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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING THE PROTECTION OF NATIONAL MINORITIES[1]

[1] *This document will be updated regularly. This version contains all opinions/reports adopted up to and including the Commission's 86h Plenary Session (25-26 March 2011).*

Introduction

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning the protection of national minorities. The aim of this Compilation is to give an overview of the doctrine of the Venice Commission in this field.

This Compilation is intended to serve as a source of reference for drafters of legislation on legislation on national minorities, governments, minority associations and other civil society organisations, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on legal texts and/or other initiatives relating to minority protection. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. It merely provides a frame of reference.

This Compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years.

The Compilation, first published in 2006 and then called the *"Vademecum of Venice Commission - Opinions and Reports concerning the Protection of Minorities"* (CDL-MIN(2006)005), is not a static document and will continue to be regularly updated with extracts of newly adopted opinions by the Venice Commission.

Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific context of that country. This is not to say that such recommendation cannot be of relevance for other countries as well.

The Venice Commission's reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of more general application, although the specificity of national/local situations is an important factor and should be adequately taken into account.

Both for opinions and reports/studies the brief extracts presented here have to be seen in the context of the wider text adopted by the Venice Commission. Therefore, each citation refers to its precise position (paragraph number, page number for older opinions), thus allowing the reader to access the citation within this context.

Venice Commission opinions may change or develop over time as new opinions are given and in the light of experience. Therefore, to have a full understanding of the Commission's position, it would be important to read all of the Compilation under a particular theme.

Please kindly inform the Venice Commission's Secretariat if you think that a citation is missing, superfluous or filed under an incorrect heading (Venice@coe.int).

TABLE OF CONTENTS

I. DEFINITION OF "MINORITY"

"For the purposes of this Convention, the term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language."

> CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"The definition of minorities is a delicate problem and one solution might be not to include a specific definition in the text but to rely on the usual meaning of the word. However, the drafters of the proposal preferred to define the framework within which the rights set forth should be applied. According to the definition adopted, only persons possessing the nationality of the State on whose territory they reside are protected. It was noted that the question of migrant workers had already been dealt with in a Council of Europe Convention [the European Convention on the Legal Status of Migrant Workers of 24/11/1977] and that further works could be carried out in this matter".

> CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 2, §§18-19; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

"Paragraph 1 of the Bill proposes an objective norm for answering the crucial question, whether a certain national or ethnic group has to be considered as a minority for the purposes of the law. One of the criteria is: living in Hungary for at least a century (paragraph 1(2)).

In addition to the technical problems of calculation, the Commission expresses doubt on this criterium. The Commission recalls that the definition of minorities in its proposal for a Convention does not contain such a criterium of time.

The Commission expresses doubts as to the criterion of having lived in the country for a certain period of time in order for a national or ethnic group to be considered as a minority."

> CDL-MIN(1993)004rev, Opinion on the Hungarian Bill N° 5190 on the Rights of National and Ethnic Minorities, Point 4.

"There is no generally accepted definition of the concept of a "minority". Some elements thereof have certainly been identified as, for example, the standard if not universal classification of minorities into three groups: ethnic minorities, linguistic minorities, and religious minorities; any of these three criteria may be present or, more often, they may be in part cumulative. This (in part) threefold characterisation is adopted in Article 27 of the International Covenant on Civil and Political Rights and mentioned in Section 5.1 of the General Comment […] of 6 April 1994. […]. However, no generally accepted definition of minorities has been formulated in any international legal instruments or doctrine to date. While some authors have attempted to bear upon the question, others have preferred not to, considering either that such a definition is impossible or that it in any case serves no purpose. Thus, the CSCE High Commissioner for National Minorities acts in a pragmatic manner, and without formulating any definition, wherever he deems that a question affecting minorities exists."

> Report on the replies to the questionnaire on the rights of minorities, in: "The protection of minorities", Collection Science and Technique of democracy, no. 9, p. 45, 1994.

"Article 1 *[of Recommendation 1201/1993]* gives a definition of the term "national minority". This denotes a group of persons in a State who: resides in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity.

It follows from this definition that the persons to whom the rights included in Recommendation 1201 are guaranteed are nationals (citizens), of the State, not foreign migrants. This is further underlined by the fact that only persons belonging to "historical" minorities (having «long standing, firm and lasting ties» with the State) can enjoy them.

The expression « long standing, firm and lasting ties with that State» should be so interpreted as to include ties with the territory of a State as a component of the latter. In this way persons belonging to a minority will not lose minority status as a result of the transfer of the territory to another State or to a new State, and Recommendation 1201 will retain its relevance in the event of such territorial transfer or of State succession – assuming, of course, that the persons concerned continue to be in a minority."

> CDL-INF (1996) 4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3 a.

"Such a restriction [of the notion of minority to citizens only] departs from recent tendencies of minority protection in international law (interpretation by the Human Rights Committee (General Comment no. 23 of 6 April 1994) of Article 27 of the International Covenant on Civil and Political Rights and practice of the OSCE High Commissioner for National Minorities). Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights."

> CDL-INF(2001)14, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, §4; see also CDL-INF (2001) 12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, prepared by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, 18 April 2001, §4.

"Under the draft Law as well as in the list of minorities that continues to exist in the Preamble to the Constitution, the notion of minorities is restricted to citizens of Croatia. Such a restriction departs, however, from recent tendencies of minority protection in international law (Article 27 of the International Covenant on Civil and Political Rights and practice of the OSCE High Commissioner on National Minorities). Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights.

The Commission understands that the definition in Article 1 of the draft Law does not purport to be a general definition of "national minorities" but aims at defining the persons who have the specific "constitutional" rights enshrined in the new Constitutional Law. Consequently, this does not prevent the Croatian legislator from granting persons belonging to minorities who are not (or not yet) citizens of Croatia the rights they are entitled to under international law and in accordance with the Constitution of Croatia. The Commission would favour nevertheless the inclusion of an explicit provision to this end in the draft law."

> CDL(2001)74, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, §4.

"A teleological interpretation of the Framework Convention suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection. Numerical inferiority may thus not be a sufficient element, even though a necessary one, for a group of persons to qualify as a "minority" within the meaning of the Framework Convention.

In the Commission's view, it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position.

A *co-dominant position* is typically found in States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations, mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups, to the extent that they are in a co-dominant position.

The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions."

> CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§6-9.

"[…] The given definitions [of "national minority "] do not expressly mention the requirement of citizenship. In other words, they do not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens of the Republic of Lithuania. Such an approach is in line with the general position of the Advisory Committee on the Framework Convention, which encourages its extensive interpretation by the contracting parties, with a view to ensuring its application also to non-citizens."

> CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §5.

"The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 §1 of the Venice Commission's Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe's Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages).

However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition.

In the Commission's opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens."

CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§17-19.

"Commission is of the opinion that most of the objective elements included in the definition of Article 3, paragraph 1, namely the numerical inferiority and the elements of a specific identity expressed by culture, language or religion, do not raise any problem, given that in particular the last three are alternative and not cumulative. The subjective element of the definition, namely the wish of a national minority to preserve, express and promote its identity, does not raise any problem either.

This is not so, however, in respect of another objective element featured in this provision, namely the requirement that the community must have lived on the territory of Romania from the moment the modern Romanian state was established in order to qualify as a national minority. It seems that this concept intends to refer to the moment in history at which Romania was confirmed in its current frontiers. This seems to indicate that the relevant time is 1919, although the creation of modern Romania may be seen as a process rather than a definite event."

CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania, §§19, 20.

"the first and the second drafts contain, in their article 1, a definition of the term "national minorities" in which reference is made to the notion of *citizenship*.

The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 §1 of the Venice Commission's Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe's Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages).

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CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§16-19.

"As far as the notion of "national minorities" is concerned, the Draft maintains the citizenship requirement. The Venice Commission refers in this respect to its recent opinion on the previous draft laws amending the Law on National Minorities in Ukraine, where it is stated that, in the opinion of the Venice Commission, "Ukraine should omit the reference to citizenship in the general definition of national minorities in the draft legislation under consideration, and add it in the specific clauses relating to the rights specifically reserved to citizens, such as political rights or access to civil service" (see CDL-AD(2004)013, Opinion on two draft laws amending the law on national minorities in Ukraine, §16-22). "

CDL-AD(2004)022, Opinion on the latest version of the Draft Law amending the Law on National Minorities in Ukraine §10.

"The expression "national minority" became part of international law terminology during the era of the League of Nations. One may note that though it is today generally used as a reference term to designate minorities within a state, there is no a specific requirement dictated by the international law for it to be used by a State in guaranteeing rights concerning persons belonging to minorities at a domestic level. This also appears to be the position of the Advisory Committee of the Framework Convention. Ultimately, the term chosen by a given state should reflect on the one hand the wishes of persons concerned, and on the other hand the specific understanding of such terminology in the particular circumstances of the state in question. "

"The Commission has recently had the occasion to express itself on the issue of the citizenship requirement with regard to the draft law on minorities of Ukraine. While recalling that traditional international law approach is to include citizenship among the objective criteria of the definition of "minorities", the Commission also noted that "*a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition*".

In the same sense, the Parliamentary Assembly's Committee of Legal Affairs and Human Rights stated in its Report on Rights of National Minorities that "*It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, the more so that, as Article 27 of ICCPR is binding for all state parties to the Framework Convention*". It could also be questioned whether is it appropriate to deny the protection of traditional minority rights such as education, language and cultural rights to individuals whose status is still unresolved."

> CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §22, 33, 34;
>
> CDL-AD(2004)036, Opinion on the Draft Law on the Status of Indigenous Peoples of Ukraine.

"While the general view has long been that a definition of the term "minority" was a *sine qua non* to make the international protection of minorities a workable regime in practice, opinions have evolved in the last decade or so.

[…]. It is to be noted that despite the absence of a legally binding definition of the term "minority" in international law, there is wide agreement that a minority must combine objective features (such as language, traditions, cultural heritage or religion, etc.) with a subjective element, namely the desire to preserve the specific elements of its identity. Admittedly, this remains a very broad scheme for addressing minority issues and States can therefore develop more detailed criteria – or even propose their own definition – to tackle minority issues, provided they do not rely on arbitrary or unjustified distinctions, which would be the source of discrimination."
[…]
"Bearing in mind the failed attempts so far to come up with a common definition of the term "minority" capable of mustering wide State support both at European and international levels, together with the significant country-by-country experience gained in the implementation of relevant international standards by the competent human rights bodies, the Venice Commission is of the opinion that attention should be shifted from the definition issue to the need for an unimpeded exercise of minority rights in practice. In this context, it needs to be stressed that the universal character of human rights, of which minority rights form part and parcel, does not exclude the legitimate existence of certain conditions placed on the access to specific minority rights. Citizenship should therefore not be regarded as as an element of the definition of the term "minority", but it is more appropriate for the States to regard it as a condition of access to certain minority rights".

> CDL-AD(2007)001, Report on non-citizen and minority rights, §§12-13 and 144.

“There is no definition of a minority nation or community in the Constitution. The Commission in this connection notes, as it has previously done, that, unlike the Constitution, the Law on Minority Rights adopted in 2006 contains a citizenship-based definition of national minority in spite of the criticism expressed in this regard by the Venice Commission (CDLAD(2004)026, §§31-36)1. The law should be amended and the word “citizen” taken out of the definition. Indeed, the scope of the minority rights should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §54.

