

Strasbourg, 28 January 1993

Restricted
CDL-MIN (93) 2

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**THE PARTICIPATION OF PERSONS BELONGING
TO NATIONAL MINORITIES IN THE OPERATION
OF DEMOCRATIC INSTITUTIONS**

Report prepared by Stéphane Pierré-Caps
Senior Lecturer in public law
at the University of Metz

as part of the Project "Human Rights and Genuine Democracy"

Summary

To what extent are citizens belonging to national minorities involved in the national and local political life of democratic states? What means are usually employed and what might be the most appropriate instruments for taking into account the distinctiveness of minorities while preserving the unity of the state?

To answer these questions it is first necessary to reflect upon the very concept of democracy. While majoritarian democracy should offer all citizens the same protection, the function of "consociational democracy" will be to adapt political institutions to the situation of a multinational society. On this basis, persons belonging to national minorities may participate in the operation of democratic institutions may thus be of two kinds: joint management of affairs common to the national group as a whole, and self-management of the minority group's own affairs. Autonomy may thus be contrasted not only with assimilation but also with self-determination.

Despite their variety, one has to acknowledge the inappropriateness and imperfection of the constitutional and legislative solutions adopted, stemming from the methods of voting and of ensuring representation of minorities, as well as from the systems of self-government applied, which appear to be linked too closely to local conditions. The search for an overall solution seems to depend primarily on the principle of legal personality, the only one capable of reconciling the political unity of the state and the diversity of its national society. It is on this condition that the single transferable vote might represent an appropriate method of voting, as might the widespread introduction of the system of personal autonomy, which has been rediscovered in Estonia and to which Hungary is currently turning.

INTRODUCTION
THE FRAMEWORK OF PARTICIPATION
MAJORITARIAN DEMOCRACY AND CONSOCIATIONAL DEMOCRACY

The participation of persons belonging to national minorities in the operation of democratic institutions takes place within a framework which must first be defined and which is represented by the concept of democracy.

For this purpose, democracy is regarded not only as an ideal form of government, but also appears as an "empirical and rational method of political decision-making"¹. American political science has accounted for this second aspect by making use of the more neutral concept of "polyarchy"², which finds expression mainly in majoritarian democracy.

The basic guarantees of majoritarian democracy are necessary for the participation of persons belonging to national minorities in the operation of democratic institutions. However, that is not a sufficient requirement bearing in mind the propensity to uniformity of the majoritarian methods of democratic regulation when confronted with ethnic, cultural, linguistic or religious divisions, which are the very basis for the existence of national minorities. Hence the introduction of the concept of "consociational democracy" - coined by Arend Lijphart³ - as a corrective for use by plural national societies.

1. A necessary framework: majoritarian democracy

According to Robert Dahl, every polyarchic system or majoritarian democracy should combine eight institutional guarantees: freedom to form and join organisations; freedom of expression; the right to vote; eligibility for public office; the right of political leaders to compete for support and votes; alternative sources of information; free and fair elections; and institutions for making government policies depend on votes and other expression of preferences⁴.

To these should be added the guarantees relating to human and civic rights and the rule of law, in particular the principles of equality and non-discrimination.

Any constitution worthy of the name should subscribe to such standards of majoritarian democracy while also facilitating access to all the political rights of citizenship. By definition,

1. C Emeri, *Droit constitutionnel et institutions politiques*, Paris, Les Cours du Droit, 1990-1991, p. 117.

2. Cf. R A Dahl, *Polyarchy, participation and opposition*, New Haven and London, Yale University Press, 1971, 257 p.

3. A Lijphart, *Democracy in plural societies. A comparative exploration*, New Haven, Yale University Press, 1977, 248 p.; *Democracies. Patterns of majoritarian and consensus government in twenty-one countries*, New Haven, Yale University Press, 1984; *Majority rule versus democracy in deeply divided societies*, *Politikon*, 4 (2) December 1977; cf. also Kenneth D McRae (ed.), *Consociational democracy. Political accommodation in segmented societies*, Toronto, 1974, 311p.

4. *Op. cit.*, p. 3.

however, majoritarian democracy is only concerned with citizens individually in their relationship to the state. The polyarchic system therefore has difficulty in coming to terms with a heterogeneous national society. Furthermore, the instruments of majoritarian democracy and of the state governed by the rule of law can be used as techniques for assimilating national minorities and, hence, imposing uniformity on national political society.

