az alkotmányozás viharaiban részekre szakadt nemzetünk, (Ethnicity and the Fundamental Law: our nation divided in the storm of constitution-making) Állam- és Jogtudomány 2015/1

attributes of those she represents. Auto-representation is not a requirement in any serious body that serves as a representative institution. Beyond jurisprudential reasons, the prevailing practice also does not indicate a reason for excluding a candidate from the electoral procedure if she can credibly and successfully persuade voters that they should elect her. Just as there is no general requirement that an executive managing an athletic association be herself an athlete, or even a former athlete, the representative of a local Roma self-government could be a non-Roma doctor. Likewise, a member of a national-level nationality self-government could be a former president of the republic.

Prohibiting a person who served as the representative of any nationality to run on the list of another nationality – which is legitimated by the nationality law[418]– is a radical and unjustifiable restriction of the previously broad recognition of the principle of multiple identity affiliations, and is incompatible with international legal recommendations.

The possibility of winning preferential seats, which is a necessary concomitant of providing minority representation, inherently implies a restriction of equal voting rights. But the particular solution used by the legislator also restricts the right to freely nominate candidates and party lists. This is in addition to the fact that an unjustifiable condition of auto-representation and an unnecessary restriction on multiple identity affiliations are also part of the effective regulations.

3.3.The role of minority political parties vis-á-vis the institution

Minority political parties are not relevant actors in Hungarian political life, and their role in parliamentary representation is subsequently insignificant.[419] There are several reasons for this. In particular, the

[418] Article 11. § (3)

[419] See Dobos, Balázs: The Role of Elections in Minority Contexts: The Hungarian Case. In: Nimni Ephraim, Osipov Alexander, Smith David J (eds.): The Challenge of Non-Territorial Autonomy: Theory and Practice. Oxford: Peter Lang Academic Publishers, 2013. pp. 163-180., Dobos, Balázs (2013): Roma political parties in Hungary after 1989. In: Dácz Enikő (ed.): Minderheitenfragen in Ungarn und in den Nachbarländernim 20. und 21. Jahrhundert.Nomos, Baden-Baden. 279-291., McGarry, Aidan (2009): Ambiguous Nationalism? Explaining the Parliamentary Underrepresentation

legislative framework for both national (minority) self-governments and the parliamentary lists builds on one political entity representing the 13 recognized communities, and the composition of these bodies presupposes an indirect internal political competition among various minority organizations – which in practice are following majority political party lines, with the major political parties having their "own" minority organizations. As mentioned above, elections to minority party lists are severely restricted in parliamentary elections and there is no procedural option for several minority organizations to compete.

3.4. Influence on decision-making

As argued above, the competence of minority representatives and, even more, of minority advocates is severely limited, both by the very definition given by the legislator as well as the practical authority of majority-led respective parliamentary committees and the speaker to define "minority related" issues.

Although it has not been clearly stated by the legislator, it can be inferred that the model is primarily meant to provide a symbolic presence for representatives of nationalities, and to create a venue for the recognition of their viewpoints, but actual decision-making influence, for example the right to veto, were never envisaged as being part of the deal.

of Roma in Hungary and Romania.Romani Studies, 2.103-124., Rövidm Márton (2012): Options of Roma Political Participation and Representation. Roma Rights, 9-17. Sobotka, Eva (2001): The Limits of the State: Political Participation and Representation of Roma in the Czech Republic, Hungary, Poland and Slovakia. Journal on Ethnopolitics and Minority Issues in Europe, Winter. 1-22.

4. Dynamics and outcomes: Achievements, failures, unintended consequences

Given that we are in the midst of the first parliamentary cycle with the new legislation, it is too early to draw conclusions on its achievements. We can see that although the worst fears for fraud and abuse of the preferential mandates did not materialize in the 2014 elections, or even any other unintended consequences, the new regime failed to bring a breakthrough in nationality representation and interest-protection. Electoral turnout did not indicate an overwhelming need or support for the institution. Even the two largest minorities failed to gain the required votes for a preferential mandate, and minority advocates had not been particularly active in parliamentary work either.

By April 2016, within 23 months, the committee of nationalities,[420] consisting of all the advocates, submitted six motions[421] and co-sponsored another 43.[422] All four amendment motions (electoral law, the minority rights act, the budget and provisions on the advocates' funding) received government support and were adopted by parliament. The committee held 46 meetings (the shortest was 10 minutes, the longest almost four hours long). Its enforcement sub-committee met three times, the other two six times, for 151, 556, and 538 minutes respectively.

The activity of the advocates varied.[423] Romanian advocate Traján Kreszta never once spoke during the plenary sessions. Félix Farkas, vice-chair of the committee and advocate for the Roma community, only spoke once when he addressed the budget subchapter on minority expenditures

420 The committee established three sub-committees on minority rights enforcement; self-government, foreign affairs and budget; and education and culture.

421 These included proposed amendments to the minority rights act, the electoral procedure law, the budget, and the law on national trademarks. Two were withdrawn and resubmitted.

422 For example 13 on budget, 4 on the report of the reports of the ombudspersons, 6 on education and on trademarked products, 2 on census, on petty criminal law, on the situation of nationalities, on the national cultural fund, on consular protection, on museums, and on curtailing bureaucracy, 1 on the report of the national audit, and on parliament.

423 See the webpage of the parliament, http://www.parlament.hu/szoszolok-listaja

and remained quite loyal and appreciative towards the government. The Ukrainian Jaroszlava Hartyányi only spoke once as well. She praised the activity and the diligence of their committee, which at the time, in fact, was the third most active in the House. She also commended the successful budget amendment, which provided additional resources to underfinanced regions. Ruthenian advocates Laokratisz Koranisz Greek and Vera Giricz spoke twice on trademark, registration and education, and the ombudspersons' report, respectively. Croatian advocate Mihály Hepp and Polish advocate Lászlóné Csúcs Polish took the floor three times (on trademark, census, and on the good Hungarian-Polish interstate relationships, respectively). Armenian advocate Tamás Turgyán spoke five times, twice in the budget debate and once on curtailing bureaucracy around minority theatre funds, but mostly on the deterioration of the Armenian-Hungarian state relationship. He also criticized the government's refugee-policy. Slovenian advocade Erika Kissné Köles spoke seven times. Bulgarian advocate Szimeon Varga 11 times – on education, budget and the report on the situation of minorities, respectively. Slovakian advocate and chair and the committee János Fuzik spoke 12 times: on the minority rights act, on budget, on the law on parliament, and on the ombuds reports. In other speeches, he praised the government's refugee-policy and international coopoerartion in building fences. German adcovate Imre Ritter was the most active, speaking 26 times (11 on budget, two on the report on minorities, three on registration and education, two on state audit, on petty offences, and on cultural funds, one on the minority rights act). Once he questioned the prime minister on the government's restrictive refugee policy, and on a speech held in Strasbourg where he claimed that Hungary has never been a multicultural society and cultural homogeneity is a value that should be maintained.

We can conclude that the advocate committee and sub-committees sit regularly, but are not very active in the legislative process. The government and the House have supported most of their motions. The advocates are also not very active in the parliamentary and political advocacy work. Only two formal questions on instruments for the political control and accountability of the government were submitted. Most interventions concerned the debates of bills, particularly around the budget. Besides the many interventions consisting of government appraisal, a significant number regarded issues that are actually outside the scope of the minority rights law, such as inter-state relations (between their home and kin states), refugee policy, and consular protections. This last point suggests that this newly introduced institution succeeded in

providing a forum for the representatives (advocates) of minorities to make their voices heard in public in whichever issue they consider relevant.

5. Beneficiaries, reactions and critics

As mentioned above, it is too early to have a deep-running comprehensive overview of the new regulation, but it is safe to say that no group can be identified as a clear beneficiary besides members of the minority elite who have been affiliated with mainstream majority party politics. Also, the newly established institution failed to generate a substantive political debate or discussion: reactions as well as criticism remained within those few interested academics thpublishing on the issue for years.

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Conclusions

The representation of minorities in parliaments can serve a number of goals: power-sharing, the aim for equality through recognition,[424] "real" substantive representation, or a cover story for other policy goals, such as advancing rights of the diaspora, et cetera. This chapter argued that the Hungarian model appears to be inconsistent, as it does not set forth clear policy goals, nor does it answer documented minority demands. Subsequently it cannot and does not seem to be able to fulfill its goals. While it carries several risks for potential fraud and abuse, it also suffers from theoretical and procedural weaknesses, such as unclear policy objectives, a constitutionally controversial imbalance in the right to vote, and a problematic approach to passive and active voting rights. Also, the parliamentary representation of nationalities carries the theoretical, political, and constitutional stigma of long held deficiencies in the Hungarian model of defining the recognized minorities and affiliation criteria.

As argued above, in the Hungarian context, the following arguments were raised in favour of the parliamentary representation of minorities: (i) Though it never really entered into effect because it was never fully specified in the form of concrete electoral law provisions, pursuant to the May 25th, 2010 amendment of the constitution,[425] parliamentary representation is an acquired right. (ii) The recommendations and reports of numerous international organizations and the Constitutional Court have determined that a constitutional omission has occurred here through the failure to enact such a solution. Moreover, this constitutional requirement was already present in the previous constitution. (iii) The Hungarian minorities and the Minority Commissioner relentlessly emphasized this point. (iv) This is an efficient and necessary instrument of legal protection

[424] See for example Christopher McCrudden - Sacha Prechal The Concepts of Equality and Non-Discrimination in Europe: A practical approach European Network of Legal Experts in the Field of Gender Equality Christopher, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, 2009

[425] http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK10085.pdf

and the representation of interests. (v) This type of legal protection and interest representation provides a model that is ready for export: It is a form of realizing the underlying objectives that set standards that we can also expect the neighboring countries to comply with.

The following arguments were raised against the parliamentary representation of minorities: (i) The notion that the previous constitution contained an obligation to provide for the parliamentary representation of minorities rests on a mistaken reading of the document. Based on a Constitutional Court decision rendered before the adoption of the minority law, a plausible reading of the previous Constitution suggested that a legally established mode of alternative political representation (realized specifically in the form of minority self-governments) was sufficient to comply with constitutional standards. Correspondingly, though minority self-governments are suboptimal solutions on account of ethno-corruption and other deficiencies they are fraught with, they nevertheless undeniably constitute acquired rights, and since they happen to comply with constitutional requirements concerning political representation, it would be logical to retain them in the new constitutional framework, for otherwise the latter would genuinely realize a step back in terms of legal protections, more accurately in terms of providing special rights. It is also important to mention that international organizations did not condemn Hungary on the grounds that this particular solution fails to live up to the relevant international expectations (in this context we cannot speak of standards or generally established practices). Instead, based on an interpretation of the Constitutional Court's decision, they called Hungary to task for failing to comply with its voluntary commitments.