The Venice Commission considers that it is of the utmost importance to clarify the exact meaning of the concepts used to define the beneficiaries of the rights and guarantees contained in the Draft Law and to use them in a consistent manner, in line with the concepts in use by the relevant international instruments. In this context it has to be recalled that according to the Language Charter, "regional or minority languages" means “languages that are: a) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and b) different from the official language(s) of that State”. The two dimensions mentioned by the Language Charter have not been taken into account by the authors of the draft when proposing a definition of a regional language (“language that is traditionally used within a given territory of the state by members of the regional language group that belong to linguistic minority”).”

CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §87.

II. LISTS OF PROTECTED MINORITIES

“The Commission welcomes the abolition of the list of minorities in the new Law. It notes, however, that a list of minorities is still valid in the Preamble of the Constitution. As the Commission had occasion to remark in its opinion on the amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia (see document CDL (2001) 69):

[…] This runs contrary to the practice generally advised by both the Council of Europe and the OSCE High Commission on National Minorities, as it tends to create legal problems related to the protection of rights of minorities (in particular, those that may exist in fact but do not appear on the list) that far outweigh the political benefits gained from the recognition of specific minority groups, which may be better accomplished at the moment when minorities seek to claim the exercise of a specific right.”

CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §3.

“[…] communities which are to be considered national minorities “in the spirit of this law”. The main problem raised by this list lies in its apparently exhaustive character. (...) Should such a list be retained, it should be explicitly construed as non-exhaustive or indicative, not least of all because over time other communities may meet the elements of the definition.”

CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania, §21.

“Article 5 of the Draft Law attempts at defining “national minorities”. While such definition is very broad - in particular because the enumeration of distinctive elements is not exhaustive (“other features”) – it lacks the essential reference to the wish of the persons belonging to the group of people in question to preserve their identity: this reference should therefore be added.

Article 5 further contains an exhaustive list of minorities explicitly recognised and protected in Bosnia. As it stands, this list would cause the exclusion of non-listed minorities from the various entitlements under the law and thus violate the concept of equal protection of national minorities. Accordingly, its abolition is strongly recommended. If it were to be kept, it should be made open-ended (by adding "and others" or "such as").

Finally, it seems more appropriate to group Articles 1 and 5 together, as they both relate to the definition of national minorities for the purpose of the application of the Draft Law."

> CDL-INF(2001)12, Opinion on the draft Law on rights of national minorities of Bosnia and Herzegovina, §4.

"In addition to a general definition, Article 1 para. 5 lists the indigenous peoples of Ukraine: Byelorussian, Bulgarian, Armenian, Gaugauze, Greek, Jewish, Karaite, Crimean Tatar, Krymchak, Moldavian, Polish, Russian, Romanian, Slovak, Hungarian and Czech people. Here again, the draft law does not seem to follow the international standards in the field. The time element is one of the essential criteria when it comes to the definition of the term "indigenous peoples": the latter are the original inhabitants of the land on which they have lived from time immemorial or at least from before the arrival of later settlers. A considerable number of the persons belonging to national groups listed in the draft law must have immigrated into the Ukrainian territory at a more recent moment in the past, and as such may not be considered "indigenous peoples" according to the existing international law standards. "

> CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples in Ukraine, §23.

"The absence of a definition of the concept of "national minority" in the 1994 FCNM itself, coupled with the particular sensitivity of the issue, prompted many States to enter declarations upon signature or ratification, with a view to giving further precisions on the groups to be protected.

Most of these declarations contain a definition of the term "national minority" for the purposes of the Framework Convention and/or a list of the groups protected. A few other declarations neither contain a definition nor list the groups protected, but express a view - at least indirectly - on the citizenship requirement."
[…]
[…] element inviting to take the wording of declarations with caution is that even in States that have given their own definition of the term "national minority" and/or a list of the groups protected without mentioning the citizenship criterion, an analysis of the related practice may indeed reveal that most rights and facilities are *de facto* available to citizens only."

> CDL-AD(2007)001, Report on non-citizen and minority rights, §§20,21 and 25

III. RECOGNITION OF MINORITIES

"Any group coming within the terms of th[e] definition [in paragraph 1: see "Definition of "minority" section"] shall be treated as an ethnic, religious or linguistic minority."

> CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"The proposal for a convention does not make enjoyment by minorities or their members of the rights set forth in the text conditional upon the obligation of previous acknowledgment."

> CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 2, §20; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

"There remains the problem that a list of national minorities is still contained in the preamble to the Constitution. This runs contrary to the practice generally advised by both the Council of Europe and the OSCE High Commission on National Minorities, as it tends to create legal problems related to the protection of rights of minorities (in particular, those that may exist in fact but do not appear on the list) that far outweigh the political benefits gained from the recognition of specific minority groups (which may be better accomplished at the moment when minorities seek to claim the exercise of a specific right).

Furthermore, most of the rights guaranteed in the draft constitutional Law shall be exercised in accordance with specific implementing laws. The importance of the hierarchy of norms and the "constitutional" nature of the Law must be stressed in this respect. The amendments to the Constitution provide that the laws on the rights of minorities shall be "organic laws" requiring a special majority in Parliament for their adoption. The new (constitutional) law should thus be understood to take precedence over implementing laws, which may be examined by the Constitutional Court for their conformity with the new Law. However, it remains to be seen how the new Article 83 of the Constitution, which provides that the "laws (organic laws) regulating the rights of national minorities shall be adopted by a two thirds majority of votes of all representatives" will work in practice. If it is interpreted to mean that even implementing laws must be regarded as organic laws, this will not only make their adoption extremely cumbersome but may also compromise the constitutional review process mentioned above, as implementing laws will have the same force as the new Law."

> CDL-INF(2001)15, Note on the Amendments to the Constitution of Croatia adopted on 9 November 2000 and 28 March 2001, §2.

"A teleological interpretation of the Framework Convention suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection. Numerical inferiority may thus not be a sufficient element, even though a necessary one, for a group of persons to qualify as a "minority" within the meaning of the Framework Convention.

In the Commission's view, it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position.

A *co-dominant position* is typically found in States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations, mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups, to the extent that they are in a co-dominant position.

The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions."
[...]
In decentralized environments there may be situations where a group that is not a minority as described in paragraph 6 above at the State level may become such a minority at a sub-State level and, by operation of the decentralized democratic mechanisms, become subject to the dominant position of another group (that could be a minority at the State level). It must be stressed in particular that the mechanisms correcting the functioning of the majority rule in favour of a co-dominant group (see para. 8 above) do not necessarily exist also at sub-State levels."

> CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§6-9 & 14.

"Commission recalls that the draft proposal of the Venice Commission on a European Convention for the protection of national minorities used, in its article 2, the words "smaller in number than the rest of the population of the State".

The choice of the more appropriate formula will depend on the demographic situation in Ukraine; furthermore, it has to be clarified to which territorial subdivision of the State this criterion should apply. This question is connected with the requirement that the minority group must not be "dominant" (see "CDL-AD(2002)1, Opinion on Possible Groups to persons to which the Framework Convention for the Protection of National Minorities would be applicable in Belgium)."

> CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§27,28.

"One of the essential features of the protection of national minorities in Romania is their guaranteed representation in Parliament [9]. This minority representation is ensured in practice through the participation of the so-called "organisations of citizens belonging to national minorities" in the election process. While persons belonging to national minorities are free to organise themselves in "associations" for the purposes of Governmental Ordinance No 26/2000, they have to meet a number of additional conditions if they want to take part in elections. These conditions are set out in Article 7 of Law No. 67/2004 on Local Elections, on which the Venice Commission adopted a critical opinion.

Chapter III (Articles 38 to 50) of the draft law on the statute of national minorities living in Romania is entirely devoted to the organisations of citizens belonging to national minorities. Articles 49 recalls that they may take part in the local, parliamentary and presidential elections and Article 50 indicates that, in doing so, they are assimilated to political parties.

The organisations of citizens belonging to national minorities have so far not received public recognition in the Romanian legislation. Several representatives of national minorities contend that Governmental Ordinance No 26/2000 on associations and foundations, which is rather liberal as it sets out very few legal conditions for creating an association, has failed to acknowledge their specific function and nature, which is to help a national minority to preserve and express its cultural, linguistic and ethnic identity while ensuring, at least to an extent, its representation.

Notwithstanding the restrictive nature of the conditions placed on the registration of the organisations of citizens belonging to national minorities (see paragraphs 46-51, below), the Commission takes the view that the inclusion, in the draft law, of a chapter dealing with these organisations constitutes a marked improvement in that it entails public recognition of their role.

This role is indeed not properly reflected in the current regulations contained in Law No. 67/2004 on Local Elections."

CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania, §§42-45

"In the inter-war period, the Permanent Court of International Justice (PCIJ) already concluded that the existence of a minority was a question of "fact" and not of "law", which made state "recognition" irrelevant under international law

[…] It would seem that in the UN system minority persons need not have citizenship in order to enjoy human rights and minority rights. In other words, a group can constitute a minority even if its members have not (yet) obtained citizenship. Indeed, the existence of a minority is and should be a question of fact and not of law or of government recognition, as governments should not be allowed to exclude minorities or define them away by non-acknowledgement or by arbitrary denial of citizenship […].

"The qualification as a minority should not depend on the numerical strength of a group. Indeed even tiny groups are to be considered covered by the instruments protecting minorities, provided they meet the necessary objective elements and express the wish to cohere as a minority with a view to preserving their specific identity. This is attested both by State practice, which contains numerous examples of protection granted to tiny minorities, and findings adopted by international bodies."

CDL-AD(2007)001, Report on non-citizens and minority rights, §§9, 95 and 121.

"The Venice Commission is of the opinion that the protection of the Russian language and its use as an expression of the identity of members of the Ukrainian society who have freely chosen this linguistic identification - therefore as a language of a national minority - is indeed a legitimate aim. This implies clear and stable legal guarantees, according to the criteria and conditions set out in the main applicable international standards, the Language Charter and the Framework Convention.
[…]
"Finally, special attention has to be drawn to the position of the persons belonging to the nationwide Ukrainian majority in regions where a minority has a dominant position.

The Venice Commission notes in this respect that the Advisory Committee on the Framework Convention has recognised on several occasions that a majority at a national level can constitute a minority on a regional level, if the regional authorities dispose of powers that are relevant to the rights guaranteed in the Framework Convention. The Ukrainian authorities should examine whether persons speaking Ukrainian are in need of protection in regions where they constitute a minority."

CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §§72, 93 and 94.

IV. MEMBERSHIP OF A MINORITY

"To belong to a national minority shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice."

CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"It would not seem correct to deny the freedom of a private minority association to apply its own rules and requirements for admission to its membership"

> CDL-MIN(1993)004rev, Opinion on the Hungarian Bill N° 5190 on the Rights of National and Ethnic Minorities, Point 4.

"It should be made clear in the Law that it is for the individual to decide how this affiliation shall be expressed and that "objective" criteria for individual minority affiliation should be excluded, whereas the core elements of minority definition should be met.
[...]
Finally, it should be made clear that this provision equally guarantees the right to change affiliation to a minority."

> CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §4.