This is the French approach, for example, as recently outlined by the French delegation to the United Nations Commission on Human Rights: "France's ideas" are based on a universal principle: all human beings are born free and equal in dignity and in law. The French Constitution draws on this principle, and under the Constitution all citizens of the Republic, which is one and indivisible, are equal before the law. The unity of the French people⁵ and the equality of citizens rule out any possibility of a distinction based on ethnic criteria"⁶.

Recourse to consociational democracy will thus make it possible to adapt the features of majoritarian democracy to national pluralism.

2. An essential corrective: consociational democracy

The numerical basis for underlying majoritarian democracy has to be adjusted when the latter is applied in a heterogeneous national society, in the same way as the constitutional principle of equality "does not prevent a law from laying down non-identical rules with regard to categories of persons in different situations"⁷. That is the purpose of the generic concept of consociational democracy, found chiefly in Switzerland and, to a lesser extent, in the United States.

Consociational democracy is thus based on a "set of institutional mechanisms and arrangements enabling a modus vivendi to be established in deeply divided societies"⁸. It is based on the principle of the search for a balance between the constituent parts of a national society. This will take the form of power-sharing on the basis of the balance thus achieved and its organisation will depend on the combination of two principles: first, co-management of common affairs, ie national affairs; second, self-management of the national minority's own affairs.⁹

5. *It will be recalled in this connection that the Constitutional Council, in its decision no. 91-290 DC of 9 May 1991 on the Law establishing the status of the territorial community of Corsica (JORF, 14 May 1991, pp. 6350-6354), specified that "the legal concept of the "French people" has constitutional value"; S Pierré-Caps, Le Conseil Constitutionnel, gardien de l'identité française, RSAMO, no. 31, pp. 141-151.*

6. *Quoted in Z Ilčić, Report of the working group on the rights of persons belonging to national, ethnic, religious and linguistic minorities, E/CN4/1991/53, 5 March 1991, p. 6.*

7. *Constitutional Council, no. 79-107 DC, 12 July 1979, R, p. 31.*

8. *B de Witte, Minorités nationales, reconnaissance et protection, Pouvoirs, no. 57-1991, pp. 126-127.*

9. *This duality was already present in the concept of personal national autonomy developed by the Austrian lawyer and politician Karl Renner: "Das Selbstbestimmungsrecht im Innern ... das Mitbestimmungsrecht im ganzen ..."; in Das Selbstbestimmungsrecht der Nationen, Leipzig and Vienna, Franz Deuticke, 1918, pp. 24-25.*

It is with reference to these two principles that one should assess the various constitutional and political experiments designed to ensure the participation of persons belonging to national minorities in the operation of democratic institutions.

PART ONE: CO-MANAGEMENT OF COMMON AFFAIRS

This can be studied at both national and local level.

A. National level

The participation of persons belonging to national minorities in affairs of national interest has to be secured through national elections. This is a particularly sensitive issue as the organisation of elections, the choice of the method of voting and the procedure for allocating seats are assimilation techniques par excellence. It will thus be sufficient to combine electoral law with a restrictive right of citizenship or even stringent residence requirements in order to exclude potential minority voters, as, in this last instance, in Northern Ireland, where immigrants from Eire cannot vote in the seven years following their arrival.

However, the use of a particular method of voting can also produce opposite effects to those originally expected. This was the case in the Bulgarian elections of 13 October 1991, which were organised according to the list system of proportional representation instead of the mixed system used previously. The setting of a minimum figure of 4% for obtaining seats was designed to limit the number of parties represented in Parliament. For this purpose, calculations were based on the national vote count in order to increase mathematically the proportional effect of the conversion of votes into seats. But this national vote count also gave an advantage to the Muslim minority in constituencies in which it is itself in the minority by encouraging it to present a Movement for Rights and Freedom list, whereas a vote count by constituency would have excluded it from parliamentary representation¹⁰.

It will also be noted that most constitutional texts leave it to the law to organise the electoral process. From this point of view, it would be desirable for the constitution to contain a number of basic provisions designed to guarantee the representation of national minorities. Some constitutions have already adopted this approach, such as the Romanian Constitution of 8 December 1991, Article 59-2 of which provides for the allocation of a member's seat to each organisation of citizens belonging to national minorities if they fail to obtain the number of votes needed to be represented in Parliament¹¹; similarly, the Slovenian Constitution of 23 December 1991 reserves one seat each in Parliament for the Italian and Hungarian minorities.

Is there any method of voting which is particularly conducive to minority representation? To answer this question it will first be necessary to review the systems commonly used.

a) Survey of voting systems allowing for minority

10. Cf. B Owen, *Les modes de scrutin de l'Europe du Centre et de l'Est: les influences à l'oeuvre*, Association française de science politique, 4th Congress, 23-26 September 1992, pp. 27-28.