(ii) The phenomenon of ethno-corruption and the abuses experienced in minority elections counsels caution the introduction of such an institution, primarily because the notion of regulating minority registration and the free choice of one's identity is not supported by either minorities or by the majority of the political elite. A cause of major concern is that based on the prevailing rules, politicians belonging to the ethnic majority could be elected to parliament as representatives of the currently identified thirteen minorities, which would constitute an abuse of minority privileges and could significantly influence the election outcome. Though the 2014 election results have not validated this concern – none of the national minorities won a preferential seat in Parliament (a fact that could also be construed as a key critique of the existing regulations, for it seems that in its current form this institution is incapable of realizing the legislative objective underlying its creation) – in future elections the existence of a

13-member faux minority faction among the 199 MPs could significantly alter election outcomes. This is especially a cause for concern because, as it was shown, the persistent practice of ethno-business and the inadequacy of the relevant regulations will continue to allow for this possibility in the future.

(iii) There are serious theoretical concerns about minority representation. (iv) The fact that minorities and the minority commissioner have relentlessly embraced this position does not imply that there is an automatic obligation to accept the underlying arguments. Their mandates would naturally lead them towards such a position.

(v) An approach that places minority law in the service of diaspora politics uses the former to advance objectives associated with the latter, or in other words, uses minority law to justify its own policies in representing the interests of ethnic Hungarians abroad. This may be indubitably useful and politically justifiable, but is nevertheless hardly defensible on jurisprudential or moral grounds. Though several such arguments were voiced during the parliamentary debate on the 1993 Minority Act, we have never officially encountered such efforts to justify legislative proposals concerning minority law.

The constitutional language does not specify the means of parliamentary "presence," so the Hungarian legislator could have chosen several, constitutionally and politically less controversial models. Examples include the right of national minority self-governments or other minority organizations to initiate legislation (which could be extended in certain cases to motions for parliamentary decisions or plenary debates), the broadening (and not limiting which the 2011 legislation actually done) of the competences of the specialized minority ombudsman (parliamentary commissioner), or even a political agreement between the parties that formally lays down the rules for ethnic/national minority quotas that must be respected in compiling the slate of each party's candidates.

Nóra Chronowski points out that even though the new regulations allow all national minorities to delegate an advocate to Parliament, this could also have been achieved if all the national-level national minority self-governments delegated advocates outside the system of parliamentary elections, without a subset of voting-age citizens having to forgo the possibility of expressing their political preferences. Those citizens namely sacrifice their party list votes in the interest of a representation scheme that is embodied by the institution of the advocate, and hence the integration of this system into the electoral system is a specious solution

that does not create a genuine opportunity for achieving the parliamentary representation of national minorities.[426]

Overall, the legislator unduly restricted the principle of equal voting rights, especially in light of the unbroken string of domestic practices involving abuses of minority elections. Though the time bomb of ethno-corruption failed to explode in the 2014 elections, all the necessary preconditions for a future explosion are given. Moreover, in addition to legislative choices that are difficult to justify in terms of how they handle multiple identities and the right to stand as a candidate, the legislator has introduced a model that will in all probability effectively limit the right to win a preferential mandate to the Roma and German national minorities, while the other national minorities are practically limited to the institution of the advocate – which, incidentally, is unproblematic in terms of both representation theory and practical application. It is too early to assess how this institution works. In any case, the advocates' rather modest activities in the first months hardly justify the hopes vested in this institution (as an instrument of representing the interests of national minorities and strengthening their identity) – assuming that such hopes actually exist.

[426] Chronowski Nóra: Alaptörvény és etnicitás – avagy az alkotmányozás viharaiban részekre szakadt nemzetünk, Állam- és Jogtudomány 2015/1

Norbert Tóth

A Tool for an Effective Participation in Decision-making Process? The Case of the National Councils of National Minorities in Serbia

12. Introductory remarks

This chapter focuses on the current Serbian legislation on national minority councils and minority rights in order to provide a thorough analyses of the main theoretical and practical issues around effective minority participation. The relevant domestic acts are compared to international and European legal standards and the relevant international jurisprudence based thereupon. Additionally, the analyses considers field research data collected through an OTKA Research Project in Novi Pazar, a traditional center of the Sandzak Region (of Serbia),[427] where I was able to speak with people working for the Bosniak National Council.[428] The questionnaire used with the Bosniak National Council was also sent to the rest of the national minority councils of Serbia, though only a couple of people repsponded.[429] It also was possible to identify the views of certain prominent ethnic Hungarian scholars living and working in Serbia on issues regarding the effective participation of minorities.[430] Furthermore, this article does not thoroughly examine the historical evolution of the relevant Serbian legislation, though

[427] The so-called Sandzak was partitioned between Montenegro and Serbia in 2006 when the former federal unit of Serbia and Montenegro left the federated State. Interestingly, the Serbian part of the Sandzak became more Bosniak dominated from the aspect of inter-ethnic proportions. Bosniak leaders working in Novi Pazar are of the view that this division worsened the Bosniak minority's possibilities, especially because some settlements lost their traditional markets due to the border. Furthermore, the Bosniak community became smaller in terms of absolute value.

[428] I would like to thank Mrs. Vasvija Gusinac, vice-president of the Bosniak National Council, for responding to my questions.

[429] I am very grateful to Sasa Radic, Slovenian National Council and Ivan Ušumović, secretary for foreign affairs of the Croatian National Council in this respect.

[430] Writings of Tamás Korhecz and Katinka Beretka are to be mentioned here.

certain aspects will be highlighted.[431]

Effective participation of national minorities was an issue even in the communist Yugoslavia, though not from a human rightist perspective. Although Yugoslavia ratified the minority rights related International Covenant on Civil and Political Rights as early as 1971,[432] the participation of members of minorities was only granted either in the Communist Party of Yugoslavia by recruiting cadres from distinct nationalities, or through the autonomous districts of the State.[433] Two separate autonomous units – though lacking significant powers – were established by the People's Assembly of the People's Republic of Serbia in 1945 and recognized later by the 1946 Constitution, namely the Autonomous Oblast of Kosovo-Metohija and the Autonomous Province of Vojvodina.[434] Interestingly, the Yugoslav partisans pledged to grant autonomy to the Italians of Istria and the Bosniaks of the Sandzak in 1943 as well, but these promises remained unfulfilled.[435] The republics could potentially establish autonomous provinces in geographic areas that had distinctive national characteristics or other distinguishing features.[436] The 1974 Constitution of Yugoslavia significantly upgraded the legal statuses of the two automous territories, almost placing them on the level of republics, though the decision-making process at the federal level was ineffective.[437] The parliament of the Federal

[431] For a brief but proper overview on the historical evolution oft he Serbian minority rights.related legislation see: Korhecz,Tamás: National Minority Councils in Serbia. In: Tove H. Malloy – Alexander Osipov – Vizi, Balázs (Eds.): Managing Diversity Through Non-Territorial Autonomy. Assessing Advantages, Deficiencies, and Risks. Oxford University Press, Oxford, 2015. 72-75.

[432] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#1 (02/03/2016)

[433] Shoup, Paul: Yugoslavia's National Minorities under Communism. Slavic Review Vol. 22. No. 1. (March) 1963. 75.

[434] Ibid.

[435] Ibid. See footnote 42.

[436] See article 111 of the 1963 Constitution of the Socialist Federal Republic of Yugoslavia.

[437] Silvo Devetak: The Dissolution of Multi-ethnic States: Yugoslavia. In: Kumar Rupeshinge – Valery A. Tishkov (Eds.): Ethnicity and Power in the Contemporary World. United Nations University Press, Tokyo-New York-Paris, 1996. 160.

Republic of Yugoslavia – in fact the legislature of Serbia and Montenegro – adopted a new constitution in 1992, right after the secession of some of its former republics. However, the new federal constitution no longer contained provisions on autonomous provinces[438] and the issue of autonomous territories was regulated at a lower level and less extensively from this moment on, so that by the 1990 Constitution of the Republic of Serbia instead.[439] Only the preamble of the Constitutional Charter of the State Union of Serbia and Montenegro made a reference to the existence of two autonomous provinces in Serbia. After the dissolution of Serbia and Montenegro, the current Constitution of the Republic of Serbia was adopted. This constitution rebalanced and refurbished the territorial organization of the State by strengthening the autonomous provinces *vis-à-vis* the central government, expressly recognizing certain participatory rights of national minorities, including the possibility to establish national councils. Though the Charter on Human and Minority Rights and Civil Liberties[440] and the Act on the Protection of Rights and Freedoms of National Minorities[441] – both adopted in 2002 – were the first important pieces of domestic legislation to pave the way for realizing the right of participation of individuals belonging to national minorities, this possibility gained constitutional recognition only in 2006. Representatives of minority groups had no chance to take part in the elaboration of the 2002 Act, though with some exceptions.[442] Three years after the current constitution entered into force, the Serbian parliament enacted the current Act on National Councils of National Minorities. Although national councils of national minorities existed

[438] See the text of the 1992 Constitution of the Federal Republic of Yugoslavia: http://www.worldstatesmen.org/Yugoslav_Const_1992.htm/ (04/03/2016)
[439] See especially Title VI. of the 1990 Constitution of the Republic of Serbia.
[440] See article 44 of the the Charter on Human and Minority Rights and Civil Liberties.
[441] See Part IV of the Act on the Protection of Rights and Freedoms of National Minorities.
[442] This includes the representatives of the Hungarian community whose main political party was a member of the then governing coalition.

between 2002 and 2009, it was not until the adoption of the Act on National Councils of National Minorities that they were elected directly as a rule. It is important to note that the different constitutions of Serbia and its predecessors recognized minority rights only around certain language issues. The 2009 Act on National Councils of National Minorities (for short: the 2009 Act) is the primary analysis in the following pages, which present the points of views from both public international (and domestic) law and the opinions of minority councils. The importance of National Councils in realizing the effective participation of persons belonging to national minorities has been recognized by the Advisory Committee of the Framework Convention for the protection of National Minorities as follows:

> [I]n practice, national minority councils play an overwhelmingly dominant role in the realisation of minority rights in Serbia, having in effect become the main channel of participation for national minorities.[443]

13. A Brief Summary of the Key Provisions of the 2009 Act[444]

The 2009 Act regulates both the procedure of electing national councils and also their composition. National councils have legal personality under Serbian law and are elected either directly by citizens or indirectly through an electoral assembly. National minorities are entitled to choose either the direct or the indirect method of electing the members of national councils, but it is mandatory to hold direct elections if more than half of the members of the given national minority signs up for the electoral list in question before the elections. In addition, the 2009 Act governs the competences of national councils. As a rule, each national council has general and special competences. General

[443] Third Opinion on Serbia adopted on 28 November 2013. para. 196.

