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

**COMMENTS**

**ON PROTECTION OF NATIONAL MINORITIES  
AND ELECTIONS**

by

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

**I.**

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

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

3. At the end of the discussion the author of the present comments was instructed to prepare a paper on the issue raised by the two documents examined.

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

**II.**

5. In its document the Office of the HCNM underlined that ideally, in a well integrated society, persons belonging to minorities are members of or vote for parties which are not organised on ethnic lines but are sensitive to the concerns of minorities. However, in certain situations where people vote along ethnic, linguistic or religious lines and a certain minority is structurally not represented or underrepresented, it might be necessary to establish mechanisms to facilitate or guarantee the election of minority representatives in the view of reducing tensions. There exists a variety of mechanisms and dual voting for persons belonging to national minorities is one of them. However the situation is different in each country and the consideration of the question of dual voting for persons belonging to minorities should be assessed in the light of the existing demographic, political and historical circumstances in each case.

6. In her observations Ms Josette Durrieu noted that dual voting raises the problem of its compatibility or incompatibility with the principle of equality and the principle of non discrimination. However the case law based on the European Convention on Human Rights affirms that measures in favour of minorities which provide for differential treatment must remain reasonable and that the general principle of strictly equal suffrage must be complied with. Possibilities, which are deviations, exist but States have less flexibility for deviating from the general "one person one vote" principle of equality than for adapting their electoral system. There are alternatives to dual voting in order to ensure effective participation by minorities in public affairs and dual voting is not required by art. 15 FCNM.

### III.

7. According to art. 15 FCNM "the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic a life and in public affairs, in particular those affecting them". The explanatory report underlines that the provision is aimed "above all to encourage real equality between persons belonging to national minorities and those forming part of the majority". *Inter alia* the following measures are listed to create the necessary conditions for the participation by persons belonging to national minorities:

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

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

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

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

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

#### IV.

12. The Venice Commission has frequently dealt with electoral matters in the field of the protection of national minorities.

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

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

15. According to a principle frequently stated by the Commission also in other documents, special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

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

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

18. Number, size and magnitude of the electoral districts may be designed with the purpose to enhance the minorities' participation, not only but especially in territories where national minorities represent a substantial part of the population. In these cases the delimitation of territorial entities (constituencies, municipalities) may favour the representation of the national minorities and prevent the dispersal of their members.

19. In this perspective, if it is necessary to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative subdivisions as well as into electoral constituencies (CDL-INF(1996) 4, Opinion on the interpretation of Art. 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly), "the more proportional an electoral system, the more it allows minorities, even dispersed ones, to be represented in the elected body" (CDL-INF(2000)4, Electoral law and national minorities). Therefore, "conditions for participation in local elections should be attuned to the local situation and should not be subject to any condition related to representation at national level" (CDL-AD(2004)040, Opinion on the law for the election of local public authorities in Romania ).

#### V.

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

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

22. Different arrangements of the electoral system should facilitate minority representation:

- in presence of minorities concentrated territorially single member districts may provide sufficient minority representation;
- proportional representation systems may assist in the representation of minorities,
- some forms of preference voting may facilitate minority representation in connection with ranking candidates in order of choice by voters;
- lower threshold may enhance the inclusion of national minorities in governance;
- geographic boundaries of electoral districts should facilitate equitable representation.

These suggestions should be adopted at the national level as well as at the regional and local levels.

## VI.

23. The case-law of the European Court of human rights is taking in consideration the problem in the frame of the general legal system: therefore, on the one side, it is very careful to the compliance with the principle of equality and, on the other side, it agrees that the States have in the matter a great margin of appreciation and are allowed to balance the requirement of the protection of the minorities with the national, traditional constitutional and electoral arrangements. But the principle of equality has to be interpreted with some flexibility: "what must be guaranteed is the principle of equality of treatment of all citizens; without however that it follows that all votes must necessarily have equal weight as regards the outcome of the election" (*Silvis Magnago and Südtiroler Volkspartei v. Italy*; *Mathieu-Mohin & Clerfayt v. Belgium*). This conclusion can open space to a policy of reverse discrimination if a legitimate aim is pursued and the free choice of the electors is not thwarted (*Podkolzina v. Latvia*).