11. *With the proviso, however, that the citizens of a national minority may only be represented by one organisation.*

representation

In a study published in 1978¹², Mrs Claire Palley attempted a survey of the various possible electoral solutions. It covers proportional representation systems, bicameral systems with community representation (Fiji), unitary bicameral systems with regional representation (Spain and, to a lesser extent, Italy), systems with a special legislative structure (the Communal Chambers of the 1960 Cypriot Constitution and the Community Councils stemming from the 1980 revision of the Belgian Constitution) and the single-ballot proportional representation system combined with community representation in a single electoral college, adopted in Lebanon following the National Covenant of 1943. To these should be added the system of separate lists and seats, which is particularly well-suited to the specific representation of autochthonous peoples (eg in New Zealand, where 4 seats have been set aside for the Maoris since 1867; similarly, Article 28 of the Danish Constitution sets aside two seats for Greenland and two seats for the Faroe Islands in the Folketing); and also the system of joint voting and proportional representation of community seats, under which the number of national seats reserved for each community is determined in advance. This is the case in China, where Article 59 of the 1982 Constitution stipulates that national minorities must be represented in the National People's Congress in an appropriate proportion, set at 12% by the Electoral Law of 10 December 1982, ie twice what proportional representation should have given them.

These various systems have at least two major disadvantages: on the one hand, it is difficult to export them outside the specific situations to which they apply; on the other, they all involve, in varying degrees, a risk of isolating of minority groups from national political life. There is, however, one solution that can be adopted, whatever the particular type of minority situation, and which offers the advantage of guaranteeing appropriate representation of minority groups while maintaining the participation of persons belonging to national minorities in national political life: it is the single transferable vote.

b) A solution: the single transferable vote (STV)¹³

Still known as the Hare system, this method of voting is used in Eire and in Northern Ireland, in the state of Tasmania in Australia and in some American local elections. It operates in a constituency where there are at least three seats to be filled and where the voter, although voting for only one candidate, is allowed to note on his ballot paper a second, third ... nth candidate to whom his vote will be transferred if the preceding candidate obtains the number of votes required to be elected.

This variant of proportional representation tends to exclude party influence and to give priority

12. C Palley, *Constitutional law and minorities, Minority Rights Group, Report no. 36, 1978, London, 23 p. (new edition 1982).*

13. Cf. A Lijphart and B Grofman (ed.), *Choosing an electoral system. Issues and Alternatives, New York, Praeger, 1984, 273 p., in particular: G H Hallet Jr., Proportional representation with the single transferable vote: a basic requirement for legislative elections, pp. 113-125; A Lijphart, Trying to have the best of both worlds: semi-proportional and mixed systems, pp. 207-213.*

to the personal element in the choice of elected representatives¹⁴, which is essential in a constituency where several national groups live side by side. The practical disadvantage represented by the time taken to count the votes can be offset by the use of computers. The widespread adoption of the STV system in plural national societies could thus be a guarantee of consociational democracy.

B. Local level

The decentralised management of national affairs is of direct concern to minority groups when they are confined to a clearly defined territory. It is for this reason that the CSCE seminar on questions relating to minorities held in Geneva in July 1991 laid particular emphasis on the need for constitutional guarantees of local self-government through freely and fairly elected consultative, legislative and executive bodies.

For example, seats on municipal councils could be reserved in given proportions for national minorities, but on condition that the municipal ballot remains a joint ballot. This is the case with the Slovenian Constitution, which guarantees representation of the Italian and Hungarian minorities on local organs of self-government.

However, the Hungarian system is undoubtedly the most original. The Hungarian law of 1990 on the election of mayors and local councillors concerns itself with the situation of minorities at an earlier stage, namely that of dividing the municipality into wards, when "account shall be taken of local ethnic characteristics, religions, historical and other features" (Article 10-2)¹⁵. In addition, Chapter 11 of the law is devoted entirely to the protection of the rights of national and ethnic minorities; it guarantees the specific expression of minorities' views in local elections and the allocation of local seats to lists of national minorities which have failed to obtain any representatives on the basis of the election results, through a complex vote counting system (Articles 48 to 50) designed to ensure that the elected candidates are truly representative.