[444] For an unofficial English translation of the 2009 Act see: www.seio.gov.rs/upload/documents/ekspertske%2520misije/protection_of_minorities/law_on_national_councils.pdf/ (06/13/2016) Please note, the original version of the act can be accessed through this link, so that the text before the interference of the Serbian Constitution Court.

competences include organizational powers such as the right to adopt and amend the statute of the national council or to adopt the financial plan and similar budgetary documents of a similar nature. National councils are also allowed to manage their own properties and to establish institutions, associations, funds, and business organisations working in different fields. Moreover, they have some symbolic powers, such as the possibility to define their own symbols, make proposals on the official holidays and emblems of national minorities, or award recognitions. The Constitutional Court's verdict declared some parts of the article referring to the general competences as null and void, including the possibility to initiate the procedure of the Constitutional Court itself. National councils still however have the power to access ombudsman-like institutions when a violation of the rights of the members of national minorities occurs. Finally, they can influence the legislation and also the implementation of an act and other regulations in the fields of culture, education, information, and the official use of language and script. Otherwise, these topics are the main and exclusive areas in which national councils are allowed to carry out their functions and practise their special competences.

14. A Critical Approach to the 2009 Act on National Councils of National Minorities and the Constitutional Court's Assessment Relating Thereto

The 2006 Constitution of the Republic of Serbia (hereinafter: the Constitution) expressly recognizes in its article 75 paragraph 2 the right of the members of national minorities:

> to take take part in decision-making or decide independently on certain issues related to their culture, education, information and official use of languages and script through their collective rights in accordance with the law.

Besides, "the right to elect their national councils in order to

exercise the right to self-governance in the fields of culture, education, information and official use of their language and script, in accordance with the law"[445] has also been acknowledged. Consequently, the right of members of national minorities to participate in public life is constitutionally recognized and guaranteed in Serbia. Based on the paragraph cited above, the parliament of Serbia adopted the Act on National Councils of National Minorities in 2009. The question that is being raised by the codification process of the aforementioned act is the following: Who should decide on the issue of forms of participation? Few international documents have tried to answer this question so far. The Framework Convention for the Protection of National Minorities signed in 1995 (hereinafter: FCNM) under the auspieces of the Council of Europe states only that the signatories

> "shall create the conditions necessary for the effective participation (…)".[446]

The FCNM's explanatory report clarifies the matter. Accordingly, States

> could promote (…) consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when they are contemplating legislation or administrative measures likely to affect them directly (…) to create the necessary conditions (…).[447]

[445] See Article 75 paragraph 2 of the Constitution of the Republic of Serbia.

[446] See Article 15 of the FCNM. Although having no specific legal relevance especially from the point of view of this chapter, it is worth noting the official Hungarian text promulgated in an Act of the Hungarian parliament does not contain the word "effective" before the term "participation." Though only the English and the French versions of the FCNM are being considered as authentic, this translation mistake can mislead the Hungarian authorities when interpreting the treaty. Certainly the principal legislative body of Hungary is not authorized to amend unilaterally the text of a promulgated international treaty however with the only exception of translation mistakes. See Article 8 paragraph 2 of the Hungarian Act No. CXXX of 2010 on Legislation in this respect. Oppositely, the official Serbian version of FCNM contains the proper expression "efikasno učešće" that stands for "effective participation/participation effective."

[447] See p. 80 of the Explanatory Report.

This means that representatives of minority groups should be consulted for any draft act on the issue of participation of members of national minorities in public life before it is adopted by the legislature. Similarly, the 1999 Lund Recommendations of the OSCE High Commissioner on National Minorities refer indirectly to the necessity for cooperation between governments and minorities when a new piece of legislation on participation is to be enacted.[448] Alan Phillips is of the view that a drafting process on minority participation without involving minorities themselves is contrary to FCNM's article 15.[449] Furthermore, a recent report elaborated by Ferenc Kalmár (hereinafter: Kalmár's report) that was presented to the Parliamentary Assembly of the Council of Europe dealt with the issue analysed above. According to Kalmár's report:

> [M]embers of a society should be able not only to formulate their interests, but *also to decide, either directly or indirectly, the methods and ways they would like to use to formulate their interests* with due respect for democratic principles and the rule of law. In my view, the *State bodies should involve representatives of the minorities concerned in the decision-making process on possible ways and methods of participation* (Emphasis added).[450]

Contrarily, the Human Rights Committee interprets article 25 – which embodies the right to participate in public affairs as a human right – of the International Covenant on Civil and Political Rights of 1966 as not providing the a directly affected group the right to choose the modalities of participation.[451]

[448] See p. 5 of the 1999 Lund Recommendations of the OSCE High Commissioner on National Minorities.

[449] Alan Phillips: Participation and the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM). In: Zelim A. Skurbaty (Ed.): Beyonf a One-Dimensional State: An Emerging Right to Autonomy? Martinus Nijhoff Publishers, Leiden/Boston, 2005. 308.

[450] Report Doc. 13445. 24 March 2014. Para 57.

[451] Martin Scheinin: The Right to Self-Determination under the Covenant on Civil and Political Rights. In: (Eds.) Pekka Aikio – Martin Scheinin: Operationalizing the

Turning back to the elaboration of the 2009 Act, the respondents of the questionnaire were of the view that the representatives of minorities were involved in the drafting process. However, some of them proposed amendments after it was taken into effect, but the State authorities rejected these additional initiations. The major Hungarian political party was then a member of the governing coalition and it was thus able to effectively influence the substance of the 2009 Act.[452] In addition, the 2009 Act was amended by the parliament during the past few years and the ideas of the minority communities on these proposed amendments were not taken into consideration. Numerically larger minority groups are in a much better position in regards to their possibilities to influence minority rights related domestic legislation since they are represented in the Serbian parliament more or less permanently. Representatives of minority communities agree that the 2009 Act was a significant step towards improving and guaranteeing minority rights in Serbia, but the implementation of some of its components is not proper enough in practice. In the opinion of one of the members of the Bosniak National Council for instance, the 2009 Act itself is only of a declarative character. Furthermore, the lack of an effective sanctioning system means that the authorities violate the 2009 Act's provisions many times.

After its adoption, the 2009 Act has been challenged by several applicants at the Constitutional Court of the Republic of Serbia claiming that some of its articles were allegedly contrary to the 2006 Constitution of Serbia.[453] The Constitutional Court spent some three years examining the applications and it finally delivered its verdict in 2014. According to the Constitutional Court of Serbia:

Right of Indigenous Peoples to Self-Determination. Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2000. 187.

[452] Korhecz, Tamás: Magyar autonómia Szerbiában. A programcéltól a hatályos törvényig. Pro Minoritate. 2010. Tavasz. 70.

[453] Korhecz, Tamás: A nemzeti kisebbségek autonómiájának korlátai a szerbiai alkotmánybíróság olvasatában. A nemzeti tanácsokról szóló törvény alkotmányossága. Létünk. 2014/különszám. 53.

> the national councils of national minorities have the character of a special (non-state) body or organisation constituting an institutional form through which the collective rights of national minorities (the right to self-government) are exercised in the constitutionally established areas of social life that are important for the preservation of the identity of national minorities (culture, education, information and official use of languages and scripts), in the way that certain public powers to participate in decision-making or to decide independently on certain issues in these areas are delegated to national councils, whilst taking into account, of course, the nature of the power that is being delegated.[454]

Since national councils are non-state bodies, the Constitutional Court stated that they could not have comptenecies in a legal sense.[455] The right to representation in public life for the members of national minorities was significantly diminished by the Court's decision. The original version of the 2009 Act gave national councils competence in initializing and proposing new legislative or other acts of a regulatory character in fields relevant to minorities. The original wording of the Act's Article 10 paragraph 10 states:

> […] the national council shall independently […] participate in the preparation of regulations and submit motions for amendments and supplements to regulations prescribing the national minority rights guaranteed by the Constitution in the fields of culture, education, information and official use of language and script," and similarly and initially paragraph 11 added they shall "submit motions for the adoption of special regulations and provisional measures in the domains in which the

[454] Assessment of Constitutionality: Published Decision of the Constitutional Court Determining the Unconstitutionality of Provisions of the Law on National Councils of National Minorities – Official Gazette of RS, no. 20/2014 Section V.

[455] Op. cit. Section VI. P. 2.

> right to self-government is accomplished in order to achieve full equality between the members of the national minority and the citizens belonging to the majority population; […].

Though the term 'regulation' was considered by the Court as too vague since it covered

> a wide range of general legal acts adopted by the authorities of the Republic of Serbia, autonomous provinces and local self-government units – from the laws and other legal acts adopted by the National Assembly, through secondary legislation in the narrower sense adopted by the Government and public administration authorities, statutes, decisions and other general acts adopted by the authorities of autonomous provinces and local self-government units, by-laws adopted by regulatory bodies and other holders of public authority in exercising public powers, to the by-laws whose adoption is within the purview of independent and autonomous state bodies such as, for example, Ombudsman, the High Judicial Council or the Constitutional Court itself.[456]

In the view of the Constitutional Court, the Serbian Constitution enumerates the propounders of regulatory acts exhaustively, and national councils of national minorities are not mentioned therein explicitly.[457] In spite of this reasoning, the Court did not find the provisions in question to be contrary to the constitution because in the Court's view, they should have been interpreted together with some articles of the 2002 Act on the Protection of the Rights and Freedoms of National Minorities, which

> "provides only the right of the national council to address the authorities (the bodies of the government, autonomous province and local self-government units) in respect of all issues affecting the rights and status of national minorities," without the right to participate in

[456] Op. cit. VI. 3.2.
[457] See article 107 of the Constitution of the Republic of Serbia.

