



Strasbourg, 13 September 2007

CDL-EL(2007)025*

Study No. 387 / 2006

Or. Fr.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**COMMENTS ON THE
NOTE OF THE OSCE HIGH COMMISSIONER ON NATIONAL
MINORITIES TO A VENICE COMMISSION STUDY ON DUAL VOTING
FOR PERSONS BELONGING TO NATIONAL MINORITIES**

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INTRODUCTION

The problem of minority rights arose from the new political landscape that followed the dissolution of Europe's major multi-ethnic empires, from Austria-Hungary and the Ottoman Empire to the break-up of the Soviet Union.

As a result of these developments, numerous population groups and peoples laid claim to various distinctive features - linguistic, ethnic, religious, cultural and even legal – within the often geographically small **nation states** to emerge from the treaties of 1918-19 and the armistices of 1945. Such groups and peoples were often divided by the **frontiers** laid down in these international agreements.

Numerous **groups of persons**, therefore, either live on either side of so-called national frontiers or are isolated as **national minorities**, and acknowledge few or no links with the governing institutions of the territory in which they are settled.

- **From the standpoint of political advisability**, the very principle of recognition of national minorities and means of safeguarding their rights is open to discussion. This "advisability" is a matter for discretion.
- **Integration**: 'The aim of "integration with respect for diversity" is central to the work of the HCNM' (HCNM note, paragraph 24). In order to **reduce tension**, it is quite reasonable to establish machinery **to facilitate or safeguard minority representation**.
- However, It should be **noted** that a certain mechanism may help to reduce tensions in one country whereas the same mechanism may create tensions in another. **Each case varies according to the specific demographic, political and historical circumstances.**

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

I. The Council of Europe and minority rights

European standards

The right to vote and to stand for election is enshrined in:

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

Article 14 of the Convention is crucial.

It proscribes any distinction in the exercise of these rights "on any ground such as sex, race, colour, language, religion, political or other opinion,

national or social **origin, association with a national minority**, property, birth or other status.”

This article therefore establishes **the universality of the rights embodied in the Human Rights Convention**. It should be noted that ratification of the Framework Convention for the Protection of National Minorities is optional for Council of Europe member states but this is not the case with the Human Rights Convention.

The **47 member states had to** ratify it in order to join the Council.

It therefore follows that **persons** belonging to **national minorities** and residing in one of the 47 member states enjoy **all the rights specified** in the Human Rights Convention, and in particular those in **Article 14**. They may not be discriminated against in **the exercise of these rights** and the European Court of Human Rights may be asked to rule against any infringements of them.

Minority rights therefore enjoy extensive and real protection. The Human Rights Convention does **allow STATES to restrict the exercise of recognised rights**, but such restrictions must be prescribed by law, proportionate and necessary for public order or to protect the rights and freedoms of others.

These restrictions must be subject to **judicial review** and it is **the European Court of Human Rights** that determines whether they meet the formal and substantive requirements, are proportionate and do not discriminate, particularly with regard to Article 14 of the Convention.

➤ OBSERVATIONS

Unlike the OSCE, the Council of Europe has a standard text, the European Convention on Human Rights, which specifies a list of protected rights, and a judicial body, the European Court of Human Rights, to rule on alleged infringements.

The Council of Europe would be ill-advised to weaken both:

- **the fundamental principle of democracy**
and equality of the right to vote
- **the principle of the universality of human rights** and fundamental freedoms embodied in the 1950 Convention and enforced by the Strasbourg Court

Recognition of **dual voting** by persons belonging to national minorities would have such a weakening effect because it would breach a key principle of the democratic system:

- by creating **citizens** who were more equal than others - positive discrimination
- by creating **special rights** that infringed the **universality principle**

Paragraph 9 of the **HCNM note also refers to other fundamental texts:**

"Electoral mechanisms should be compatible with the principle of equal suffrage, as guaranteed by Article 25 ICCPR (in conjunction with Article 2 ICCPR) and by Article 3 Protocol I ECHR (in conjunction with Article 14 ECHR)."

The key provision is Article 3 of the first Protocol to the Convention, which provides for free elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

II. General tone of the HCNM note

Prudence but a clear position

- **Prudence:** aim of "further clarifying the position of the HCNM" (paragraph 2 of the note), after considering Mrs Durrieu's initial comments to the Council for Democratic Elections and the Sub-Commission for the Protection of Minorities. This note of the HCNM Bureau aims at **providing fresh input** to the examination of **the topic of dual voting** for persons belonging to national minorities.