Another tendency, which reflects the dissociation of nationality and citizenship, is worth mentioning here: namely, the granting of the right to vote to foreigners satisfying a certain residence requirement. Where citizens belonging to a particular national minority are related to the dominant national group in a neighbouring or bordering country, as is usually the case in Central Europe, one can see the full significance of granting foreign residents rights pertaining to local citizenship. In fact, some recent constitutions have embarked on this course, as in Hungary (Article 70-3) and Russia (Article 29-4). The incipient dissociation of nationality and citizenship can also be reinforced by an inter-state approach developed through the signing of treaties on neighbourly relations between states with common borders. From this point of view, the Germano-Polish treaty of 17 June 1991 on "relations of neighbourliness and friendly co-operation" stands out as a model owing to the status which it gives minorities (Article 20) and the fact that, here, international law, as Pierre Koenig points out, "introduces some extremely interesting distinctions regarding the nationality of an individual in his relations with the host

14. Cf. B Chantebout, *Droit constitutionnel et science politique*, Paris, Armand Colin, 10th edition, 1991, pp. 206-207.

15. In B Owen and H Opolska, *La réinvention démocratique - les premières élections en Europe de l'Est. Les lois électorales*, Association française de science politique, 27-28 March 1991.

state's legal system. A person belonging to the German minority is a Polish citizen, he has rights and obligations as a national and as a person belonging to a minority ..."¹⁶. Other treaties have been signed by Germany, notably with Hungary, and by Hungary with Slovenia and Croatia. But these treaties mainly stress self-management of minorities' own affairs, especially in the educational sphere. That is the second aspect of consociational democracy.

PART TWO: SELF-MANAGEMENT OF MINORITIES' OWN AFFAIRS

Here again we shall draw a distinction between the national and local levels.

A. National level

To what extent do national political institutions arrange for minority groups' specific aspirations to be taken into account? The answers to this question presuppose constitutional or, at the very least, legislative recognition of the heterogeneity of the national political society¹⁷. On this basis, the right of minorities to form political parties and specific associations must be fully guaranteed. The situation in Hungary is exemplary in this respect since they are able to organise themselves under freedom of association. The associations representing minorities' interests have also set up some flexible co-ordinating bodies, such as the Union of Minorities of Hungary or the Round Table of Minorities of Hungary.¹⁸

It will thus be possible to devise a rough classification according to whether the bodies in charge of minorities' own affairs have rule-making or consultative powers.

Bodies with rule-making powers

Affairs specific to minority groups may first of all be discussed by their directly and separately elected representatives, as was the case, for example, in Cyprus and as is the case in Belgium today. But the failure of the Cypriot system and the difficulties which Belgium is currently experiencing are no incentive to copy it. What is more, it seems to occur only in a particular type of plural national society - the bi-national political society.

For this reason, affairs specific to minority groups will often be discussed by the national Parliament acting on a qualified majority basis, as in Belgium since the constitutional revision of 24 December 1970 and in Hungary, where "the adoption of the law on national and ethnic minorities requires a majority of two-thirds of the votes of the members present" (Article 68-5). Similarly, mention should be made of the provisions of the Slovenian Constitution according to which legislation - in the broad sense of the term - relating to the rights and situation of infra-

16. P Koenig, *Le traité germano-polonais sur "Les relations de bon voisinage et de coopération amicale" du 17 juin 1991*, AFDI, 1991, p. 294.

17. *A survey of the recognition given to infra-national groups may be found in S Pierré-Caps, Nation et peuples dans les constitutions modernes*, Nancy, Presses Universitaires de Nancy, 1987, pp. 555-577.

18. Cf. Peter Kovács, *The situation of linguistic minorities in Hungary, report to the Council of Europe's ad hoc Committee of Experts on Regional or Minority Languages (CAHLR)*, 31 May 1992, 33p.

national communities may not be adopted without the consent of the representatives of those national communities (Article 64), which implies that they would have a right of veto in this particular case.

This second kind of solution undoubtedly offers the advantage of not fragmenting national representation, provided, however, the representatives of minority groups are under the aegis of national sovereignty and the representative mandate, and do not seek above all to assert a distinct identity as in Belgium. This last risk would in fact be an argument against taking the minority dimension into account - except in a consultative capacity - within the executive, unless it is vested with wide rule-making powers.

Consultative bodies

They are extremely varied and there would be no point in trying to draw up an exhaustive classification of them here. This variety should not lead one to underestimate the extensive possibilities stemming from the choice of consultative bodies. Inter alia, it is by this means that certain identity-related aspects of persons belonging to national minorities can be taken into account by states which refuse to recognise their national plurality officially. For example, a "National Council for Regional Languages and Cultures" has been operating in France since 1985. From the same point of view, the Swedish example is edifying in that the state began to consider the phenomenon of minorities through various consultative bodies before officially recognising the existence of "ethnic, linguistic and religious minorities" in the 1977 revision of the Constitution (Article 2). The example of Hungary must be mentioned, however, since a genuine institutional system is gradually being introduced which, in the very words of bill no. 5190 on the rights of national and ethnic minorities, is opposed to a policy of assimilation.