preparing and proposing amendments to regulations.[458] Interestingly, the Constitutional Court of Serbia deduces relatively 'soft' minority participation rights from one of the paragraphs of the Constitution[459] interpreted in line with article 15 of the FCNM.[460] According to Serbia's Constitutional Court, the Constitution expressly makes a clear distinction on participation in a decision-making *vis-à-vis* the independent forms of decision-making regarding persons belonging to national minorities.[461] Accordingly, "participation in decision-making," as opines the Constitutional Court, simply engulfes consultative rights that are enjoyed by representatives of persons belonging to minorities without having "tougher" tools such as practising a kind of "veto power" in a decision-making process.[462] In line with this reasoning, the Court found the preliminary preconditional approval of electing "the director of the institution where the majority of classes are taught in a national minority language"[463] to be unconstitutional. Quite similarly, the Constitutional Court of Serbia nullified article 25 of the 2009 Act in which the State's legislature recognized the National Concils' right to "submit their proposals, initiatives and opinions regarding the issues falling within their competences to the National Assembly, the Government or other State bodies and special organisations."[464] Furthermore, paragraph 2 of the same article stipulated that "[a]n opinion shall be requested from a national council by the bodies referred to in paragraph 1 of this Article before consideration and adoption of decisions on the

[458] Assessment of Constitutionality: Published Decision of the Constitutional Court Determining the Unconstitutionality of Provisions of the Law on National Councils of National Minorities – Official Gazette of RS, no. 20/2014 VI. 3.2.
[459] See Article 75 paragraph 2 of the Constitution of the Republic of Serbia.
[460] Assessment of Constitutionality: Published Decision of the Constitutional Court Determining the Unconstitutionality of Provisions of the Law on National Councils of National Minorities – Official Gazette of RS, no. 20/2014 VI. 5.
[461] Ibid.
[462] Ibid.
[463] Ibid.
[464] See the original wording of the 2009 Act's Article 25. paragraph 1.

issues in the fields referred to in Article 2[465] of this Act," which was also considered by the Court as contrary to the Constitution. The Constitutional Court first interpreted the undoubtedly vague term of "other state bodies" as meaning "public administration authorities."[466] The Constitutional Court assessed the right incorporated to this article, which indeed seemed to be somewhat similar to the status of propunding legislative and other acts, and found it unconstitutional since article 107 of the Constitution contained the exhaustive list of propounders.[467] Moreover, the right to initiate legislative measures can properly be practised by consulting with those ministries inline of the view of the Constitutional Court.[468] Article 25 paragraph 1 contained the word "proposal" but not the term "act" or "law." In my opinion, the contested paragraph of article 25 of the 2009 Act was not necessarily contrary to article 107 paragraph 1 of the Constitution of Serbia, and the Constitutional Court was a bit rigorous in relating to this issue. The difference between the status of constitutionally recognized propounders of laws and other entities is that while the proposals of the former category result in a procedure which is mandated to start when the proposal has been filed, the latter causes no similar consequences. Furthermore, and referring to the question of taking part in the decision-making process *versus* independent decision making, the *differentia specifica* of these two categories needs to be examined. With independent decision making, usually the decision-maker has the right to invite others to participate but is not obligated to do so. "Participation" on the other hand implies a requirement to involve other actors in the decision-making process. When someone has the right to a "veto power" to hinder the decision-making process, it means simply

[465] Fields include: culture, education, information and official use of language and script.

[466] Assessment of Constitutionality: Published Decision of the Constitutional Court Determining the Unconstitutionality of Provisions of the Law on National Councils of National Minorities – Official Gazette of RS, no. 20/2014 VI. 13.

[467] Ibid.

[468] Ibid.

that the room of manoveur of the decision-maker is not unlimited, but is independent within certain limitations. Unlimitedness and independence are overlapping but not identical categories. Every independent decision-maker has limits stemming from law or other sources. Since the "veto power" of an entity is supposedly compatible with the concept of shared decision-making, some additional parts of the Serbian Constitutional Court's reasoning should be reviewed. According to the Court, article 15 of the FCNM suggests that "effective participation" only covers cases in which the decision-maker has to consult with others when formulating an opinion on a final decision. Indeed, the signatory States of FCNM "enjoy a wide margin of appreciation in how to approach its aim of promoting the effective participation of persons belonging to national minorities in public affairs."[469] Moreover, the Advisory Committee of the FCNM, which has the role to monitor the application of the treaty's rules, emphasises the importance of consultation mechanisms[470] when speaking about non-territorial arrangements such as the Serbian system of national councils. This also means that the Advisory Committee rather prefers the procedural aspects of effective participation *vis-à-vis* material ones.[471] The Advisory Committee's preference does not mean that some other possible variations of participation would necessarily be contrary to article 15 of the FCNM, since effective participation in public affairs cannot be restricted merely to consultative rights. Furthermore, the Advisory Committee acknowledges that "mere consultation does not constitute a sufficient mechanism for ensuring effective participation (…)"[472] and "if advisory or consultative bodies are established ([P]arties should ensure that) they represent national minorities in an

[469] Markku Suksi: Effective Participation of Minorities in Public Affairs – European Norms and Praxis Evaluated in Light of the Lund Recommendations. In:
[470] Markku Suksi: Ibid.
[471] Marrku Suksi: Ibid.
[472] See the Preamble and paragraph 71. of the Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and Public Affairs. Adopte on 27 February 2008.

adequate manner."[473] The FCNM's Explanatory Report contains a non-exhaustive list[474] relating to this matter. The real issue is whether or not the original wording of the 2009 Act's relevant articles was compatible with article 15 of the FCNM. Since the aim of article 15 of the FCNM is to "encourage real equality between persons belonging to national minorities and those forming part of the majority," according to the Explanatory Report, the most important benchmark on measuring the "effectiveness" of a participatory form is if the possibilities attached thereto are proper enough to reach real equality between the two categories of indiviudals mentioned above. 'Real equality' does not simply mean equality under the law, but represents something more, including the opportunity to substantively influence the decisions that affect him/her.[475] Quite similarly, the Advisory Committee stated in its "thematic commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs" that "State Parties should also ensure that participation of minorities has a substantial influence on decisions which are taken, and that there is, as far as possible, a

[473] Rainer Hofmann: The Work of the Advisory Committe under the Framework Convention for the Protection of National Minorities, with particular Emphasis on the Case of Germany. In: Martin Scheinin – Reetta Toivanen (Eds.): Rethinking Non-Discrimination and Minority Rights. Institute for Human Rights, Åbo Akademi University, Turku/Åbo, German Institute for Human Rights, Berlin, 2004. 83.

[474] See the phrase: "inter alia" in this respect. For the possible modalities of effective participation relating to the article 2. paragraph 2. of the UN General Assembly's resolution 47/135 on the „Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities see: Kristian Myntti: The Right of Indigenous Peoples to Self-Determination and Effective Participation. In: (Eds.) Pekka Aikio – Martin Scheinin: Operationalizing the Right of Indigenous Peoples to Self-Determination. Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2000. 127.

[475] Similarly, in the case of the ILO Convention (No. 169.) Concerning Indigenous and Tribal Peoples in Independent Countries adopted in 1989, effective participation means "the opportunity to have a real impact on the decisions taken in questions which affect the directly" however without the right of veto. Kristian Myntti: op. cit. 120.

shared ownership of the decisions taken."[476] Joseph Marko opines, "instruments of participation (…) range on a continuum of 'effectiveness' of influence in decision-making from membership (…) to absolute veto powers."[477] Both consultative rights and veto power are possible instruments of participation, though the former is less effective than the latter."Veto rights can usually be invoked only in relation to legal acts concerning *exclusively* the rights and status of persons belonging to national minorities"[478] in the view of the Advisory Committee. In conclusion, the Constitutional Court's reasoning on this issue seems to be ill founded. Certainly the parliament of Serbia could have decided when adopting the original version of the 2009 Act that it conferred the National Councils only with consultative rights, but instead it provided stronger powers to them, which the Constitutional Court assessed as unconstitutional. In my consideration, the Court's restricted interpretation can surprisingly be against the Constitution of Serbia since the Serbian fundamental law in its article 16 paragraph 2 expressly recognizes the "[g]enerally accepted rules of international law" as being "an integral part of the legal system in the Republic of Serbia and they are applied directly." The only important question in this respect is if the principle of acquired or vested rights (droits acquis/erworbene Rechte) could have relevance in this sense. If that principle is acknowledged as being a general principle of law, the answer is in the positive. A proper analysis on the exact status of this principle would certainly exceed the scope of this text, but some initial observations can be made. In its judgement *Concerning certain German interests in Polish Upper Silesia*, the Permanent Court of International Justice concluded the "principle of respect for vested rights, a principle

[476] ACFC/31DOC(2008)001. 19.

[477] Joseph Marko: The Council of Europe Framework Convention on the Protection of National Minorities and the Advisory Committee's Thematic Commentary on Effective Participation. In: Marc Weller (Ed.): Political Participation of Minorities. A Commentary of International Standards and Practice. Oxford University Press, Oxford, 2009. 239-240.

[478] ACFC/31DOC (2008)001. 98.

which, as the Court has already had occasion to observe, forms part of generally accepted international law (…)."[479] Although it is true, this statement was made in line with issues relating to private property (property rights, land laws, et cetera) of foreigners. Thus the principle of acquired rights has its origins in private law that expanded gradually to certain public law related relations,[480] like labour laws[481] or social security rights[482] over time. The International Court of Justice confirmed the principle's primarily private law character in its *Northern Cameroons judgement of 1963*.[483] Certainly when talking about public international legal matters, the principle of acquired rights has its strongest underpinnings in questions related to state succession.[484] F.V. Garcia Amador, then special rapporteur of the International Law Commission, dealt with the principle of the respect of acquired rights in his fourth report on the issue of state responsibility. But his report was restricted only to private, or at best, mixed rights of individuals.[485] Despite its original character, which is economic in nature, the principle of respecting acquired/vested rights is being recognized as having some

[479] Permanent Court of International Justice, Series A, No.7, p.42.

[480] See in this repsect: Pierre A Lalive: The Doctrine of Acquired Rights. In: Bender (Ed.), *Rights and duties of private investors aborad - International and comparative law center*, New York, 1965. pp. 145-200.

[481] Quite early, the German Supreme Court (Reichsgericht) declared in its judgement in 1932 based on the Weimar Constitution of 1919, that it was not possible to reduce the salary of civil servants for it was an acquired right. Köztisztviselői szerzett jogok. Jogtudományi közlöny. 1932. 8. szám. 52.

[482] The substance of the principle of acquired rights is not sufficiently clarified by the Hungarian Constitutional Court, but it means certain limitations regarding social rights. Takács, Albert: A szociális jogok. In: Halmai, Gábor – Tóth, Gábor Attila: Emberi jogok. Osiris Kiadó, Budapest, 2008. 831-832.