The issue "is a complex one which deserves careful consideration" (paragraph 4)

According to paragraph 5, the issue will probably continue to come up in the work of the HCNM.

- The method used

Examination

- first, of the international legal framework: machinery to improve minority participation in public affairs
- then of the compatibility of this mechanism with the principle of equal suffrage
- finally, draw certain conclusions concerning **conflict prevention**.

- HCNM position

1. Insist on compatibility with the equality principle

- The one person, one vote principle

Paragraph 9: "Electoral mechanisms should be compatible with the principle of equal suffrage, as guaranteed by Article 25 ICCPR (in conjunction with Article 2 ICCPR) and by Article 3 Protocol I ECHR (in conjunction with Article 14 ECHR). The principle of equal suffrage entails two aspects: first, **the principle of equal numerical value of votes ("one person one vote")** and second, **the principle of equal effect of the votes.**"

Paragraph 10:

Paragraph 11: "each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes."

- **The effect of the votes**

Paragraph 12: "The method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."

Paragraph 13: "seats must be evenly distributed between the constituencies."

Paragraph 14: "This means, for example, that when the effect of votes is skewed by gerrymandering, discriminating against certain groups of voters or otherwise devoid of all factual justification, this violates the principle of equal suffrage."

2. Defending the "one person, one vote" principle

Paragraph 15: "It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes'."

Paragraph 16: "According to the right to dual voting of persons belonging to minorities ... is quite exceptional".

"States enjoy less flexibility in altering the "one person, one vote" principle, than in designing the methods that translate votes into seats of parliament".

Possibility of restriction (on the right to equal vote): if it pursues a legitimate aim and is not disproportionate. **Votes need not necessarily have equal weight as regards the outcome of the election** (Mathieu-Mohin & Clerfayt v. Belgium judgment, in connection with so-called "amplifier effects").
"Such a mechanism must not thwart "the free expression of the people in the choice of the legislature".

3. Encouraging mechanisms which indirectly favour minority representation

Paragraph 7: "All mentioned documents show that there are a **variety of mechanisms** to implement the right to effective participation in public affairs".

- ✓ **Electoral systems such as proportional representation** may favour minority representation.
- ✓ **Exemption from the voting thresholds** directly favours or even guarantees minority representation.
- ✓ **Reserved seats** favour minority representation.

III. Assessing the arguments and proposals concerning dual voting in the HCNM note

1. Dual voting

Dual voting has been considered by several legal bodies and **discussed by certain countries as a possible option.**

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

As yet there is no case-law on whether **dual voting rights for minorities** is incompatible with any conventions.

- **In Cyprus**, minority representatives belonging to religious groups only have observer status and are consulted on matters relating to religion.
- **In Croatia**, dual voting rights are granted to national minorities that constitute less than 1.5% of the population. They elect four representatives and also have a normal right to vote in general elections. Serbs and other minorities who make up more than 1.5% of the population only have one or more guaranteed seats.

The freedom of the electorate to express its opinion presupposes – as is only reasonable - equality of votes.

Freedom and equality go hand in hand.

If some voters carry more weight than others, how can the people express themselves freely?

2. State flexibility

The courts grant states a wide margin of discretion in electoral matters. Votes need not necessarily have equal weight as regards the outcome of the election (Mathieu-Mohin & Clerfayt v. Belgium judgment, 1987).

This applies to:

- **the choice of voting system**

The judicial bodies of the ECHR have found the great majority of electoral systems to be compatible with the Convention:

- Proportional representation or majority voting

- Simple (one round) or relative (two round) majority voting
- Two stage or indirect voting (as in the case of French senatorial elections by an electoral college made up of elected members)

The question arises as to whether the Court of Human Rights might find such a system of indirect suffrage, in which voting is restricted to certain "privileged" citizens, even if they are elected members, to be incompatible with the Convention, since in practice it deprives the great majority of the population of the right to vote.

- Single transferable or alternative voting, in which citizens receive two or more votes, which promotes co-operation between communities.
- **how votes are translated into seats, in accordance with the equal suffrage principle of one person one vote.**
Exceptions, restrictions and variations are accepted if their purpose is lawful and necessary and the method chosen is proportionate to the outcome sought.
According to the Court of Human Rights, **such alternatives** permit different treatment of minorities to enable them to participate effectively in public life.