"[…] with reference to the need […] to obtain proof of the national background of foreigners seeking access to the benefits provided to kin-minorities, the Commission considers that it is preferable (even if it is not required under international law) that the relevant legislation set out the exact criteria that must be employed in the assessment of the national background. […] [The Framework Convention] while enshrining the principle of the individual's free choice as to the affiliation to a minority, does not prevent States from requiring the fulfilment of certain criteria when it comes to granting privileges to the persons belonging to that minority. In other words, the personal choice of the individual is a necessary element, but not a sufficient one for entitlement to specific privileges."

> CDL-INF(2001)19, Report on the preferential treatment of national minorities by their kin-State, §Da)ii).

"A group of persons that is numerically inferior to the rest of the population, shares common ethnic, cultural, linguistic or religious features and wishes to preserve them is not to be considered as a minority in the sense of the Framework Convention if and to the extent that it finds itself in a dominant or co-dominant position.

In situations of decentralization of powers, the existence of a "minority" within the meaning of the Framework Convention and in particular the question of whether a group is dominant or co-dominant must be assessed both at the State and at the sub-State levels. "

> CDL-AD(2002)001, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium §§40,41.

"Article 40, paragraph 4 which determines that no more than 25% of the members of an organisation of citizens belonging to a national minority may be persons who do not belong to the minority concerned, is questionable and can prove extremely difficult to monitor in practice. Article 40, paragraph 5, which prohibits membership of two organisations belonging to the same minority, also raises questions. Both provisions amount to a strong interference with the freedom of association as guaranteed in Article 11 of the European Convention on Human Rights, and their justification is not obvious.

The draft law seems to imply that the organisations may consist of citizens only, since the term is explicitly contained in the expression "organizations of citizens belonging to national minorities". It is, however, difficult to understand why these organisations, which will be established to promote and protect the identity of the national minority concerned, should be prevented from extending their activities to non-citizens resident in Romania who belong to the same minority, and why those non-citizens should ex lege be barred from becoming members

of these organisations. This point needs further clarification, particularly in view of the fact that the competences assigned to these organisations by far exceed electoral privileges.

The Commission acknowledges that it may be legitimate for the state to restrict to citizens only the right for these organisations to take part in parliamentary and presidential elections. The draft law, however, also seem to imply that only citizens belonging to these organisations may participate in local elections. This is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to foreign residents. The Commission can therefore only echo its earlier recommendation to introduce the possibility for stable resident non-citizens to take part in local elections in Romania. This could constitute a significant progress in terms of participation of those non-citizens belonging to national minorities."

> CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania, §§55-57

"In the Venice Commission's view, it is essential for the authorities to ensure that, in the future census, questions and forms be drawn up in such a way as to allow individuals to express their linguistic, but also ethnic identities freely. Adequate questions and flexibility are essential - optional questions and an open list of alternative answers with no obligation to affiliate to a set category and including also the possibility for multiple identity affiliations (e.g. for children of mixed marriages) - to allow the census results to reflect each individual's actual choices. Likewise, respect for the free expression of ethnic and linguistic identity when processing the data collected is crucial.

The Commission recalls in this respect the principle of free self-identification enshrined in Article 3 of the FCNM and encourages the authorities of Ukraine to ensure that this principle is scrupulously respected and that international standards on personal data protection are observed. It is also important for the authorities to ensure that representatives of the various population groups are consulted on the formulation of the questions and the list of options for answering them. Particular attention should also be paid to the matter of the languages used for the census forms.

While being aware, in the light of the specific linguistic situation prevailing in Ukraine, of the difficulty facing the authorities of Ukraine in drafting the linguistic question, the Commission considers that the individual choice should be the main criterion for obtaining reliable information in this regard. The criterion of the use of the language, as proposed by the Draft Law, might lead to undue distortion of the actual linguistic composition of the population, its needs and expectations. At the same time, it would perpetuate an approach which may have its explanation in the situation inherited by Ukraine due to its recent history, but which would not be in line with the fundamental principle of the respect of individuals' identity (see in this respect Article 5 of the Framework Convention). (See also related comments in Part V of this Opinion)."

> CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §§14-16.

V. RIGHTS EXERCISED IN COMMUNITY WITH OTHERS

"The international protection of the rights of ethnic, linguistic and religious minorities, as well as the rights of individuals belonging to those minorities … is a fundamental component of the international protection of human rights"

> CDL(1991)007, Proposal for an European Convention for the Protection of Minorities, Artcile 2, reproduced in « The Protection of Minorities » Collection Science and Technique of Democracy, STD N°9, 1994, p.10

"With a view to promoting and reinforcing their common features, persons belonging to a minority shall have the right to associate and to maintain contacts, in particular with other members of their group, including across national borders. This right shall include notably the right to leave freely one's country and to go back to it".

> CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"[…] Minorities are not only the sum of a number of individuals but represent also a system of relations among them. Without the concept of collective rights the protection of minorities would be somewhat limited."

> CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 1, §15; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

"It is important however not to exaggerate the difference between these two systems of protection [of the rights of individuals belonging to the minority and of the rights of the minority as such]. In the text of the proposal most of the rights recognised concern individuals. Only one article recognises rights for groups: Article 3 (right of minorities to be protected against any activity capable of threatening their existence; right to respect, safeguard and development of their identity); moreover, two provisions place on States obligations in respect of minorities: Article 13 (obligation to refrain from forced assimilation) and Article 14 (obligation to favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them)."

> CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 1, §16; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

"The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7, 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all contracting States, §1.

"The Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard "the value of interculturalism and multilingualism" as an "important contribution to the building of a Europe based on the principles of democracy and cultural diversity", but always «within the framework of national sovereignty and territorial integrity» (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.

“Interpretation of Article 11 of Recommendation 1201 (1993)

a. "... the persons belonging to a national minority ..."

“Holders of the right provided for in Article 11 are "the persons belonging to a national minority", not the minorities as such, although, in the Commission's view, despite this formulation, the right to autonomy is conceivable only as a right exercised in association with others. Therefore, the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a component of the people or the nation, a concept which might affect any unitarity of the State. The presentation of the minority phenomenon in Article 11 is no different from that in the other provisions of the text proposed in Recommendation 1201: it is indirect and based on recognition of individual rights, albeit exercised in association with others (ie. collectively), a point merely mentioned in the Slovak declaration accompanying the ratification of the neighbourhood treaty with Hungary. This element should nevertheless be taken into consideration for the purpose of interpretating the substance of the right provided for in Article 11.

Article 1 gives a definition of the term "national minority". This denotes a group of persons in a State who: reside in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity.

It follows from this definition that the persons to whom the rights included in Recommendation 1201 are guaranteed are nationals (citizens), of the State, not foreign migrants. This is further underlined by the fact that only persons belonging to "historical" minorities (having "long-standing, firm and lasting ties" with the State) can enjoy them.

The expression "long-standing, firm and lasting ties with that State" should be so interpreted as to include ties with the territory of a State as a component of the latter. In this way persons belonging to a minority will not lose minority status as a result of the transfer of the territory to another State or to a new State, and Recommendation 1201 will retain its relevance in the event of such territorial transfer or of State succession - assuming, of course, that the persons concerned continue to be in a minority.”

> CDL-INF(1996)004, Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3a**.**

“[…] the Commission considers that each minority should have the right to freely choose its own self-nomination, without any interference from the authorities of the home-State. The solution adopted by the Charter and the Federal Law, providing that “u*nder the terms of this Law, all groups of citizens who consider or define themselves as peoples, national or ethnic communities, national or ethnic groups, nations or nationalities, and who fulfil the conditions from [paragraph 1 of this Article], will be treated as national minorities”* seems to be the most appropriate one to be followed also by the present draft law. As to the revised article 2, as well as the rest of the draft law, they should refer only to the term “national minorities”. In this respect, the Commission assumes that it is not the intention of Montenegro to introduce a hierarchy of categories within the “minorities” in Montenegro, and that whatever terminology will be used in the final draft, the legal status and the scope of the protection guaranteed to the persons concerned shall be the same.”

> CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §30.

"Chapter V of the draft law implements what could be described as the collective dimension of the protection granted to national minorities. Indeed, the main feature of a system of cultural autonomy is that it goes beyond the mere recognition of rights to persons belonging to national minorities. This is reflected in Article 57, paragraph 1 of the draft, which defines cultural autonomy as the right of a national community to have decisional powers in matters regarding its cultural, linguistic and religious identity, through councils appointed by its members.

The first part of the draft, and in particular Chapter I and Chapter II, seems to favour the protection of national minorities through individual rights, although Article 20 of the draft mentions at the same time cultural guarantees for persons belonging to national minorities and the right of national minorities to public cultural institutions. This is evidenced by the frequent use of the expression "persons belonging to national minorities" when rights are stipulated. In order to strengthen its internal coherence, the draft law could make clearer - especially in its first two chapters - that it aims at combining individual protection with protection granted to the group. This second dimension is particularly prominent in Chapter V of the draft law through the binding consent that needs to be obtained from the Councils of National Minorities. The combination of both individual and group protection and their proper articulation in the draft law also need to be taken care of as concerns the judicial protection (see item F, paragraph 39, above).

It is true that the international principles in the matter show a clear preference for the protection of the minorities through individual rights, but they do not prohibit the adoption of means of collective protection, for example through group rights as this may also be a means to ensure minority participation in public affairs. As a matter of fact only cultural institutions can, in cooperation with the public authorities, implement the policy of promotion and preservation of the historical and present culture of national minorities. Moreover, the exercise of rights in community with others, including rights for persons belonging to national minorities, is often an emanation of the freedom of association."

> CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania, §§60-62.

"While each person belonging to a minority enjoys almost all individual human rights and freedoms, the exercise of such rights "in community with others", in particular through the freedom of association, is often indispensable for a minority to be able to preserve and develop its specific identity. This is, however, not sufficient: the exercise of basic freedoms and enhanced minority rights by members of a minority - even in community with others - but without any State involvement whatsoever would most probably mean nearly insurmountable difficulties for many minorities to maintain their identity.

Minority rights should not be regarded as a distinct category, nor interpreted and analysed in isolation from the human rights family. It is rather a combination of classical (universal) human rights - which are often exercised in community with others - and enhanced minority rights/facilities. While the former may occasionally entail positive obligations from the States, the latter undoubtedly and inherently necessitate a concerted, coherent and sustained state action aimed at offering adequate opportunities and providing a range of linguistic and other rights and facilities. Hence due regard must be given to this complex set of rights and obligations in any attempt to determine the exact scope of a state's action through the use of relevant criteria."

> CDL-AD(2007)001, Report on non-citizen and minority rights, §§108, 130.

VI. NON-DISCRIMINATION PRINCIPLE

A. Affirmative action – positive discrimination

"The adoption of special measures in favour of minorities or of individuals belonging to minorities and aimed at promoting equality between them and the rest of the population or at taking due account of their specific conditions shall not be considered as an act of discrimination".

> CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"[…] the very nature of minorities implies that special measures should be taken in favour of persons belonging to them. Therefore, non-discrimination within the meaning of the proposal does not denote formal equality between individuals belonging to the minority and the rest of the population, but rather substantive equality."

> CDL(1991)008, Explanatory report on the Proposal for a European Convention for the Protection of Minorities, Article 4, §24; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994.