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

## VII.

25. We are confronted with two different alternatives in dealing with the problem of the participation of national minorities in public life: we can adopt arrangements which favour that participation without conflicting with the general principles in the electoral field, or we can, instead, prefer solutions which imply exceptions to these general principles.

26. For instance, the choice of the proportional electoral system may insure an effective participation even when no exception is introduced to bypass the general principles of the system. But obviously when a threshold is introduced, the provision for a lower threshold for the national minorities parties implies special exceptions to the rules which are generally applied.

On the other side, single member electoral districts in areas where territorially concentrated minorities are present, may imply a special exception only if the number of electors assigned to the minority electoral districts are not complying with the criteria of the general distribution of voters in the electoral districts provided for by the general rules of electoral law.

27. As a matter of fact special provisions for the minority participation don't conflict with the principle of equality: they are examples of reverse discrimination. Therefore they have to be justified according to the principle of proportionality, it means that they don't violate the principle of equality if and as far as they are necessary to cover the gaps and difficulties which endanger the participation of minorities in the public life.

28. The States have in the matter a large scope of appreciation: they have the freedom of choosing between many different solutions. The international practice does not oblige them to adopt one or another specific solution, they have to take care of the participation of the minorities in the public decision-making processes according to their choices but in any case they are required to comply with their constitutional principles when these principles are dealing with the matter and give specific guidelines for the solution of the problem. Therefore the States are allowed to adopt solutions which are coherent with their constitutional systems by choosing arrangements which are the development and the implementation of the principles of those constitutional systems, or they can introduce special exceptions to these principles according to the principles of rationality and proportionality.

29. The establishment of electoral districts with the purpose of increasing minority participation can imply the creation of one (or more) single member district(s), if there is only one territorially concentrated minority; if there are more than one minority it could preferable adopting the proportional electoral system.

30. If a State has a newly established democracy after many years of totalitarian regime and of repression of the minorities, which were deprived of all the internationally required protections, it could be advisable providing for reserved seats for the minorities in the elective assemblies. But this solution does not favour the integration of the minorities in the general societies, especially if the members of a minority are not allowed to make a choice between different political parties when the seat or the seats are reserved only to a political party which pretends to be the exclusive representative of the minority. Therefore the research of a solution has to be made not only balancing the rights and interests of the persons belonging to a national minority with the rights and interests of the people at large, but also balancing the rights and interests of the persons belonging to a national minority with the rights and interests of the minority as a group or a community.

31. History is especially relevant. When in the past, for instance in an old democracy, there was free adherence of a minority or of a part of it to national political parties, irrespective of its ethnic identity, and, therefore, the integration in the general society was in progress, it could be preferable avoiding to reserve a seat to political party representating a minority, but it could be better to assign the seat, which is reserved to the minority, to the person belonging to the minority who, as a candidate, got a proportionally larger support in a national political party than other candidates of other national political parties, equally belonging to the minority. This can be a way of balancing the requirement of the integration of the minority in the national society at large and the necessity of insuring the presence of the national minorities in the national decision-making processes.

32. The dual voting system for persons belonging to national minorities can reconcile the requirement of providing for a reserved representation of a minority, especially if a State comes from a totalitarian experience, with the necessity of favouring the integration of the minority in the national political life. It is another example of reverse discrimination which can be justified by the history of a country, especially if it is provided for as a temporary arrangement at least until the effects of the repression and of the totalitarian regime are satisfactorily (even if only partially) cancelled. On the one side, the minority has the guarantee of being represented in the public affairs, and, on the other side, the persons belonging to the national minorities are

allowed to take part in the national political debate. But, obviously, the freedom of political expression has to be provided for not only in the vote for the general national representation, but also when the elections for the reserved seats are at stake: it could be particularly helpful if more than one political party representative of a minority were allowed to run in the election for the reserved seat.

33. In all the solutions providing for reserved seats for persons belonging to national minorities there is danger because the interested persons are obliged to declare their ethnic or linguistic identity. The danger cannot be avoided. Therefore it is necessary that the guarantee of the human rights and fundamental freedoms at large is provided for by the national legal system.