[483] Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963 p. 34.

[484] A.M. Stuyt: The General Principles of Law. As Applied by International Tribunals to Disputes on Attribution and Excercise of State Jurisdiction. Springer-Science Business Media, BV, Amsterdam. 1946. 79. and James Crawford: Brownlie's Principles of Public International Law. Eighth Edition. Oxford University Press, Oxford, 2012. p. 429.

[485] See Document A/CN.4/119.

relevance to pubic law in different domestic legal orders.[486] In Serbia, for instance, the third state report shows that the right to use of languages of minorities can be considered as acquired:

> [O]n several occasions, the National Council was requested to provide an opinion for the funds awarded on competitions and for the names of new streets in Bela Crkva where the Czech language has been in official use by *the acquired right*,[487] although the number of its members does not exceed the legal threshold.[488]

Additionally, the principle of respecting acquired rights is a constitutional principle in Serbia in relation to human and minority rights: "[A]ttained level of human and minority rights may not be lowered."[489] And I agree with Tamás Korhecz that the Constitutional Court did not interpret this principle thoroughly in the present case.[490] Furthermore, and much more interestingly, the Council of Europe's Committee of Ministers referred explicitly to vested rights when delivering its resolution on the implementation of FCNM relating to the Third State Report of Serbia:

> [I]ssues for immediate action: (…) pursue work towards revising the Law on National Councils of National Minorities, in close consultation with representatives of all minorities and of civil society, in order to ensure the effective participation of persons belonging to national minorities in all matters affecting them, while taking into

[486] See for instance the case of Poland, where the Constituional Court recognized this principle in certain issues of public la was well. Piotr Tuleja – Krzystof Wojtycek: La protection des droits acquis élément constitutif de l'État de droit? Remarques sur la jurisprudence constitutionnelle polonaise. Revue internationale de droit comparé. Vol. 47 N°3, Juillet-septembre 1995. pp. 737-762.

[487] Emphasis added.

[488] Third Report submitted by Serbia pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities. Received on 14 March 2013. P. 7.

[489] See Article 20 paragraph 2. of the Constitution of the Republic of Serbia.

[490] Korhecz, Tamás: Nemzetiségi autonómia az Alkotmánybíróság szorításában. A szerbiai Alkotmánybíróság a nemzeti tanácsokat szabályozó törvénnyel kapcsolatos döntésének kritikus elemzése. Jog, állam, politika. 2014. (6. évf.) 3. sz. 29.

> account the importance of *respecting and protecting the vested rights*[491] of persons belonging to national minorities as exercised by National Councils, especially with regard to their powers, competences and financing, in accordance with the constitution.[492]

In Gábor Sulyok's view, a legal principle can be considered as being a general principle of law if it has roots in domestic legal orders, is preferably recognized by all of the major legal systems of the world, and it is necessary of being recognized by international law as such. It is also crucial that the given principle should play a role in the relationships between the subjects of international law.[493] Serbia (or its predecessors) concluded bilateral treaties with several (neighbouring) countries[494] on minority protection and some of these agreements are expressly referring to the right of national minorities (sic!) to participate in public life.[495] It shows that the principle of respecting acquired rights might have a sort of international relevance. Seemingly, the principle of vested/acquired rights is both a principle of the Serbian (and perhaps other domestic) and the international legal orders, which also suggests that it might be a general principle of law, though its applicability is highly

[491] Emphasis added.

[492] Resolution CM/ResCMN(2015)8 on the implementation of the Framework Convention for the Protection of National Minorities by Serbia (Adopted by the Committee of Ministers on 1 July 2015 at the 1232nd meeting of the Ministers' Deputies) p. 2.

[493] Sulyok, Gábor: Az általános jogelvek nemzetközi jogforrási jellegéről. Közjogi szemle. 2011/1. 24-41.

[494] For example with the Former Yugoslav Republic of Macedonia in 1996, the Republic of Croatia in 1996, Romania in 2002 and Hungary in 2003. For the English version of these treaties see: Björn Arp: International Norms and Standards for the Protection of National Minorities. Bilateral and Multilateral Texts with Commentary. Martinus Nijhoff Publishers. Boston – Leiden. 2008. 512. pp.

[495] Article 8 of the *Convention between the Republic of Hungary and Serbia and Montenegro on the Protection of the Rights of the Serbian minority living in the Republic of Hungary and the Hungarian minority living in Serbia and Montenegro of 2003* stipulates for instance, that: „The Contracting Parties recognize the right of national minorities to participate in public life in line with their domestic legal order, (…)."

controversial. Moreover, if that principle is truly one of the general principles of law, another problematic issue occurs in the present case. International minority rights law, with its concrete rights and standards, is considered to be part of the international protection of human rights. As the FCNM stipulates in its very first article:

> The protection of national minorities and of the rights and freedoms of persons belonging to those minorities *forms an integral part of the international protection of human rights*,[496] and as such falls within the scope of international co-operation.

Besides, it was established by the Advisory Committee that the statement of article 1 covered article 15, too: "Article 15 of the FCNM forms also a part of the internatonal protection of human rights."[497] Presumably, the principle of acquired/vested rights can hardly be interpreted within a framework that is grounded on the concept of inherent rights. At the same time, the Serbian legislation on National Councils still ensures the possibility of participation, albeit on a lower level. Thus the principle of acquired/vested rights and the concept of inherent human rights are not necessarily in a contradiction in the case in question, since the Serbian Constitutional Court reduced only the level of participation without completely abolishing the right itself. Should the principle of respecting acquired/vested rights be inapplicable to the present situation, some other related fundamental legal principles such as the requirement of legal certainty can also be taken into consideration. In my opinion, the Constitutional Court's unneccesarily strict legal approach restricted the application of article 15 of the FCNM. This restrictive interpretation of human rights related issues is quite unusual, but not unprecedented.[498] Security concerns of States

[496] Emphasis added.
[497] ACFC/31DOC(2008)001. 5.
[498] See in this respect: Alexander Orakhelasvili: Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights. European Journal of International Law (2003), Vol. 14. No. 3. 529-568.

are especially likely to lead to such an interpretation.[499] However, the Constitutional Court of Serbia should not have come to the conclusion of diminishing the possibilities of national councils based either on international or national considerations.

The different possibilities of the distinct National Councils to act or participate in affairs affecting them was also analyzed during the research project. Unsurprisingly, it was mostly the less numerous communities that complained about the prospects of minority councils. Usually they observed that the numerically smaller minority communities have less political powers than the larger ones since they have the opportunity to become a member of a governing coalition through which they are able to more effectively represent their interests. Interestingly, concerning a larger community like the Bosniaks of Serbia, it seems as though the smaller communities would engage only to preserve their culture and to maintain relations with their kin-states rather than to aim to improve their statuses. Some of the smaller minority groups concentrated mainly in the territoriy of the Autonomous Province of Vojvodina have better conditions since they can use the channels of participation and instruments of the autonomous territory. There is no officialy recognized, institutionalized form of cooperation among the separate National Councils in Serbia through which they could more effectively influence the decision-making process. This deficiency was also highlighted by the Advisory Committee in its latest opinion on Serbia:

> [T]he Advisory Committee is also concerned that the national minority council system, as it is presently conceived, may lead to fragmentation in the representation of minorities, in so far as each council represents only the interests of a single national minority and little has been done to encourage co-operation

[499] Peter Vedel Kessing: Terrorism and Human Rights. In: Stéphanie Lagoutte – Hans-Otto Sano – Peter Scharff Smith (Eds.): Human Rights in Turmoil. Facing Threats, Consolidating Achievments. Martinus Nijhoff Publishers, Boston-Leiden, 2007. 160.

between the various councils.[500]

Furthermore, the monitoring body of the FCNM also emphasised that

> (Serbia should) promote a more effective participation of numerically smaller national minorities in elected bodies at national level.[501]

15. Concluding observations

The 2009 Act ensures and improves the right to effective participation in political or public life for minorities, yet the Constitutional Court's verdict unnecessarily restricted this right to certain kind of modalities. In addition, the approach of the Constitutional Court is quite controversial from a political as well as a legal perspective. In fact, its verdict downgraded the status of national councils to a more or less consultative role in issues such as adequately influencing the quality of legislation concerning minorities. It is true that consultative status and the possibility to give preliminary opinions to draft laws are compatible,[502] but the current Serbian legal framework makes it difficult to effectively absolve this task.

In sum, minority communities are of the view that the 2009 Act is a significant step forward for the effective participation of individuals in political and public life. However, they claim the improper implementation of its rules weakens its efficiency. Especially on a lower level, state authorities of self-governments do not really treat national councils as their equal partners. The Bosniak National Council is even more critical because they think central authorities refuse to accept them. It is important to note that the Bosniak National Council makes an effort to create an additional framework of participation of their own, notably regarding territorial autonomy, but this idea does not necessarily meet the concepts of the central government. In its current status,

[500] Third Opinion on Serbia adopted on 28 November 2013. para. 196

[501] Third Opinion on Serbia adopted on 28 November 2013. Para. 180.

[502] Yash Ghai: Public Participation, Autonomy and Minorities. In: Marc Weller (Ed.): Political Participation of Minorities. A Commentary of International Standards and Practice. Oxford University Press, Oxford, 2009. 18.

The 2009 Act provides less effective participation than before the decision of the Constitutional Court was made. Revision of the constitution is required in order to restore the pre-2014 opportunities of wider participation.

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bla3

Zarije Seizović

Ethnopolitics as Local and International Practice
"Constituent Minorities" and National Minorities in Bosnia and Herzegovina

1. Introduction

Twenty-one years ago the *General Framework Agreement for Peace in Bosnia and Herzegovina* (the *Dayton Agreement*) was signed and entered into force. The basic achievements of the *Dayton-Paris Agreement* were two-fold: it terminated the four-year war and started the overall democratization process in the country. However, the Agreement did not create a politically sustainable and socially stabile union of three 'constituent peoples' and "Others." In the human rights protection sphere, the Agreement created a rather bizarre political structure that is exclusively based on the ethnic representations of the three 'constituent peoples.'

Under the "political integration" motto, the country had undergone an artificial institutional reanimation under the auspices of International Community (IC). From the constitutional and legal point of view, both theoretically and practically, BiH was founded as a sort of unfinished country, which was constitutionally, legally, and politically affirmed and fashioned *sui generis* as a union. The State is a strange legal creation consisting of two entities: one 'republic' and one 'federation.' This peculiar state, consisting of these two entities, cannot be labelled as a simple sovereign (unitary) state, or a complex one. Furthermore, it is neither a republic nor a federation; it is not even a union. The geopolitical side effects of war and the Balkan melting pot materialized in a creature that might be considered a post-modern anti-state without precedent.