"Furthermore, Article 7, paragraph 2 *[of the European Charter for Regional or Minority Languages]*, the scope of which extends to the entire national territory, contains a non-discrimination clause which amounts to recognition of the admissibility of positive discrimination:

«Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it».

However, «the adoption of special measures in favour of regional or minority languages [...] is not considered to be an act of discrimination against the users of more widely used languages». This positive discrimination follows logically from the very objective of the Charter, which is to stop the decline of regional and minority languages and, where possible, promote their use in order to contribute to «the maintenance and development of Europe's cultural wealth and traditions» (cf. Preamble to the Charter)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states, §4.2.

"Participation of minorities in public life is primarily founded on formal recognition of the principle of equality. […] However, merely securing the principle of equality does not ensure real participation of minorities in public life; special action on their behalf may prove necessary."

> CDL-MIN(1998)001rev, Summary Report on Participation of members of minorities in public life, Introduction.

"[[…] the obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally."

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.1.

"[…] Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities. Where such measures do no more than treat the minority group on a par with the majority group, they lack «positive» force and pertain to prohibition of mediate discrimination as described in the foregoing paragraph. On the other hand, when they go further, for example by giving certain minority bodies or productions specific financial support, they are genuine positive measures."

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.1.

"Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied – inter alia – to minorities. The situation is different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles." – rather pos. discrimination, under 4

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.

"When special treatment is unrelated to an intrinsic feature of the group concerned, the situation is different; it is a case of affirmative action (in the strict sense), sometimes called «positive discrimination» (improperly, since the term "discrimination" should denote unacceptable distinctions only).
[…]
Difference in treatment, far from infringing equality on the pretext of promoting it, is thus seen as founded on a morally justified criterion: the wish to make reparation to the victims of discrimination. This, however, raises a problem: these measures may benefit members of national minorities who have not suffered any unfavourable treatment without benefiting other persons who have been discriminated against.
[…]
[…] The problem of minorities is a question of mutual trust between majority and minorities. Measures on behalf of minorities can thus spell out the message of the majority to the minorities that it does not intend to oppress them by virtue of its numerical strength."

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.3.

Effective equality may require positive discrimination

CDL(2000)79rev, Opinion on the draft constitutional law on the rights of minorities in Croatia, §6**.**

"[…] The Commission notes with approval that Article 3.5 of the Draft Law clearly states that the implementation of the minority rights guaranteed by the Constitution, the Framework Convention, other international treaties, the Law on National Minorities and other laws, shall not be considered discriminatory. This means that, even if these rights constitute a "positive discrimination", their exercise is allowed notwithstanding the international and domestic legal prohibition of discrimination. In this respect, it should be stressed that "positive discrimination" is

legitimate only if, and to the extent that the positive action concerned is necessary in order to bring about substantive equality. The principle of proportionality should therefore be embodied here as a guiding principle for the legislature and the administration in determining necessary positive measures.**"**

> CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §9.

"In this regard our report is focussed on the achievements of one of the latest developments of affirmative action in the sphere of electoral rules as a mechanism for participation of national minorities in the decision making processes. The participation in the decision making process of members of national minorities relates not only to the exercise of general human rights, but also to the exercise of special minority rights. That means that members of national minorities, when they appear in the politics as nationals of the state, are at the same time as nationals with special minority needs.

Affirmative action in connection with the national minorities can be defined as conferring special benefits upon individuals by virtue of their membership in a certain minority group. Viewed from the individual or from the group standpoint this principle seems of essential importance for the establishment of *de facto* not only *de jure* equality.

Yet, the principle of affirmative action is very often subjected to criticism. Usually the arguments are that measures, which are taken as an affirmative action, are leading to the discrimination of the majority. This is the reason why the action taken must be proportional to the real needs of the minority group in question and directed to providing means for achieving equal opportunities. Affirmative action must be seen as a mechanism which does not establish privileges for the minorities but effective rights that members of the majority already enjoy."
[…]
"[…] Following the accepted definition on affirmative action, we could talk about affirmative action electoral rules if they go beyond the principle of non-discrimination. For an electoral rule (constitutional provision or law) to be categorised as an affirmative action electoral rule it needs to fulfil the following conditions:

- To provide national minorities (individually or collectively) with effective rights already benefiting the members of the majority;
- The preferences established by the electoral rules should only be limited to creating equal opportunity for the participation of the members of national minorities in the decision making.

In theory, such affirmative action electoral rules can be formulated for the various dimensions of the electoral system and the electoral law. In practice, various measures in the form of electoral rules are also implemented in the different European countries. The most frequently used affirmative action electoral rules are found in the following areas:

- the electoral system in general (proportional or mixed system)
- the voting right (dual voting right and special voters lists)
- the numerical threshold
- the electoral districts (their size, form and magnitude)
- reserved seats
- representation (over-representation)
- use of the national minorities language in the electoral process. "

[…]
"The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. In that direction the Venice Commissions' Code of good practice in electoral matters provides some of the basic principles

for developing electoral affirmative action rules in accordance with the Europe's electoral heritage. Among them we will emphasise here the following principles:

a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
d. Electoral thresholds should not affect the chances of national minorities to be represented.
e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

Affirmative action electoral rules, as the experience of the OSCE High Commissioner on National Minorities shows, are particularly productive when applied in local elections. Furthermore, in territories where national minorities represent a substantial part of the population, the delimitation of territorial entities (constituencies, municipalities), in such a way as to prevent dispersal of the members of a national minority, may favour the representation of minorities in the elected bodies, as underlined by Recommendation 43, on Territorial Autonomy and National Minorities, of the Congress of Local and Regional Authorities of the Council of Europe.

The above mentioned principles can provide a basis for developing common European frameworks, if not yet standards for affirmative action rules, for national minorities' participation in the decision-making."

> CDL-AD(2005)009, Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, §§9-11, 15,16,68-70.

"Article 15 of the Council of Europe's Framework Convention for Protection of National Minorities states that "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 affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commission Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with European electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of national minorities, electoral thresholds should not affect the chances of national minorities to be represented, electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes."

> CDL-AD(2005)011, Report on the abolition of restrictions on the right to vote in general elections.

"Although human rights and fundamental freedoms were originally meant to place an obligation on States not to interfere with their exercise (i.e. an essentially negative obligation), subsequent interpretation and especially ECHR case-law have inferred positive obligations on the part of the States: the latter now have a duty to protect human rights and fundamental freedoms against violations which do not emanate from them. The possibility of such positive obligations has also been recognised in different contexts by the European Court of Human Rights, including that of persons entitled to a protection under minority instruments

It follows that organised State action aimed at helping minorities preserve and develop the essential elements of their identity is crucial and actually even dictated by both the letter and the spirit of relevant international standards, such as the FCNM and the ECRML. Although initially somewhat controversial, a State duty to take positive action is now also widely accepted in relation to Article 27 ICCPR, as attested by the HRC itself and corroborated by academic legal opinions. The 1992 UN Declaration on Minorities makes it clear that the rights it spells out often require action, including protective measures and encouragement of conditions for the promotion of their identity and specified, active measures by the State".
[…]
"Positive action is essential to enable persons belonging to minorities to assert their specific identity, which is the objective of every minority protection regime. International standards require such positive action mostly through programme-type provisions which set out objectives. These provisions, which are in principle not directly applicable, leave the States concerned an important margin of appreciation in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account."

CDL-AD(2007)001, Report on non-citizens and minority rights, §§107, 109 and 131.

"It seems questionable whether only "extremely unfavourable living conditions" may justify positive measures in favour of national minorities which are not to be regarded as discriminatory.

CDL-AD(2007)004, Opinion on the Constitution of Serbia, §43.

The application of hate legislation must be measured in order to avoid an outcome where restrictions which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities, and reinforcing the dominant political, social and moral discourse and ideology.

A legitimate concern which arises in this respect is that only the religious beliefs or convictions of *some* would be given protection. It might be so on account of their belonging to the religious majority or to a powerful religious minority; of their being recognised as a religious group. […]"

CDL-AD(2008)026, Report on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, §§58, 78.

The catalogue of criteria not allowing for any "privileges or restrictions" has been widened and now also contains the criterion "minority affiliation". This might cause problems, as minority protection on the basis of international law requires accepting some sorts of privileges (e.g. use of the mother tongue; special schools). It is important to interpret Article 27 in the light of Article 56 which allows the use of minority languages.

CDL-AD(2009)024, Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, §20.

B. Direct and indirect discrimination

- "[…] ostensibly non-discriminatory measures nevertheless having a proportionally greater impact on members of a group (a national minority is a case in point) or being proportionally more favourable to members of another group […] are only acceptable if they serve an overriding public interest. Otherwise, they constitute indirect discrimination."

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2.

- "[…] to ascertain whether or not the stipulation of knowledge of the [country's] official language [in order to hold an appointment in the public administration] constitutes a form of indirect discrimination against minorities, what must be considered is first whether or not the minority language shares official language status, second the required level of command of the language, and furthermore how gradually the requirement is imposed, and the possible application of programmed measures to prevent the exclusion of members of minorities from public appointments."

> CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2 A.)

"States are bound to respect the international agreements on human rights to which they are parties. Accordingly, in exercising their powers, they must at all times respect human rights and fundamental freedoms. Amongst these, the prohibition of discrimination, provided for, inter alia, by the UN Charter, by the Universal Declaration of Human Rights, by the International Covenant on Civil and Political rights and by the Framework Convention.

In particular, States that are parties to the European Convention on Human Rights (hereinafter "the Convention" or ECHR) must secure the non-discriminatory enjoyment of the rights enshrined therein to everyone who is within their jurisdiction. A State is held accountable under Article 1 of the Convention also for its acts with extraterritorial effects: all the individuals affected thereby, be they foreigners or nationals, may fall within the jurisdiction of that State.

The legislation and regulations that are the object of the present study aim at conferring a preferential treatment to certain individuals, i.e. foreign citizens with a specific national background. They thus create a difference in treatment (between these individuals and the citizens of the kin-State; between them and the other citizens of the home-State; between them and foreigners belonging to other minorities), which could constitute discrimination – based on essentially ethnic reasons - and be in breach of the principle of non-discrimination outlined above.

The discrimination must be invoked in relation to a right guaranteed by the Convention. Not all the benefits granted by the legislation under consideration refer, at least *prima facie*, to guaranteed rights. Some ECHR provisions could be pertinent: *in primis* Article 2 of the First Protocol; possibly, Article 8 of the Convention and Article 1 of the First Protocol.

The Strasbourg established case-law shows that different treatment of persons in similar situations is not always forbidden: this is not the case when the difference in treatment can be objectively and reasonably justified having regard to the applicable margin of appreciation. The existence of a justification must be assessed in relation to the aims pursued (which must be legitimate) and the effects that the measure in question causes, regard being had to the general principles prevailing in democratic societies (there must be a reasonable relation of proportionality between the legitimate aim pursued and the means employed to obtain it).

Article 14 prohibits discrimination between individuals based on their personal status; it contains an open-ended list of examples of banned grounds for discrimination, which includes language, religion, and national origin. As regards the basis for the difference in treatment under the laws and regulations in question, in the Commission's opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship. The acceptability of this criterion will depend of course on the aim pursued.

In this respect, the Commission finds it appropriate to distinguish, as regards the nature of the benefits granted by the legislation in question, between those relating to education and culture and the others.

Insofar as the first are concerned, the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission's view, for instance, the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.

In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State)."