Article 19 of the Constitution provides for the election by the National Assembly of a commissioner for the rights of national and ethnic minorities, a kind of ombudsman (Article 32/B-5) for minorities¹⁹. Since September 1990, there has been an Office for National and Ethnic Minorities, a government institution for the expression of state policy and consultation with minorities, which also operates a government foundation for national and ethnic minorities in Hungary.

B. Local level

It is at this level that the question arises of the type of autonomy which should be granted to national minorities, and hence the extent of that autonomy. This question is all the more important in that it is related to the issues of self-determination and territorial integrity and therefore concerns the very destiny of the particular nation-state. Illogical as this might seem, the solution should be the right of national minorities not to become a state²⁰, provided they

19. *Similarly, Article 70 of the Chinese Constitution states that, among the special commissions set up by the National People's Congress to study and draw up, under its guidance, the motions concerning them, is a "commission of nationalities".*

20. *In international law, the right of peoples to self-determination always means the right of peoples to become a state. This linear approach overlooks the other aspect of the right of peoples, namely that not to become a state.*

enjoy a constitutional status of recognition and protection based on autonomy. But what kind of autonomy is involved? There are two main schools of thought, one favouring territorial autonomy, the other favouring personal autonomy.

a) Territorial autonomy

This is currently the most widespread kind. In particular, it can help national minorities to be taken into account in states which do not recognise the heterogeneity of their national society but which practise governmental and administrative decentralisation: the developments in the status of Corsica within the French Republic provide a good illustration of how a unitary state can come to terms with a certain degree of regional diversity. The same idea may be found in federal states such as the United States, Germany and Australia.

The difficulties arise where territorial autonomy is associated with a plural national society. Except in the case of Switzerland, multinational federalism is quite clearly in crisis: failure in Yugoslavia, difficulties of adaptation in Russia, in India and, in a quite different context, since it is a bi-national society, in Canada. Similarly, Belgium's progress towards federalism has not resolved that country's existential crisis, to judge by the success of the Walloon "rattachiste" movement. The underlying reason for all this would seem to be that territorial federal autonomy is too close to the principle of self-determination. This is probably also why the formula of the regional state, which originated in Italy and has been successfully adopted in Spain, appears more satisfactory, although, in the latter case, the historical nationalities have become diluted in the generalisation of the "state of autonomies". It is for all these reasons that the notion of personal autonomy currently warrants attention.

b) Personal autonomy

This was the subject of intense thought in the Austro-Hungarian Empire²¹. It had some repercussions within the League of Nations and was translated into positive law with the Estonian law of 1925 on the cultural autonomy of minorities²². Personal autonomy fits in with the unity of the state. It tends to separate nationality - in the sense of identity - from territory to make it an attribute of each citizen, in the same way as his belonging to a particular religion, which will therefore be freely chosen: hence, Article 7 of the Estonian law of 15 December 1925 on citizens' ethnic rights, which is based partly on that of 1925, stipulates that all Estonians have the right to choose their ethnic group freely according to their ethnic origins. Paragraph 9 of the 1925 law provided as follows: "Membership of an institution of cultural autonomy shall be determined by the register of nationality, in which citizens aged 18 or over may have their names entered ...". This means that national minorities are organised not on a territorial basis but in the form of corporate units governed by public law and having their own organs of self-government, mainly in the educational and cultural fields, but also financial responsibilities.

21. *The major work in this connection is that of K Renner, previously cited.*

22. *Official Journal of the League of Nations, June 1925, pp. 788-791.*

They must therefore possess legal personality. The Hungarian bill on the rights of national and ethnic minorities (no. 5190) adopts a similar approach, stipulating that "elected minority self-governments are public bodies" (paragraph 5-2) and, hence, that "the national minority is a legal subject" (paragraph 35-2). Admittedly, the complexity and practical difficulties of personal autonomy should not be underestimated. But thinking on this subject originated in Central Europe itself and, since then, administrative science has been able to perfect the idea of local self-government. Even if the latter has proved unsuccessful in Cyprus and Lebanon, the causes are too closely associated with these countries themselves for any further lessons to be drawn. Consequently, it seems that it is indeed the principle of legal personality which should be explored today as the basis for the participation of persons belonging to national minorities in the operation of democratic institutions.