In the US military base Wright Peterson (Dayton, Ohio), the Bosnian state was revitalized, re-established, and re-contextualized as, above all, a very odd "union" based on an unsteady principle of 'one state – two entities – three constitutive peoples.' This principle played a key role in long-term and constant disintegrative processes and tendencies within Bosnia and Herzegovina ever since the Agreement was entered into force.

Ethno-nationalistic exaltation and crude form of nationalism—side-effects induced by the crashing of the East-European communist totalitarian regimes—have turned into basic obstacles for the genuine democratization of former communist countries and societies, including the Bosnian state

and its society. By virtue of the BiH Constitution, ethnic-based nationalism became institutional: the Preamble of the Constitution of Bosnia and Herzegovina (as well as a number of its normative parts) is a serious obstacle to the creation of an efficient state with a steady legal environment in which power-sharing is situated within the civil society. On the contrary, the Constitution, as the highest legal and political normative instrument in the country, favours ethno-nationalism and the collective (national) rights of ethnic communities over individual citizens' rights[503].

The Preamble of the BiH Constitution defines Bosniacs[504], Croats, and Serbs as 'constituent peoples,' while 'Others', i.e. 'citizens,' are considered to be second-class citizens. By recognizing the collective rights[505] of ethnic groups (nations), the anachronistic notion of 'constituent peoples' represents a rather obvious violation of the *European*

[503] „Ethnical, cultural, traditional, habitual as well as other components of complicated BiH social *milieu* is composed of sophisticated net of *Bosnian concord of diversity*, so territorial principle taken as a base to form an opinion on somebody's ethnic affiliation has no either theoretical or practical rationalization. Thereby any idea and/or theory of "ethno-cantonisation" or any other "ethno-regionalisation", notwithstanding if it comes from "outside" or "inside", is absolutely incompatible with multiethnic concept of the BiH society and entails latent threat to survival of the State of BiH. Cantonisation, of course, might be concept of internal institutional structure of the multi-ethnic state under the condition that it is a civilized state in which any form of diversity cannot be ground for human rights violation whatsoever. On the other side cantonisation and/or regionalisation based on natural and geographical distinctiveness, as model of "de-entitetisation" of BiH seems to be the reasonable and logical constitutional solution for internal state organization of BiH.", Seizovic, Zarije, *Constitutuen Peoples and Constitutional Changes*, 2nd updated edition, Dobra knjiga, Sarajevo, 2014. p. 23-24.

[504] Constitutional title for citizens of Bosnia and Herzegovina with Muslim (Islam) religious origins. In Socialist Federal Republic of Yugoslavia, they were know as Muslims (capital letter „M").

[505] *Collective rights*, although nowadays increasingly acknowledged in both theory and practice in Western states, are nonetheless secondary to rights based on individual citizenship. The language and cultural rights of national minorities are protected (in some cases by international conventions), and native peoples have often reasserted pre-existing territorial entitlements, but they remain citizens of the states in which they live (International Crisis Group, *Implementing Equality: The "Constituent Peoples" Decision in Bosnia & Herzegovina*, 16 April 2002, ICG Balkans Report No. 128, Sarajevo/Brussels, p. 2, foot-note 5).

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), since the guiding idea of human rights protection has been placed in correlation with the citizen as an individual, not as a member of a social/religious/ethnic/national group. The very Bosnia and Herzegovina Constitution introduces the anti-discrimination clause[506] in Article II (4), but at the same time, the Constitution itself directly breaches that clause as well as Article 14 of the ECHR *(Prohibition on Discrimination)*. The existing concept of 'constituent peoples' as state-building nations and the impacts of this concept on the constitutional and legal position of 'Others'[507] is discrimination par excellence. This concept perpetuates institutional discrimination towards a certain number of citizens who do not belong to 'the chosen ones,' including those who opted to exercise their right to 'not to belong' (both of these groups are being labelled as 'others'). It is clear that the BiH Constitution incorporates a discriminatory concept that recognizes different legal/political/constitutional statuses for Bosnian citizens. The European Court of Human Rights clearly and explicitly noted this unbearable state of affairs in the *Sejdić and Finci vs. Bosnia and Herzegovina* case, as well as in a few cases following this one. The 'national veto' principle, a principle to protect 'national interests,' provides ethno-nationalistic elites with unlimited power to block the enactment of laws if they find that the law would run counter to the "national interests" of any of the three constituent peoples.

Nowadays, sadly, the public arena in Bosnia and Herzegovina is a testing ground for a collectivism that enjoys absolute freedom in subsuming the individual to the utmost possible extent under its abstract categories. The democratic system of the three ethno-religious groups is thus a democracy of oligarchies—a set of groups of authoritarian members or ethnic groups engaged in shaping ethnic, collectivist narratives. Such a democracy is

[506] „All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void".

[507] Individuals that do not belong or title themselves as *Bosniacs, Croats* or *Serbs* – meaning *constituent peoples.*

meaningless.[508]
The international position and status of national minorities influence the position and status of national minorities in Bosnia and Herzegovina (BiH) in regards to national minority protections and the legal framework. According to records and experience of the OSCE, there is certain social and political marginalization of the Roma and Jewish population in BiH. Traditionally, the Roma population was not subject to social inclusion. Despite an acceptable legal framework, the remains of this status are still felt nowadays. As far as Jewish population is concerned, taking into consideration its traditional position, the level of inclusion is much higher in comparison to the Roma population. Yet there are also evident experiences of discrimination that both national minorities have in common due to the systemic errors of the Dayton constitutional settlement.[509] However, apart from these two national minorities, there are "constituent/constitutional minorities" that would be closely explored in terms of their constitutional position as well as their right to political participation.

2. National Legal Framework for National Minority Protection

Annex I to the Constitution of Bosnia and Herzegovina (Constitution of BiH) introduces a list of human rights agreements to be applied in BiH, amid which there are few very important agreements regarding the protection of national minorities: *International Convention on the Elimination of All Forms for Racial Discrimination* (1965), *International Covenant on Civil and Political Rights* (1966), *Optional Protocols* (1966 and 1989), *International Covenant on Economic, Social and Cultural Rights* (1966), and the most important ones being *Framework Convention for the Protection of National Minorities* (1994) and *European Charter for Regional or Minority Languages* (1992).
The State of Bosnia and Herzegovina adopted the *Law on Rights of National Minorities* based on the international standards provided for in the listed human rights instruments.[510] In Article 1, the Law provides for

[508] Mujkic, Asim, *We, the Citizens of Ethnopolis,* Human Rights Center of the University of Sarajevo, Sarajevo, 2008, p. 39.

[509] The OSCE Mission to BiH, available at: http://www.oscebih.org/Default.aspx?id=53&lang=HR (23.08.2016.).

[510] „Official Gazette of Bosnia and Herzegovina" No 12/03, 76/05, 93/08). The Law provides for *direct applicability* of the *Framework Convention for the Protection*

rights and obligations of members of national minorities in Bosnia and Herzegovina as well as duties of the authorities in BiH as to respect and protect, preserve and develop the ethnic, cultural, linguistic and religious identity of each member of national minorities in BiH being citizen of BiH. Starting from international standards on definition of national minorities[511], the Law states

> A national minority, in terms of this Law, shall be a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other

of National Minorities and states that the law is an integral part of the legal system of State of BIH and its two Entities (Article 2.). Similar laws had been adopted in both Entities: in the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of Bosnia and Herzegovina" No 56/08) and Republic of Srpska ("Official Gazette of the Republic of Srpska No. 2/04).

[511] There is no single and internationally agreed definition as to which groups constitute minorities.*The United Nations Minorities Declaration* (1992) in its Article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. The very existence of a minority is a question of fact and any definition must include both *objective factors* (existence of a shared ethnicity, language or religion) and *subjective factors* (an important one being the one that individuals must identify themselves as members of a minority). As such, members of the group have the right to exist, right to equal treatiment and freedom from discrimination, right to adequate political representation and participation in the political decision-making processes, right to use their own language for private and public purposes, even right to their own institutions. The term *minority* being used in the UN human rights system mainly refers to a national or ethnic, religious and linguistic minorities, according to the *UN Minorities Declaration* concept. All States have one or more minority groups within their national territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that identity of the majority population (*see* http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx) Prof. Zoran Pajić is of the opinion that all those that do not belong to one of the three constituent peoples are put in an unclear position with undefined rights in the state shaped along the ethnic principle" (Zoran Pajic, „A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina", *Human rights Quarterly*, 20 (1), 1998).

characteristics. (Art. 3).

Additionally, the law provides for the protection of status, equality, and rights of seventeen national minorities that live in BiH,[512] and affirms and guarantees to members of national minorities the rights to organise and gather in order to express and protect their cultural, religious, educational, social, economic and political freedoms, rights, interests, needs and identities.[513]
Furthermore, the law affirms the right of national minorities to use their insignia, symbols and language, rights in the field of education, information, culture, economic and social rights and political participation, providing also for the following penal provision

> In accordance with the criminal laws of the entities in BiH, any action, encouragement, organisation and aiding and abetting of the activities that could imperil survival of a national minority, initiate ethnic hatred, lead to discrimination or bringing members of a national minority into unequal position shall be prohibited. (Art. 25).

In Article 4, the law recognises the right of national minority members to freely choose to be treated or not to be treated as such. It also states that individuals may not be put into an adverse position due to such a choice, nor be subject to any other form of discrimination on these grounds, stressing that assimilation of members of national minorities against their will shall not be allowed.
Members of national minorities have the right to organise and gather in order to express and protect their cultural, religious, educational, social, economic and political freedoms, rights, interests, needs and identities.[514]
According to Article 7, entities, cantons, cities, and municipalities in BiH, within the scope of their competencies, shall regulate in detail their laws and other rights and duties arising from the law hereto and international conventions regulating issues of importance for national minorities.
Members of national minorities may freely display and bear insignia and

[512]Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks, Ukrainians and others who meet requirements of national minority.

[513]Art. 5.