> CDL-INF(2001)19, Report on the preferential treatment of national minorities by their kin-State D.d.

"[…] It can be stated that the ECHR offers a powerful and efficient mechanism of protection for persons - be they citizens or non-citizens - belonging to minorities, as long as the violation of classical human rights and fundamental freedoms is at stake, mainly through a state excessive interference. The ECHR has, however, produced very limited results under the prohibition of discrimination as concerns the State obligation to take special measures on behalf of minorities to compensate their vulnerable and disadvantaged position This state of affairs may be explained by the inherent limitation of Article 14 ECHR, whose violation needs to be invoked in correlation with another, substantive right. ECHR practice therefore does not seem to offer examples of rulings promoting special measures for minority groups, be it in the context of applications lodged by citizens or non-citizens. The additional protocol 12 to the ECHR, which entered into force on 1 April 2005, might encourage future developments in this direction, although its explanatory report suggests some caution in this respect.
[…]
It is also clear from the practice of the ACFC that the State has a duty to encourage a spirit of tolerance and intercultural dialogue between all groups living on its territory, irrespective of citizenship (Article 6 §1 FCNM) and that an important function of the State is to *protect* minorities and their members - including non-citizens - against threats or acts of discrimination (Article 6 §2 FCNM), particularly against those perpertrated by other individuals or groups
[…]
[…] The HCNM has emphasised that internationally protected human rights are universal, also in the sense that they must be guaranteed to everyone within the jurisdiction of the State without discrimination. He has stressed that minority rights are an integral part of human rights and the principal of equal treatment extends to the enjoyment of minority rights. Indeed, in order to achieve full equality, minority rights have to be secured in addition to non-discrimination measures.
[…]
[…] In certain particular situations, a citizenship requirement is indeed likely to have discriminatory effects by excluding certain members of minority groups who might also wish to preserve their specific identity. For example, a citizenship requirement is likely to give the wrong signal that non-citizens cannot be entitled to rights and facilities which exist for minorities: in reality, human rights are universal and most of the enhanced minority rights - especially linguistic ones - already available to a minority group should not be refused to certain individuals on the basis of their citizenship as such a differentiation would hardly be in compliance with the principles of equality and non-discrimination.
[…]

Bearing in mind the need to respect the principle of equality and the prohibition of discrimination, it is necessary to rely on objective criteria when deciding on the development of special measures on behalf of minority groups […].
[…]
States are therefore entitled to require that different objective criteria be met according to the rights and measures at stake. For example, a series of criteria attesting a strong and lasting link with a territory may be warranted when it comes to authorising the display of bilingual topographical indications, but certainly not before taking measures to protect persons subject to acts of discrimination, hostility or violence as a result of their affiliation with a minority […]."

CDL-AD(2007)001, Report on non-citizens and minority rights, §§19, 40, 82, 129, 134 and 136

"Based on the obligation of equal treatment of persons belonging to National Minorities under the Framework Convention, the Commission deems it preferable that the Constitution expressly takes into account the rights of these persons rather than to rely on the general rule of non-discrimination only."

CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §62.

"In a country where there is a marked link between ethnicity and a particular church such as exists in Armenia (98% are ethnic Armenian; 90% of citizens nominally belong to the HAAC), there must be a distinct opportunity for discrimination against other religions. To guard against this possibility there is a particular need to protect pluralism in religion which is an important element of democracy.

The "special relationship" between the State and the HAAC is regulated by the "Law of the Republic of Armenia Regarding the Relationship Between The Republic of Armenia and the Holy Apostolic Armenian Church" (see para. 9 above). The privileges expressly accorded to HAAC in this legislation make it particularly necessary to ensure that there are guarantees elsewhere that the state will accord all necessary rights to other religions. HAAC is acknowledged as part of the Armenian identity, but it must not be allowed to suppress other religions in maintaining this identity."

CDL-AD(2009)036, Joint Opinion on the Law on Making Amendments and Addenda to the Law on the Freedom of Conscience and on Religious Organizations and on the Law on Amending the Criminal Code of the Republic of Armenia, §§20, 21.

"In particular, certain measures discriminating against the latter [other religions], such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26 [of the ICCPR]." Thus, such status must not be allowed to repress, discriminate against, or foster hostility toward other religions in maintaining this identity."

CDL-AD (2010)054, Interim joint opinion on the law on making amendments and supplements to the law on freedom of conscience and religious organisations and on the laws on amending the criminal code, the administrative offences code and the law on charity of the Republic of Armenia. §26.

VII. LINGUISTIC RIGHTS

"Any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private.

Whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write in their own language to the political, administrative and judicial authorities of this region or, where appropriate, of the State. These authorities shall have a corresponding obligation"

> CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"[…] The he knowledge and possibility of employing the mother tongue constitutes the essence of cultural identity of a minority, ie with the loss of its language, a minority may well lose its identity and eventually disappear".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.

"In the view of the Venice Commission, the question raised is not whether linguistic rights must benefit from a collective guarantee at European level (it has no doubt about this) but whether the creation of a hard core on the basis of the provisions of the European Charter for Regional or Minority Languages is an appropriate way to ensure those rights"

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.

"The Commission agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area (cf. judgment of the European Court of Human Rights in the Belgian language case, judgment on the merits on 27 June 1968, Series A No. 6), the Convention does not explicitly guarantee any linguistic freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression (Article 10; see however the «Sadik Ahmet v. Greece» case, currently pending before the Court), freedom of thought and conscience (Article 9) or Article 3 of Protocol No. 1 (cf. the «Mathieu-Mohin and Clerfayt v. Belgium» case of 2 March 1987, Series A No. 113)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.

"The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.

"The Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard «the value of interculturalism and multilingualism» as an «important contribution to the building of a Europe based on the principles of democracy and cultural diversity», but always «within the framework of national

sovereignty and territorial integrity» (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.

"[…] the definition of regional or minority languages as set forth in the Charter in Article 1.a.i only covers languages which are traditionally used within the territory of a State by its nationals and are different from the official language(s) of the State, and does not include either the languages of migrants or dialects (Article 1.a.ii)".

> CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.

"[…] the obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally."

> CDL-MIN(1998)1rev, Summary report on participation of members of minorities in public life, §1.1.

"Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness […]

"[…] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities."

> CDL-MIN (1998) 001rev, Summary report on participation of members of minorities in public life, §2.1.

"[…] Persons belonging to national minorities shall have the right to use, freely and without interference, his/her minority language, in private and in public, orally and in writing. While this right as such does not require the adoption of specific legislation, the criteria allowing the person belonging to a minority to exercise this right in its relations with the public administration are not clearly laid down. Furthermore, paragraph 1 introduces an important restriction of the right to use the minority language by stating that it shall be granted "without prejudice to the provisions of the laws governing the use of the state language in the public life of Lithuania". A comparable restriction ("within the rule of laws") can also be found in the third paragraph concerning the right to display public signs and inscriptions in the minority language, as well as in Article 8.1 in relation to the setting up and management of schools ("within the rule of law").

Persons belonging to national minorities shall also have the right to receive information from the public administration, in the minority language or in a language "acceptable to both parties". Considering the importance of the right of persons belonging to national minorities to use their mother tongue in their relations with administrative authorities, this provision raises concerns as to the willingness of the state to ensure the presence of officials able to provide information in the minority language. Furthermore, the effective exercise of the right to receive information is within the discretion of civil servants who shall give the information asked for "as far as possible" in the minority language or in a language "acceptable to both parties" (Article 6.2).

With a view of ensuring the effective exercise of the right to use a minority language, the Commission recommends that the Draft Law and the legislation regulating the use of a minority language, in particular in relations with public administration, include provisions providing for:

a) the precise criteria and guidelines allowing to determine "the areas inhabited by persons belonging to a national minority in *substantial numbers*" where these persons may address the public administration in their mother tongue, or display public signs or inscriptions in the minority language;
b) an administrative procedure to be followed by persons wishing to submit applications written in the minority language; and
c) the precise conditions for displaying public signs or inscriptions in the minority language.

The Commission also notes the lack of the right to display names of places in minority language in areas traditionally inhabited by minorities in substantial numbers. "

> CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §§14-17.

"The right to use its own language in one's dealings with the authorities is one of the core rights. The wording of Article 8 of the first draft law seems preferable to that of Article 16 of the second draft law. Nevertheless, the provisions in question call for a clarification. An any rate, it should be made clear that the "authorities" in question include the judiciary.

However, the quantitative requirement ("where persons belonging to national minorities form *the larger part* of the population") seems too restrictive. It is recalled in particular that recently the Parliamentary Assembly of the Council of Europe referred to the need to pay special attention to the "free use of national minorities' languages in geographical areas *where they live in substantial numbers*" (see recommendation 1623(2003), point 11 v.). This question needs to be regulated in detail in the relevant secondary legislation, but a precise guideline needs to be given in this law. **"**

> CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§37,38.

"The use of the mother language is restricted to dealings with and to official acts of local and authorities *in areas where the majority of the population is of a distinct national minority* (Art 20 of the Draft). This is a too narrow a criterion. Recommendation 1201 (1993) of the Parliamentary Assembly the Council of Europe speaks in Art 7 (3) about "regions in which substantial numbers of a national minority are settled" (see also Art 10 (2) of the Framework Convention).
[...]
"The use of the minority language should be provided for also for the contacts with regional bodies. Of course, it will depend on the territorial – administrative assessment of the state, to which degree this idea can be realized in Ukraine. "

> CDL-AD(2004)022, Opinion on the latest version of the Draft Law amending the Law on National Minorities in Ukraine §§12, 14.

"The right to freely use a minority language in official communications is one of the most important rights for the preservation of the minority identity. The draft law goes beyond European standards in this field. The provision of Article 14 §2, which provides that in municipalities where the population belonging to a national minority accounts for 5% of total inhabitants, the language of that minority shall be in official use, is to be commended. It should be noted though that the possibility to recognise, as official language, one or more minority languages is not provided by the Charter."

CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §41.

"The Commission welcomes the readiness of the Ukrainian authorities to ensure the right to education and instruction in the persons' mother tongue, the right to use the language in private and public sphere in oral and written communication, the right to establish private educational institutions (Article 13), as well as to provide for the conditions for teaching and learning the language (Article 14).

However, it seems unclear who the "relevant indigenous people" mentioned in Article 14 para.1 are, and to whom the rights in Article 13 will apply. The text should be amended to indicate that no inappropriate distinction is meant here.

The second paragraph of Article 14 deals with the use of the language of "relevant" indigenous peoples by local authorities in statute-established procedures, along with the state language. Such use however, seems to be rather restrictive. In the first place, according to the draft law, local authorities may use the language of the indigenous people but are not obliged to do so, which would mean that the provision does not offer any legal guarantee. In the second place, they are authorized to do so only if in the municipality concerned the indigenous peoples constitute the majority of the population. Compared to regulations concerning the use of the languages of national minorities in public life, the majority requirement would seem to be too severe."

CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples in Ukraine.

"Under Chapter II of the draft law, Section 5 contains several provisions governing "the use of mother tongue". Article 31 thus provides for the right to use minority languages for public purposes in those "administrative-territorial units where the citizens belonging to a national minority have a significant percentage, in the conditions of the Public Local Administration Law No 215/2001".