➤ **Observations**

1. The HCNM note makes a number of proposals

Paragraph 21: reserved seats

Paragraph 24:

- two or more votes for all citizens
- single transferable vote (proportional)
- alternative vote (majority system)

Paragraph 7: Exemption from the voting threshold

Paragraph 13: Distribution of the constituencies

Under Article 14 of the Convention taken in conjunction with Article 3 of the first Protocol, these proposals undoubtedly entail positive **discrimination**.

However, the courts recognise **the lawfulness of such discrimination** if it is for a lawful purpose and the means used are not disproportionate to the objective sought. **Whether such measures are legitimate is a matter for states' discretion.** Differences of treatment would probably only be disproportionate where **the voting inequalities** were significant.

2. Time limits on such measures

If they are judged necessary, such exceptions, restrictions or reservations of seats on behalf of minorities should only be transitional, assuming that the measure is effective in the short term.

The long term interests of minorities and of countries as a whole are better served by representation under the **ordinary electoral system**, which grants all citizens equal rights irrespective of the group to which they are initially affiliated.

Conclusion

The debate and exchanges of views between the Venice Commission and the HCNM have certainly helped to progress matters and bring the two sides closer together.

However, we wish to repeat that the development of the argument in the body of the note is clearer than the conclusion.

The note abandons caution and **puts forward arguments that are unfavourable to dual voting**, strictly defends **the equal suffrage** principle of one person one vote, states that **the integration of minorities** while continuing to respect diversity is "central" and rings an "early warning" (paragraph 23) to indicate that it is a "conflict prevention strategy" (paragraph 25).

The conclusion introduces a number of surprisingly contradictory notions. The tone of some of the discussion, such as that dual voting may be "justified" or constitute a solution, is not consistent with the way the arguments are developed in the note.

The arguments developed in the note, which we support, include:

1. Strict compliance with the fundamental principle of equal suffrage:

one person, one vote

States have little scope for altering this principle.

There are two aspects:

- Parity in vote counting - one person, one vote
- The effect of the votes - the vote of one elector should be equal to the vote of another.

Dual voting is incompatible with this principle. It gives certain votes greater weight.

It represents a deviation from the basic principle that does not appear in Article 15 of the Framework Convention for the Protection of National Minorities.

2. State flexibility

States may deviate from the equal effect of votes principle by adapting their electoral systems in a legitimate fashion and adopting special systems on behalf of minorities if their purpose is lawful and necessary and the method chosen is proportionate to the outcome sought.

The HCNM note makes a number of proposals.

According to the case-law of the European Court, preferential treatment to assist minorities must be reasonable and limited in time.

3. Integrating minorities

Generally speaking, the HCNM considers the integration of minorities into society to be the best conflict prevention strategy.

It also seems unlikely that granting dual voting rights to a "privileged minority" will improve their relations with other citizens. Indeed, such a privilege, in the legal sense of the term, could lead to conflict.

"A certain mechanism may help to reduce tensions in one country whereas the same mechanism may create tensions in another" (paragraph 25 of the note).

The HCNM considers that its task is to provide "early warning" (paragraph 23) and take action at the earliest possible stage in regard to tensions involving national minority issues that have the potential to develop into a conflict within the OSCE area.

"Effective participation of minorities in public affairs is key to a stable and peaceful society."

"The aim of integration with respect for diversity is central" (paragraph 24) and is a "conflict prevention strategy" (paragraph 25).

Finally:

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

This might lead other countries to accept greater autonomy for their minorities. However, there also counterexamples, such as Belgium, which is currently experiencing great difficulties, or the rejection of the Annan plan by Cyprus.

- Consideration needs to be given to the state of Europe and its evolution.

The break-up of multi-ethnic empires and the increasing number of identity-based demands in the Council's 47 member states, including the examples of Kosovo, Chechnya, Transnistria, South Ossetia and Abkhazia, are all grounds for caution. The threat of terrorist violence, as in the Basque Country, or of Balkan-style ethnic cleansing are also sad realities.

The only way of responding satisfactorily to minority claims is to enforce the rights embodied in the European Convention on Human Rights and abide by the case-law of the European Court.