[514] Art. 5.

symbols of the national minority they belong to, as well as their organisations, associations, and institutions. When using insignia and symbols referred to in paragraph above, the members of national minorities shall also be obliged to display the official insignia and symbols of BiH, as well as the symbols and insignia of the entities, cantons, and municipalities, in accordance with their regulations.[515] The State recognises and protects the right of each member of a national minority in BiH to use his/her language freely and without any hold-ups, both in private and in public, orally and in writing. The right embraces the right of a member of national minority to use his/her name in the language of minority and to request it to be used as such in public.[516]

Within the realm of education, the law prescribes that

> Entities and cantons in the Federation of Bosnia and Herzegovina shall be obliged to secure within their educational system (pre-school, primary, secondary) that the members of national minorities shall be enabled to have education in the minority language in the cities, municipalities, and inhabited areas in which the members of national minorities represent an absolute or relative minority. Regardless of the number of members of national minorities the entities and cantons shall be bound to secure that the members of national minority, if they request so, may have instructions on their language, literature, history, and culture in the language of minority they belong to as additional classes. For the purposes of the realisation of rights referred to in Paragraph above the Entity, cantonal, city and municipal authorities shall be bound to secure funds, means for the education of teachers to teach in the language of the national minority, to ensure the space and other requirements for the additional classes as well as printing of textbooks in the languages of national minorities (Art. 14).

Within the Federation of BiH, the entities and cantons are obliged to determine by their legislation the possibilities for members of national minorities to establish and preserve their own private institutions for education and vocational training. National minorities are obliged to

[515] Art. 10.

[516] Art. 11.

secure financing of such institutions.[517]

According to Article 15 of the law, members of national minorities in BiH have a right to establish radio and TV stations and to issue newspapers and other printed information in the language of the minority they belong to. Public service radio and TV stations whose founders are BiH entities, cantons, cities, and municipalities shall be obliged to provide special programs for members of national minorities in their program schedules and they may also provide for other materials in the minority languages. Public radio and TV stations in BiH shall secure informative programing for members of national minorities in their languages at least once a week. The entities and cantons shall identify these rights pursuant to the percentile representation of national minorities in the relevant entity, canton, city and municipality.[518]
Members of national minorities also have the right to establish libraries, video libraries, cultural centres, museums, archives, cultural, artistic and folklore associations, and all other forms of free cultural expression and to preserve their monuments of culture and cultural heritage. The contents in national minority languages are to be provided for in the institutions for cultural activities in the cities, municipalities, and local communities (or inhabited places) in which members of national minorities constitute over one third of population. Archives, museums, and institutions for protection of monuments of culture and tradition in BiH and its entities have to ensure the proportional representation of all national minorities in BiH in their programs and contents and shall protect national monirities' monumental heritage and cultural heritage.[519]
In the cities, municipalities, and local communities (or inhabited areas) in which members of a national minority make an absolute or relative majority of population, the authorities are to ensure that the use of minority language and the (administrative services) treatment in minority language is facilitated in financial and banking institutions and other services of the public sector through the payment receipts and forms as well as in hospitals, nursing homes, and other social institutions.[520]

[517] Art. 13.

[518] Art. 16.

[519] Art. 17.

[520] Art. 18.

As far as political participation is concerned, the law states the following:
The manner and criteria of electing representatives of national minorities into parliaments, assemblies and councils in terms of the Article above shall be closely regulated by the Election Laws of BiH and the entities, as well as the statues and other regulations in cantons, cities and municipalities.
A special law and other regulations of BiH states that entities, cantons, cities, and municipalities shall regulate the manner of representation of members of national minorities in executive and judicial authorities as well as in public services.
National minority representatives in positions of public authority shall represent all national minorities and shall be obliged to protect the interests of all national minorities.[521]
The BiH Council of National Minorities is entitled to give opinions, advice, and proposals to the BiH Parliamentary Assembly on all matters regarding the rights, statuses, and interests of national minorities in BiH. The BiH Council of National Minorities may delegate an expert to work with the Constitutional-Legal Commission and the Human Rights Commission in both houses of the BiH Parliamentary Assembly.[522]

The Roma population is the largest national minority in BiH and is marginalized in social, economic and political life. In post-war BiH, the Roma population faces many difficulties in exercising their fundamental rights and freedoms that are guaranteed by the Constitution of BiH. Private property rights and access to social care, education, and employment are of particular concern. There are various projects being undertaken in order to provide for their full and effective participation in the state bodies, to resolve their problems related to housing, health care, employment, and education, and to prevent discrimination and ingrained biases toward the Roma population.[523]

There are around 80,000 to 100,000 Roma inhabitants in BiH. It is being reported that the Roma population is leaving country in attempt to attain asylum from the discriminatory environment in BiH in the realm of social

[521] Art. 20.

[522] Art. 21-22.

[523] The OSCE Mission to BiH, available at: http://www.oscebih.org/Default.aspx?id=53&lang=HR(23.08.2016.).

rights, housing, education, and employment. *The Roma informative centre* estimated that as little as one per cent of the Roma population able to work is employed. It has also been noted that employers intending to decrease labour power first dismiss Roma labour. The Roma population is not adequately represented in the public sector despite the constitutional provision guaranteeing proportionate representation in public institutions.[524]

Within the Institution of Human Rights Ombudsmen, there is a Department for elimination of all forms of discrimination to which individuals may file complaints. It also initiates *ex officio* procedures and conducts investigations into cases of discrimination and cases involving violations of rights and fundamental freedoms as provided for in the *European Convention on Human Rights, International Convention on Elimination of all Forms of Racial Discrimination, Convention on Elimination of all Forms of Discrimination Against Women, Framework Convention for Protection of National Minorities,* especially in cases involving any form of discrimination based on race, colour, gender, language, political or other affiliation (opinion), national or social origin, or material status.[525]

There is also a Department for Following of National, Religious and Other Minorities Rights that receives and registers complaints concerning violations of the rights and freedoms of the members of national, religious, and other minorities. This department also monitors the functioning of the legislative, executive and judicial authorities relevant to the exercise of rights of national, religious and other minorities.

The Department for Following of National, Religious and Other Minorities Rights pay special attention to:

- Promoting rights determined in the Convention on Protection of National Minorities and other international standards regulating minority rights;

[524] Embassy of the United States to Bosna and Hercegovina –*Report on Human Rights,* available at official Embassy web page http://bosnian.sarajevo.usembassy.gov/ljudska-prava-2013.html (23.08.2016.).

[525] According to *2014 Annual Report on Discrimination Cases in Bosnia and Herzegovina* produced by the Human Rights Ombudsmen for Bosnia and Herzegovina, there were 22 cases of discrimination based on ethnic affiliation.

- Analyzing legal regulations that treat rights of minorities and state in the field, aimed at initiating changes of legal provisions and their harmonization with international standards of human rights;
- Protecting members of national minorities: Albanian, Montenegrin, Czechs, Italians, Jews, Hungarian, Macedonian, Germans, Poles, Roma, Rumanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, Ukrainians and others, fulfilling conditions from Article 3 (1) of the Law on Protection of Rights of National Minorities in BiH;
- Removing obstacles for consistent application of international conventions ratified by BiH.[526]

The Institution of Human Rights Ombudsman of BiH may be addressed by each natural person or legal entity that has legitimate interests, regardless of citizenship, race, gender, religious affiliation, or ethnic origin. Complaint filed with the Institution shall not cause any criminal, disciplinary or any other sanctions in disfavour of complainant.[527]

3. Constituent Peoples – Institutionalised Form of Discrimination

3.1. Discriminatory Constitution Providing for Non-discrimination

Let us take a look into the bizarre concept of constituent peoples. The very notion of *constitution* is developed from the Latin word *constitutio,* meaning "organization," "system," "frame," et cetera. Accordingly, the Latin word *constitutus* means "made" or "created". The term *constituent* might be roughly translated into local languages (B/C/S) as "creative" or "the one that creates/makes/does." *Constituent peoples* therefore are those

[526] http://www.ombudsmen.gov.ba/Default.aspx?id=12&lang=EN (23.08.2016.)

[527] Complaint is filed in writings, by mail, fax, e-mail or through personal contact. Complaint should contain brief description of events, facts or decisions that led to filing of complaint. Complaint must be signed by complainant or authorized proxy. Provision of copies of complaint supporting documentation together with the complaint is desirable, if such documentation exists. The Institution may refuse to review anonymous complaints for which it considers that they are malicious, ill-founded, those in which there is not actual complaint, those that would make damage to third parties or those that are filed more than 12 months following event, facts or decision subject to complaint. http://www.ombudsmen.gov.ba/Default.aspx?id=10&lang=EN (23.08.2016.)

(peoples) that the state's social quintessence is composed of.[528]

The Preamble of the Constitution of BiH defines Bosniacs, Croats, and Serbs as "constituent peoples" of BiH, while "others" and "citizens" are merely mentioned. Obviously, individual rights were granted to the three ethnic groups, but not to all citizens. The entities' constitutions ensured that discriminatory concept as such was applied throughout the country because Bosniacs and Croats were not considered to be constituent peoples in Republika Srpska (RS). In the same fashion, Serbs were left without that status in the Federation of BiH. All three peoples were constituent nations only at the state level. Unfortunately, these rights hardly existed at all as state prerogatives, such as in the police and the administration of justice that were bestowed in the two entities. All "others" who did not belong to any of the privileged, constitutionally recognized ethnic groups were lost along the road. Denying the status of constituent peoples to Bosniacs and Croats in the RS and/or to Serbs in the Federation of BiH is both in discord with the Constitution of BiH and has no historical justification, as it is well known that BiH was at all times multi-ethnic society *sui generis* and a paradigm of "unity and tolerance."[529]
At the same time, the Constitution of BiH provides for *non discrimination clause that reads as follows:*

> The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination 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.[530]

[528] Seizovic, Zarije, *Constitutuen Peoples and Constitutional Changes*, 2nd updated edition, Dobra knjiga, Sarajevo, 2014. p. 19.

[529] Seizovic, Zarije, *Bosnia and Herzegovina: Concord of Diversity – Compilation of Legal Essays,* Studio Flaš, Zanica, 2005, p. 11.

[530] Cited from: *The Dayton Peace Accords, General Framework Agreement for Peace in Bosnia and Herzegovina,* Paris, 14 December 1995, Office of Public Communication, Bureau of Public Affairs, U.S. Department of State.

Despite its [GFAP's] outstanding 'ceremonial achievements' in the field of human rights protection of individuals, the entire political structure of BiH is based on the principle of exclusive ethnic representation of the three 'constituent peoples' which, *de facto,* constitutes a disadvantage to the functioning of state and entity institutions whenever minority members of a constituent people feel like obstructing decision-making processes.[531] Ethnic, cultural, traditional, habitual, and other components of the complicated BiH social *milieu* is composed of a sophisticated net of *Bosnian concord of diversity*, so the territorial principle taken as a base to form an opinion on somebody's ethnic affiliation has neither theoretical nor practical rationalization. Thereby any idea and/or theory of "ethno-cantonisation" or any other "ethno-regionalisation," notwithstanding if it comes from "outside" or "inside," is absolutely incompatible with a multi-ethnic concept of the BiH society and entails latent threat to the survival of the State of BiH. Cantonisation, of course, might be a concept of internal institutional structure of the multi-ethnic state under the condition that it is a civilized state in which any form of diversity cannot be grounds for human rights violations.[532]

3.2. In the Ruling of the Constitutional Court of Bosnia and Herzegovina back in July 2000, the court took the decision to impose duty upon the Federation of Bosnia and Herzegovina and the Republic of Srpska[533] to amend their constitutions in order to ensure full equality of the three "constituent peoples" throughout the state territory.
As the Dayton Agreement's discriminatory concept of "one state/two entities/three constituent peoples" was politically unsteady, the decision put an end to the idea of recognising the right of the Bosnian Croats to establish their small *quasi*-state, as it required both entities to be really and efficiently multinational. Adversaries of the single Bosnian state pronounced the decision to run counter to the Dayton Peace Accords, while followers of the idea of a single state considered the decision as a breakthrough for institutionalizing improvements upon the existing Dayton political architecture that, to their opinion, had to undergo constitutional changes.

[531] Seizovic, Zarije, *Constitutuen Peoples and Constitutional Changes*, 2nd updated edition, Dobra knjiga, Sarajevo, 2014. p. 15.

[532]Ibidem, p. 24.

[533]The two Entities country is being composed of.

However, even though the decision denoted a significant step forward in recognizing the same constitutional position of all constituent peoples in every part of territory of the state, it did nothing in favour of improving the positions of the non-constituent population of BiH. With or without the decision, the constitutional position of the non-constituent peoples remained the same: they were still *non-constituent throughout the country*.[534]

3.3. Judgments of the European Court of Human Rights

In the case *Sejdić and Finci* v. *Bosnia and Herzegovina*,[535] the European Court of Human Rights established that the Constitution of Bosnia and Herzegovina contains discriminatory provisions. As such, the judgment constitutes legal and political disgrace as well as a strong strike upon its international position and renown of Bosnia and Herzegovina – even the position would be described as rather bad, not to mention its bad renown whatsoever. Having delivered such a judgment against it, the political establishment of any state belonging to the circle of "Western European Democracies" would mobilize all political powers and make all necessary efforts to amend the Constitution in order to harmonize it with the said judgment.[536]

[534] On constitutional position of „Others" see more in dr. Iur. Nedim Ademović, „Kritički osvrt na poziciju tzv. Ostalih u Ustavu BIHkroz sudsku praksu ustavnog suda BIHi Evropskog suda za ljudska prava u Strazburu" in Abazović, Dino et al (ed.), *Mjesto i uloga „Ostalih" u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu (Place and role of „Others" in the Constitution of Bosnia and Herzegovina and Future Constitutional Settlements for Bosnia and Herzegovina),* Centar za ljudska prava Univerziteta u Sarajevu, Sarajevo, 2010, pp. 125-140.

[535]European Court of Human Rights, Grand Chamber, Case *of Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, Judgment, Strasbourg, 22 December 2009. The same judgment ECtHR rendered in two similar cases: *Azra Zornic vs. Bosnia and Herzegovina,* Application no. 3681/06, Judgment, Strasbourg, 15 July 2014 and *Ilijaz Pilav v. Bosnia and Herzegovina, (Application no.* 41939/07), Judgment, Strasbourg, 9 June 2016.

[536] Seizovic, Zarije, *Constitutuent Peoples and Constitutional Changes*, 2nd updated edition, Dobra knjiga, Sarajevo, 2014. p. 43.

What are local politicians are doing with regards to implementation of the judgement in the case *Sejdic and Finci* v. *Bosnia and Herzegovina?* Nothing. The negotiations related to the future organization of the State are being held in restaurants throughout Bosnia and Herzegovina. In a rather arrogant and unacceptable manner, political talks are transposed from Parliamentary benches to restaurants, asserting ugly connotation of a tavern-like discourse in administering the state.[537]

Such unbearable indolence of ethno-national[538] political elites and the complete absence of any implementation of the judgment created the perception that Bosnia and Herzegovina is positioned *against* its citizens-Sejdić and Finci - taken as a paradigm to all citizens being discriminated against![539] The decision confirmed that the BiH Constitution contains a discriminatory concept that makes discrimination itself *institutionalised.*[540] Therefore, "the political practice in Bosnia can be rightly described as the *democracy of ethnic oligarchies,* not as *democracy of citizens."*[541]

Today's demographic structure of Bosnia and Herzegovina does not match

[537]Ibidem, p. 46.

[538]„Ethnopolitics is somewhat oximoronic term. The meaning of word *ethnos* implies pre-political category of the *people* referring to its blood origin, heritage, tradition [...] The ethnos is bes described as *kinship*", Mujkic, Asim, *We, the Citizens of Ethnopolis,* Human Rights Center of the University of Sarajevo, Sarajevo, 2008, p. 21. „In Bosnian case Ethnopolitics is very similar to *Religious nationalism".* Bosnian ethnic groups („constituent peoples") are basically formed along the religious lines as the onli „striking" difference between the communities. In fact, there is a little to their ethnicity besides their „religiousness", Ibidem, p. 23.

[539] Literally: *Bosnia and Herzegovina v. Sejdić and Finci.*

[540] In December 2009, European Court of Human Rights has declared State Constitution and Election law discriminating against Roma and Jewish population in BiH. *See:* Human Rights Watch, *Second Class Citizens: Discrimination Against Roma, Jews, and OtherNational Minorities in Bosnia and Herzegovina* (2012), p. 2. The judgement of the European Court has not been implemented almost seven years after it had been taken.

[541]Mujkic, Asim, *We, the Citizens of Ethnopolis,* Human Rights Center of the University of Sarajevo, Sarajevo, 2008, p.18.

pre-war percentages[542] or the Dayton electoral system, which does not provide for the huge number of citizens that do not identify themselves with the state, one of the constituent peoples, or who chose not to identify themselves at all. Citizens of a civic orientation represent *the fourth constituent people*.[543]

4. Conclusion

The international position and status of national minorities influences the position and status of national minorities in Bosnia and Herzegovina – both with regards to national minority protections as well as to the legal framework. According to records and experience of the OSCE, there is certain social and political marginalization of the Roma and Jewish population in Bosnia and Herzegovina. Roma population, traditionally, had not been subject to social inclusion, so remains of such status, despite acceptable legal framework, can be felt nowadays. As far as Jewish population is concerned, taking into consideration its traditional position, level of inclusion is much higher in comparison to Roma population. Yet, there is also evident discrimination that both national minorities have in common due to systemic error of the Dayton constitutional settlement. In

[542]Statistics show that the 1991 census national break-down was the following: 43,7% Bosniacs, 31,3% Serbs, 17,3% Croats and 7,7% of Others.

[543] International Crisis Group (2012) *Bosnia's Gordian Knot: Constitutional Reform*, Policy Briefing Europe N°68 Sarajevo/Istanbul/Brussels, p. 13. There are opinions that the term „Others", „due to dominant ethnic pattern [...] refers to ethnic minorities: Roma, Jewish, Ukrainians, Czech and others that live in BiH" – *see:* Asim Mujkić, „Ostali – Četvrti konstitutivni element ili strategija demokratske transformacije?", in Abazović, Dino et al (ed..), *Mjesto i uloga "Ostalih" u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu (Place and role of „Others" in the Constitution of Bosnia and Herzegovina and Future Constitutional Settlements for Bosnia and Herzegovina),* Institut za društvena istraživanja – Fakultet političkih nauka Univerziteta u Sarajevu, Sarajevo, 2010, p. 80.). It has to be stressed that *civic principle* of organizing state and power as well as advocating „effective" state model definitely are not inherently neutral institutional positions. Those features are being inwrought into political conflict of dominant political encampments in which the Bosniak side, at least formally, enjoys support to its political position. On the other side, Bosnian Serbs and Bosnian Croats in any such manoeuvre, which they consider rhetoric, see potential undermining of their political elite position, but also undermining the *multi-ethnic* principle.

any "normal" European country governed by democracy and the principle of the rule of law, such institutional social exclusion of and discrimination against national minorities (referred to as "Others") would be ephemeral or would not take place at all.
The position of national and "constitutional" minorities is intolerable, especially in light of the judgement of the European Court of Human Rights in case *Sejdić and Finci v. Bosnia and Herzegovina,* and two other cases in which the Constitution of Bosnia and Herzegovina was declared to be discriminatory as to participation of the minority populations that applicants were affiliated with. Almost seven years of impolite limbo has passed in which almost nothing has been done in order to abolish "institutionalised discrimination." On the contrary, the concept of constituent peoples, especially in the sphere of political participation, is being additionally affirmed and emphasised. It is obvious that "[n]ational homogenization will still remain the main obstacle to political and economic reintegration of the […] society and will be playing significant role in continuing disintegration processes throughout the country while national (ethnic) identity will very likely be almost sole identification model for the […] citizens."[544]

Under the current constitutional set up, it appears that when ethno-national identity is taken as the only (or the strongest) source of citizen identification, and when 'constituent peoples' is held as a constitutional category, the State is essentially non-functional. After the conducting of general elections in BiH and the establishment of a new government, it seems inevitable to conduct a political, constitutional, and judicial review of the Constitution provisions (the entity constitutions included as well) in order to inaugurate and promote of a 'civil' discourse and to negate a national/ethnic discourse. It seems important to emphasize that this is not the sole discretion of the state of BiH, but it has an international and legal obligation to harmonize its legislation and, above all, it's Constitution, with European standards, as directed by the verdict of the Court in Strasbourg. If it fails to do so, BiH risks remaining on margins of Euro-

[544] Zarije Seizovic, "Human Rights Protection in Bosnia and Herzegovina, within the Framework of the Dayton Peace Accords with Special View to Non-Discrimination Policy", essay written in the course of Summer School "Post-Communist transition and the European Integration Processes", organized by *Instituto per l'Europa Centro-Orientale e Balcanica* – International Network Europe and the Balkans and Italian Ministry of Interior in Cervia, Italy, 4-16 September 2000, p. 12.

Atlantic integrations, for which any functional state striving to join must have a perfectly organized system of government, rule of law, and protection of individual rights and freedoms.

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