The exact meaning of the term "significant percentage", which is in itself too vague a concept, is of such vital importance for the application of this and other articles (see Article 37) that the authorities and the recipients of the law need sufficient guidance to implement it. It is therefore of crucial importance that Article 31 makes an explicit reference to the Public Local Administration Law No 215/2001, which contains a 20% threshold that will be rendered applicable also in the draft law on the statute of national minorities. This will indeed represent a positive step fully in line with international standards.

The Commission understands the concern of the drafters who have preferred not to repeat the 20% in Article 31 of the draft law, so as to avoid reopening the political debate on this threshold. The Commission nevertheless notes that the reference to the "significant percentage" is not consistently used in Articles 31 to 38. As a logical consequence and unless otherwise specified, it seems that the articles not mentioning it, such as Article 34, paragraph 2 (right to conclude a marriage in a minority language), should not be subject to the threshold deriving from the Public Local Administration Law No 215/2001. In such cases, it may be useful to include other criteria in the draft law as it is hard to imagine that such linguistic rights will in practice be available without any limitation.

In the provisions of this Section 5, the draft frequently uses the expressions "in the conditions of the law" (see Article 32), "according to the law" (see Article 34, paragraph 1) or "according to the legal provisions in force" (see Article 36, paragraph 1). These references, which are not further specified, make it extremely difficult for those concerned to know which additional conditions are placed on the public use of minority languages in the various contexts at issue, such as the issuance of normative documents by the central public authorities and the use of minority languages before law courts. Some more precise references to the relevant laws should

therefore be included in the text of the draft or at least in an explanatory report in order to remedy this legal uncertainty (see related comments under item C, paragraph 14, above).

As concerns ways and means to make the public use of minority languages effective in practice, the draft law provides for the need to ensure language training of the public officers concerned, as well as for the possibility to resort to authorised translators (Article 36, paragraph 1). The draft, however, does not indicate which solution must prevail in what circumstances: is the choice left to the discretion of the authorities? Does the choice depend on the percentage of persons belonging to national minorities living in the administrative-territorial unit concerned ? Are the economic capacities of the authorities of any relevance? The Commission suggests that the draft law be completed in order to give further guidance on these important questions.

The Commission is of the opinion that reserving the linguistic rights listed under Section 5 to citizens only and thereby not extending them to non-citizens can hardly be justified (see related comments under item D, paragraphs 24-30, above). Non-citizens may indeed speak certain minority languages which already enjoy protection under the draft law. For example, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bound of citizenship, registration of their name and surname in the minority language would seem important (see Article 33). Similarly, a distinction between citizens and non-citizens would seem inappropriate and even problematic in practice as regards the linguistic situation of detainees (Article 35), as well as patients in sanitary institutions and centres (see Article 37). As concerns the latter provision, it would also seem strange not to take into account those residents who feel they belong to a recognised national minority, but are not yet Romanian citizens, in determining whether the requirement of a "significant percentage" is fulfilled."

> CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania, §§31-36.

"According to the definition set out in Article 1 (a) [of the European Charter for regional and minority langages], the expression "regional or minority languages" does not include the languages of migrants. The term "migrants" applies in principle to persons of foreign origin who are not nationals of an acceding state. The question as to whether non-citizens can also benefit from the measures aimed at protecting a regional or minority language remains, however, not an easy one to answer: it would seem difficult to distinguish in practice between citizens and non-citizens speaking the same language so as to deny the latter and not the former the right to make use of their language in certain contexts."

"[…]territorial limitations - coupled with time requirement - in the availability of linguistic rights and facilities seem in principle admissible. They should, however, be based on reasonable and objective criteria. […]

[…]The Venice Commission itself has already questioned the admissibility of restricting certain cultural and linguistic rights to citizens only and highlighted in this regard the exclusion of non-citizens from membership in a system of cultural autonomy as well as in associations established to promote and protect the identity of minorities. […]

The relationship between citizenship and other criteria is not finally settled. On the one hand, the use of other criteria may appear preferable in certain fields such as enhanced linguistic rights, especially as concerns education and use of minority languages in the public realm. The use of other criteria is also more appropriate in certain national contexts like State succession resulting from the dissolution of larger units. On the other hand, the use of the citizenship criterion remains admissible - and perhaps even more suitable - in certain limited contexts, in particular as concerns some political rights and access to certain public functions."

> CDL-AD(2007)001, Report on non-citizen and minority rights, §§62, 115, 120, 142.

"[...] the Venice Commission wishes to emphasise that state authorities are perfectly entitled to promote the knowledge and use of the official language and to ensure its protection, although it is more usual for states to regulate and protect the use of minority languages.

In the first place, protecting and promoting the official language can respond to public order needs as the use of the State Language allows the State authorities to have access to official communications and documents which are essential to fulfil their public responsibilities.

The protection of the State language has a particular importance for a new State in which, as it is the case for the Slovak Republic, linguistic minorities represent a high percentage of the citizens of the population. The promotion of the State language guarantees the development of the identity of the State community, and further ensures mutual communication among and within the constituent parts of the populations. The possibility for citizens to use the official language throughout the country can be ensured also in order to avoid that they be discriminated against in the enjoyment of their fundamental rights, in areas where the persons belonging to national minorities have a majority position.

In addition, knowledge of the official language is also important from the perspective of persons belonging to national minorities. As recognised in the Explanatory Report on the Provisions of the Framework Convention (commentary on article 14 §3), "*knowledge of the official language is a factor of social cohesion and integration*". The Advisory Committee has recognized that the protection of the state language is a legitimate aim.

The Preamble of the European Charter for Regional or Minority Languages stresses that "the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them" and should be done "within the framework of national sovereignty and territorial integrity".

Promoting the knowledge of the official language of the State also pursues the legitimate, public interest of persons belonging to national minorities not to be confined to specific geographical areas where the relevant minority language is spoken. The real possibility of circulating and settling down anywhere within the territory of the state, if one so wishes, is important with a view to pursuing one's professional and personal development.
[…]
The legitimacy of an official language's special position and its unifying potential do not, however, absolve the State of the obligation to comply with the provisions of the international conventions on the protection of national minorities, notably Articles 5 and 10 of the Framework Convention for the protection of national minorities. As the OSCE High Commissioner for National Minorities rightly pointed out, it is therefore crucial to strike a proper balance between the promotion of the state language and the protection of the linguistic rights of persons belonging to national minorities. This means, in particular, that such measures should not go beyond what is necessary to achieve the legitimate aim pursued. It should also be noted in this context that the state language, has the advantage of being the language of the majority of the people living in the territory of the State.
[…]
[...] the possibility of using regional or minority languages in contacts with the public authorities only in areas in which 20% of the population belong to the relevant minority amounts to a territorial reservation which is incompatible with the Charter. While the Charter does not set up a general right for users of regional or minority languages to demand the use of their language in their relations with the public authorities, they require the State to adopt a positive attitude towards the practice of a regional or minority language in contacts with the public administration and services whenever this is possible without excessive constraints on the part of the public authorities.
[…]

57. In conclusion, the Venice Commission considers that the obligation to use the State Language should be imposed on public authorities (art. 3. 1) and their employees, civil servants and members, acting in their official capacity, only to the extent that this can be done without prejudice to the linguistic rights which private individuals can draw from the separate regulations or international treaties on human rights and on the protection of national minorities (notably the European Charter for Regional or Minority Languages), irrespectively therefore of the mere criterion of the 20% threshold.
[…]
134. Protection and promotion of the state language must be balanced against protection and promotion of the linguistic rights of persons belonging to national minorities. These rights are guaranteed and protected at the international as well as at the national level. The right of the majority of the population to speak the official language and the right of persons belonging to minorities to use their minority language are compatible and may co-exist with each other without conflict, provided that a positive approach is taken by both the majority and the minorities towards each other. The obligation to use the official language should be confined to genuine cases of public order needs and bear a reasonable relation of proportionality; the extent of public order need may depend on the attitude of the national minorities. In other cases where the State deems necessary or appropriate or desirable to ensure the use of the state language in addition to minority languages, it should provide adequate facilities and financial means."

> CDL-AD(2010)035, Opinion on the Act on the State Language of the Slovak Republic, §§40-45, 47, 53, 57, 134.

"It is important for the Ukrainian authorities to make sure that such guarantees are available for the Russian language as well as for other regional and minority languages in accordance to the Ukrainian Constitution and Ukraine's international obligations. A comprehensive and inclusive approach, which would imply an overall review of the relevant legislation, including the law on the protection of national minorities and various sectoral laws, would be a pre-condition for establishing clear, stable and consistent guarantees in this field.

At the same time, while being aware of the complex linguistic situation in Ukraine, in particular in the specific context resulting from the dissolution of a former larger multi ethnic State, the Commission is of the view that the preferential protection of the Russian language as a general measure might be questionable from a legal point of view and raise undue tensions within the Ukrainian society. Where the use of the Russian language is already an everyday fact, and the Russian language is used even by people who identify themselves as Ukrainians with Ukrainian language as linguistic identity, such a preferential level of protection is not needed and would have an adverse impact on the efforts made to consolidate Ukrainian as a State language.
[…]
The international treaties on human rights and on the protection of minorities, such as the Framework Convention and the Language Charter, do not impose specific obligations on member states as to the recognition and the protection of an official/state language and they do not explicitly set boundaries on the protection of minority rights either. Nevertheless, it has always been acknowledged that these treaties imply that the member states have to strike a fair balance between the protection of the linguistic rights of persons belonging to national minorities, on the one hand, and the maintaining of the cohesion between the different linguistic groups of the country, on the other hand. In achieving this last aim, the state language can be of the utmost importance.
[…]
The Venice Commission is of the view that appropriate legal guarantees are indispensable to ensure the effective preservation of the above-mentioned balance, on the basis of a stable, sustainable and clearly defined long-term linguistic policy. It notes with regret that Draft reflects the absence of such a long-term linguistic policy for Ukraine and that it fails to propose viable solutions to the most challenging questions facing Ukraine in this field.

The Venice Commission acknowledges that the Framework Convention and the Language Charter do not impose an obligation on the state authorities to grant an identical protection to every single minority group. It considers however that, in elaborating a law "on Languages in Ukraine", the Ukrainian legislator should take the opportunity to re-examine the overall linguistic situation of minorities in Ukraine. By focussing on the Russian language, the current Draft Law pursues language regulation reform in isolation from other minority issues. Therefore the Venice Commission supports the recommendation of the HCNM that the Ukrainian authorities undertake a comprehensive modernization of the legal framework concerning minority protection including the use of minority languages.
[…]
In the Venice Commission's view, the Ukrainian authorities should identify more adequate legislative solutions to confirm the pre-eminence of the Ukrainian language as the only state language, take protective measures in those fields where a further development of the Ukrainian language is needed, and thus establish a fair balance between the protection of the rights of minorities, on the one hand, and the preservation of the State language as a tool for integration within society, on the other hand. In the meantime, clear and sustainable legal guarantees should be provided for the protection of the persons belonging to national minorities and their regional or minority languages, in line with the Constitution and the relevant international standards."

CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §§73, 74, 97, 101, 108, 116.

A. Education

"The Commission suggests that when States are not in a position to provide pupils with teaching in their mother tongue, they must permit those children to attend private schools"

CDL(1991)20rev, Opinion on the draft Charter for Regional or Minority Languages, §9.

"[…]The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7 , 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group".

CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.

"[…], the Venice Commission draws attention to the important issue of the establishment of minority language schools. Under the present legislation, the local authorities are competent to assess whether there is a need to establish and to maintain such minority schools. The Venice Commission considers that it would be welcome, in order to enhance legal certainty for all minorities as well as for the majority, that the law itself would contain precise provisions on the number of requests that are necessary to guarantee an enforceable right to have such schools established and maintained, and on the relevant decision-making procedures. […].

96. […]. The Venice Commission wishes to underline once more that, to ensure adequate opportunities for teaching and/or in minority languages, clear criteria and procedures, in line with the applicable standards and taking into account the existing needs, are essential."

CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §§95-96.

VIII. FREEDOM OF PEACEFUL ASSEMBLY

"Freedom of peaceful assembly is a fundamental human right which can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. Assemblies may serve many purposes, including the expression of diverse, unpopular or minority opinions. It can be an important strand in the maintenance and development of culture, and in the preservation of minority identities. The protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralist society in which groups with different beliefs, practices, or policies can exist peacefully together.
[…]
Freedom of peaceful assembly is to be enjoyed equally by everyone. In regulating freedom of assembly, the relevant authorities must not discriminate against any individual or group on any ground. The freedom to organise and participate in public assemblies must be guaranteed to individuals, groups, unregistered associations, legal entities and corporate bodies; to members of minority ethnic, national, sexual and religious groups; to nationals and nonnationals (including stateless persons, refugees, foreign nationals, asylum seekers, migrants and tourists); to children, to women and men; to law enforcement personnel, and to persons without full legal capacity, including persons with a mental illness.
[…]
The freedom to organise and participate in public assemblies should be guaranteed to members of minority and indigenous groups. Article 7 of the *Council of Europe Framework Convention on National Minorities* (1995) provides that '[t]he Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.' Article 3(1), *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992) also states that '[p]ersons belonging to minorities may exercise their rights ... individually as well as in community with other members of their group, without any discrimination.' As noted above at paragraph 7, '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.'"

CDL-AD(2010)020, Guidelines on Freedom of Peaceful Assembly, §§A 1, 2.5, B.II.54.

IX. FREEDOM OF CONSCIENCE AND RELIGIOUS ORGANIZATIONS

"The Venice Commission therefore concludes that, on the basis of the case law of the ECtHR, there seems no doubt that the present Turkish system of not providing non-Muslim religious communities as such with the possibility to obtain legal personality amounts to an interference with the rights of these communities under Article 9 in conjunction with Article 11 ECHR."

CDL-AD(2010)005, Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to use the adjective "Ecumenical", §58.

"Article 31 explicitly lists the criteria for recognition as religious communities; it is necessary in the first place to have been operating in the territory, during 20/30/50 years after being registered as religious organisations, being continuously in accordance with the constitution and the legislation during this period of time. In addition, a bilateral agreement has to be stipulated with the Council of Ministers. At this stage, a legal remedy is provided in case of refusal. Subsequently, this agreement has to be ratified by Parliament by majority vote. For minority religions, it might be difficult to obtain such a majority vote. There is no legal protection against discrimination in this case."

CDL-AD(2007)041, Opinion on the Draft Law on Freedom of Religion, Religious Organisations and mutual relations with the State of Albania, §34.

"Article 15 also permits liquidation of religious organizations for "coercion of citizens to refusal to perform their obligations as defined by law." Firstly, it is not clear why this is limited to citizens. Secondly, permitting some forms of conscientious objection is common in modern democracies. As the *Guidelines* [OSCE/ODIHR Venice Commission Guidelines for Review of Legislation Pertaining to Religion or Belief] state: "There are many circumstances where individuals and groups, as a matter of conscience, find it difficult or morally objectionable to comply with laws of general applicability (...). Most modern democracies accommodate such practices for popular majorities, and many are respectful towards minority beliefs."

CDL-AD(2008)032, Joint opinion on Freedom of Conscience and Religious Organizations in the Republic of Kyrgyzstan, §123.

X. RIGHT TO LOCAL OR AUTONOMOUS REPRESENTATION

"Article 11 of the draft additional protocol to the ECHR appended to Recommendation 1201/93 of the Parliamentary Assembly provides as follows: "In the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the State."

"The drafters of the proposal for a Convention preferred not to include an obligation for the State to ensure proportional parliamentary representation of minorities since this principle seemed difficult to implement.

However, they decided to set forth the obligation for the State to favour the effective participation of minorities in decisions affecting the regions where they live or in the matters affecting them.

Moreover, it is necessary for the State to take account of the presence of one or more minorities on their territory when dividing the territory into political and administrative sub-divisions, as well as into constituencies"

CDL(1991)008, Explanatory report on the proposal for a European Convention for the Protection of Minorities, §42; reproduced in "The protection of minorities", Collection Science and Technique of Democracy, no. 9, p. 24, 1994;

last paragraph cited in CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3.b.)

"Concentrated minorities, for which territorial solutions are possible, should be clearly distinguished from dispersed minorities, for which such solutions are evidently excluded."

CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, I.

"Federalism - or indeed regionalism - is undoubtedly a system which enables minorities to obtain a degree of autonomy within the framework of the existing State structure."

CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, III.

"When a minority is itself in the majority in a federated State or region, it indirectly benefits from such competences and from such participation in central government."

> CDL-MIN(1994)001rev2, The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland, Conclusion.

"The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities.
[…]
The Framework Convention for the Protection of National Minorities did not borrow from Article 11 of the Parliamentary Assembly's proposal the idea of granting to persons belonging to minorities in the regions where they are a majority "the right to have at their disposal appropriate local or autonomous authorities or to have a special status" […] From the standpoint of the Framework Convention, participation in public affairs is above all a question of personal autonomy, not of local autonomy.

Nor has the case-law of the European Convention on Human Rights implied that some provisions of this Convention could be used for the purpose of claiming a right to a special status
[…]
It follows from the foregoing that international law cannot in principle impose on States any territorial solutions to the problem of minorities and that States are not in principle required to introduce any form of decentralisation for minorities."

> CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the draft protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2b.

"Holders of the right provided for in Article 11 are «the persons belonging to a national minority», not the minorities as such, although, in the Commission's view, despite this formulation, the right to autonomy is conceivable only as a right exercised in association with others. Therefore, the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a component of the people or the nation, a concept which might affect any unitarity of the State. The presentation of the minority phenomenon in Article 11 is no different from that in the other provisions of the text proposed in Recommendation 1201: it is indirect and based on recognition of individual rights, albeit exercised in association with others (ie. collectively) […]".

> CDL-INF(1996)4, Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3a.

"A minority must constitute a majority in a «region» for Article 11 to be applicable.
[…]
[…] The he term [region] should be construed in its geographical, not administrative or political, sense. But it also has a historical dimension which is not unconnected with the settlement of various groups in a particular territory.
[…]
[…] The phrase [«in a majority»] should be understood not as denoting a mere numerical relationship but as implying that the minority has settled and is concentrated in the region concerned."

> CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §§2d, 3b

The Commission's work and a study of national systems for protecting minorities do not reveal the existence of any common practice in the matter of territorial autonomy, even in general terms.

> CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3c.

What is important, though, is that the State offers the minorities the possibility to appropriate local or autonomous administrations or at least the minimum requirements of a special status, which means that:

"The institutions which make up this special status should be capable of representing the minorities and ensuring that persons belonging to the minorities:
– will be consulted whenever the Parties are contemplating legislative or administrative measures liable to affect them directly;
– will be involved in the preparation, evaluation and implementation of national and regional development plans and programmes liable to affect them directly;
– will effectively participate in the decision-making process and elected bodies at both national and local level, particularly in the fields of culture, education, religion, information and social affairs."

> CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3c.

"Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them […] the Rapporteurs stress that this revision (of the Constitutional Law of 1991) should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime.
[…]
"In the opinion of the Rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations".

> CDL(1996)026, Report on the implementation of the Constitutional law on Human Rights and Freedoms and on the Rights of Ethnic Communities and Minorities in the Republic of Croatia, §§20-22.

"[A]lthough a number of constitutions guarantee the right to self-determination, the concept excludes secession. What is often being referred to is a state's external self-determination. Where self-determination is envisaged within a state, it is construed in ways compatible with territorial integrity" .

> CDL-INF(2000)016, A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe, §I.A.

"The idea that a conflict can best be solved through division into a number of separate states is not consistent with the real shape of things at the dawn of the 21st century. Today power is increasingly distributed among various tiers of authority - at state level and the levels below and above states - to the point where it may be a question of shared sovereignty. In these

circumstances the dichotomy between full sovereignty and total lack of power - if ever there may have been any basis for it - is in any case no longer relevant. The solutions to conflicts lie far more in co-operation between tiers of authority, which can be organised in as many ways as there are different situations".

> CDL-INF(2000)016, A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe, §I.A.

"The participation of persons belonging to national minorities in the legislative and the administrative fields concerning minority questions, in particular, at the regional and the local level, is very important. Here, Article 18 of the first draft law and Articles 15 and 28-30 of the second draft law follow different ways.

The powers of the consultative bodies referred to in Article 18 of the first draft are rather vague and must be duly co-ordinated with those of the "central executive body with special powers" referred to in the same provision.

The creation of a body of the kind of the "minority council" which – following a suggestion made by the Venice Commission – has been introduced in the Croatian constitutional law on the rights of national minorities, and which turned out to be a valuable instrument, could be envisaged. "

> CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§47-49.

"Participation of persons belonging to national minorities in all aspects of public life is an important condition for their integration into the society of which they are part. Furthermore, the possibility to actively participate in the decision-making processes which govern the protection of minority rights appears necessary to ensure the effective enjoyment of guaranteed rights as well as the prevention of discrimination of minorities.

Specific procedures, institutions and arrangements are often established, through which minorities can influence decisions that concern them. Participation may include the ability of minorities to bring relevant facts to decision-makers, defend their views and positions before them, veto legislative or administrative proposals, and establish and manage their own institutions in specified areas."
[...]
"Independent advisory bodies comprising representatives of minorities and advising the state authorities in the field of minority policies may have an important role in ensuring better protection of their interests."

> CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §§44,45,58.

XI. RELATIONS WITH ADMINISTRATIVE AUTHORITIES AND PARTICIPATION IN PUBLIC AFFAIRS

"Any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private.

Whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write in their own language to the political, administrative and judicial authorities of this region or, where appropriate, of the State. These authorities shall have a corresponding obligation"

CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them".

CDL(1991)007**,** Proposition pour une Convention européenne pour la Protection des Minorités (figure aussi dans "La protection des minroités", Collection Science and Technique de la démocratie, STD N°9, 1994, p.10

"The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7 , 8 and 9 of the proposal, persons belonging to a minority shall have the right to use their language freely, in public and in private; whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write their own language to political, administrative and judicial authorities; moreover, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of teaching of the mother tongue is the keystone of safeguarding and promoting the language of a minority group".

CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §1.

"The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14)".

CDL-INF(1996)003, Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states §2.

"The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities. Article 14 paragraph 1 of the Commission's proposal provides that «States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them»".

CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2.b.

"In the Vienna Declaration of Heads of State and Government of the member States of the Council of Europe, of 9 October 1993, it is recognised that the creation of a climate of tolerance and dialogue is necessary for participation by everyone in public life. An important contribution to this can be made by local and regional authorities ".

CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §2.b.

“Having regard to the importance of granting particular rights to concentrated minorities making up a substantial part of the population to participation in public institutions and in the administration of matters concerning them […] the Rapporteurs stress that this revision (of the Constitutional Law of 1991) should not lead to the abolition of any special status but should rather institute a regime of local self-government adapted to the new situation. In this respect, it is of course for the national legislature to determine the principal characteristics of that regime. […]

In the opinion of the Rapporteurs, a special status should be granted to concentrated minorities making up a substantial number of the population irrespective of the total percentage that such a minority represents at national level. This point is of particular relevance to those territories presently under international administration as well as to displaced populations”.

> CDL(1996)026, Report on the implementation of the Constitutional law on Human Rights and Freedoms and on the Rights of Ethnic Communities and Minorities in the Republic of Croatia, §§20-22.

“Participation of minorities in public life is primarily founded on formal recognition of the principle of equality”

> CDL-MIN(1998)001rev, Summary Report on Participation of Members of Minorities in Public Life, Introduction.

“[[…] The obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations. Indeed, these measures deprive persons belonging to a minority of the rights secured to members of the majority (right to communicate with the authorities in one's mother tongue; right to be taught, or possibly to be taught in, one's mother tongue). On that basis, measures taken to foster the use of minority languages in the public sphere or in education are to be regarded not as positive measures but as allowing different situations to be treated equally.”

> CDL-MIN(1998)1rev, Summary report on participation of members of minorities in public life, §1.1.

“[…] to ascertain whether or not the stipulation of knowledge of the [country’s] official language [in order to hold an appointment in the public administration] constitutes a form of indirect discrimination against minorities, what must be considered is first whether or not the minority language shares official language status, second the required level of command of the language, and furthermore how gradually the requirement is imposed, and the possible application of programmed measures to prevent the exclusion of members of minorities from public appointments.”

> CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §1.2 A.

“Substantive enforcement of the right to maintain one's existence or at least cultural, linguistic and religious distinctiveness […] carries the specific obligation for the state to finance teaching of or in the minority language and its use in public administration, and to finance bodies responsible for representing and furthering the interests of minorities.”

> CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.1.

"Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied – inter alia – to minorities. The situation is different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles." – rather pos. discrimination, under 4

> CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.

"The involvement of members of minorities in the various aspects of life in society is an important factor in their integration and in the prevention of conflicts. This applies especially to what is commonly called public life, that is to say participation in state bodies".

> CDL-INF(2000)4, Electoral law and national minorities, Introduction.

"It is conceivable that indirect participation of the entities in the decision-making process might take place not only in the legislature, but also in the executive and the judiciary".

> CDL-INF(2000)16, A general legal reference Framework to facilitate the settlement of ethno-political conflicts in Europe, §II.B.2.

"[…] The restriction of the right to take part in the conduct of public affairs and of access to the public services to citizens does not conflict with international standards provided that it does not prevent non-citizens from holding lower-level posts attached to the civil service."

> CDL-INF(2001)14, Opinion on the constitutional law on the rights of national minorities in Croatia, §4.

"The involvement of persons belonging to minorities in the various aspects of life in society is an important factor in their integration; this applies in particular, to what is commonly called public life, i.e. participation in state bodies. Although in most cases the representation of minorities in a state's elected bodies is achieved through the application of the general rules of electoral law, a certain number of countries dispose of specific rules of electoral law providing for special representation of minorities in state bodies. Article 55 of the Lithuanian Constitution provides that members of the Seimas shall be elected on the basis of "universal, equal and direct suffrage". It further provides that the electoral procedure shall be established by law.

The Commission regrets that the Draft Law does not contain specific provision on the representation of national minorities in state bodies (national parliament and local councils, governmental bodies and judiciary). A specific guarantee of proportional representation is of the utmost importance, also for an effective enjoyment of other minority rights. The Draft Law should therefore at least include the reference to this important issue.**"**

> CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania §§23,24.

"The participation of persons belonging to national minorities in the legislative and the administrative fields concerning minority questions, in particular, at the regional and the local level, is very important. Here, Article 18 of the first draft law and Articles 15 and 28-30 of the second draft law follow different ways.

The powers of the consultative bodies referred to in Article 18 of the first draft are rather vague and must be duly co-ordinated with those of the "central executive body with special powers" referred to in the same provision. "

> CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine §§47,48.

"The procedure ensuring representation of national minorities in "*public authorities, public institutions and local authorities*" (Article 29) does not seem to be adequate. It results from the current drafting of the article that the political level "looks after" the representation of the minorities in these institutions. The involvement of the political level in appointing such representatives is to be avoided especially when it comes to the representation within the judiciary. The Commission is of the opinion that an appropriate solution would be to set forth that persons belonging to national minorities shall be able to work in public institutions in conditions of equality with the others, and according to their own individual merits."

> CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §56.

"Pursuant to the draft law, a "specially authorised central executive authority" shall be set up with the aim to develop and implement the state policy in the field of indigenous peoples and national minorities. "Corresponding structures" shall also be established within the municipal executive bodies (Article 3).

The establishment of specialized bodies responsible for the implementation of the state policy in the field of indigenous peoples is to be welcomed. There is however no guarantee in the draft law as to the representation of indigenous peoples in the mentioned bodies.

Furthermore, the draft law is silent on the relations of the new central governmental body with the existing State Committee for Nationalities and Migration, which is the main state executive institution in the sphere of ethnic policy.

The Assembly of Indigenous Peoples

Article 4 provides for the creation of the Assembly of Indigenous Peoples, as an advisory body to the central government in the field of protection of the rights and freedoms of the indigenous peoples and national minorities of Ukraine. This provision is to be welcomed. The existence of a body representing the interests of indigenous peoples of Ukraine is of particular importance for ensuring a channel of communication and co-ordination between the government and indigenous peoples, and between different indigenous peoples themselves. However, it is not clear why such an Assembly of Indigenous Peoples should also advise on issues related to national minorities, when a specialised body – the Council of Representatives of Civic Associations of National Minorities, attached to the State Committee on Nationalities and Migration - already exists.

The draft law should also clarify the relationship between the Assembly and the corresponding structures to be established at the local level (see supra, para. 28).
[…]
Article 8 of the draft Law provides for the right of access to legislative, executive and judicial bodies, other public functions and enterprises, institutions and organisations. It is the Commission's understanding that the last three categories are meant to be public "enterprises, institutions and organisations". At any rate, the Constitution of Ukraine guaranties the equal electoral (passive and active) rights to all its citizens (Article 38). From that perspective, if Article 8 is meant to reaffirm the above mentioned constitutional provisions it should be written in a non-restrictive manner.

In addition, the Venice Commission points out that there is today a growing tendency in Europe to extend the right to vote for, and to be elected as a member of representative bodies at the local level to non-citizens who have had residence in the country for a certain period of time.

The Commission welcomes the readiness of the Ukrainian authorities to ensure the right to education and instruction in the persons' mother tongue, the right to use the language in private and public sphere in oral and written communication, the right to establish private educational institutions (Article 13), as well as to provide for the conditions for teaching and learning the language (Article 14).

However, it seems unclear who the "relevant indigenous people" mentioned in Article 14 para.1 are, and to whom the rights in Article 13 will apply. The text should be amended to indicate that no inappropriate distinction is meant here.

The second paragraph of Article 14 deals with the use of the language of "relevant" indigenous peoples by local authorities in statute-established procedures, along with the state language. Such use however, seems to be rather restrictive. In the first place, according to the draft law, local authorities may use the language of the indigenous people but are not obliged to do so, which would mean that the provision does not offer any legal guarantee. In the second place, they are authorized to do so only if in the municipality concerned the indigenous peoples constitute the majority of the population. Compared to regulations concerning the use of the languages of national minorities in public life, the majority requirement would seem to be too severe."

> CDL-AD(2004)036, Opinion on the draft Law on the status of indigenous peoples of Ukraine, §§29-33, 35-36, 38-40.

"Under Chapter II of the draft law, Section 5 contains several provisions governing "the use of mother tongue". Article 31 thus provides for the right to use minority languages for public purposes in those "administrative-territorial units where the citizens belonging to a national minority have a significant percentage, in the conditions of the Public Local Administration Law No 215/2001".

"The exact meaning of the term "significant percentage", which is in itself too vague a concept, is of such vital importance for the application of this and other articles (see Article 37) that the authorities and the recipients of the law need sufficient guidance to implement it. It is therefore of crucial importance that Article 31 makes an explicit reference to the Public Local Administration Law No 215/2001, which contains a 20% threshold that will be rendered applicable also in the draft law on the statute of national minorities. This will indeed represent a positive step fully in line with international standards.

The Commission understands the concern of the drafters who have preferred not to repeat the 20% in Article 31 of the draft law, so as to avoid reopening the political debate on this threshold. The Commission nevertheless notes that the reference to the "significant percentage" is not consistently used in Articles 31 to 38. As a logical consequence and unless otherwise specified, it seems that the articles not mentioning it, such as Article 34, paragraph 2 (right to conclude a marriage in a minority language), should not be subject to the threshold deriving from the Public Local Administration Law No 215/2001. In such cases, it may be useful to include other criteria in the draft law as it is hard to imagine that such linguistic rights will in practice be available without any limitation.

In the provisions of this Section 5, the draft frequently uses the expressions "in the conditions of the law" (see Article 32), "according to the law" (see Article 34, paragraph 1) or "according to the legal provisions in force" (see Article 36, paragraph 1). These references, which are not further specified, make it extremely difficult for those concerned to know which additional conditions are placed on the public use of minority languages in the various contexts at issue, such as the issuance of normative documents by the central public authorities and the use of minority

languages before law courts. Some more precise references to the relevant laws should therefore be included in the text of the draft or at least in an explanatory report in order to remedy this legal uncertainty (see related comments under item C, paragraph 14, above).

As concerns ways and means to make the public use of minority languages effective in practice, the draft law provides for the need to ensure language training of the public officers concerned, as well as for the possibility to resort to authorised translators (Article 36, paragraph 1). The draft, however, does not indicate which solution must prevail in what circumstances: is the choice left to the discretion of the authorities? Does the choice depend on the percentage of persons belonging to national minorities living in the administrative-territorial unit concerned? Are the economic capacities of the authorities of any relevance? The Commission suggests that the draft law be completed in order to give further guidance on these important questions.

The Commission is of the opinion that reserving the linguistic rights listed under Section 5 to citizens only and thereby not extending them to non-citizens can hardly be justified (see related comments under item D, paragraphs 24-30, above). Non-citizens may indeed speak certain minority languages which already enjoy protection under the draft law. For example, for those persons belonging to a national minority who are residents in Romania but (still) do not have the special bound of citizenship, registration of their name and surname in the minority language would seem important (see Article 33). Similarly, a distinction between citizens and non-citizens would seem inappropriate and even problematic in practice as regards the linguistic situation of detainees (Article 35), as well as patients in sanitary institutions and centres (see Article 37). As concerns the latter provision, it would also seem strange not to take into account those residents who feel they belong to a recognised national minority, but are not yet Romanian citizens, in determining whether the requirement of a "significant percentage" is fulfilled.
[…]
The overall question as to whether persons belonging to national minorities living in Romania are ensured an effective participation in cultural, social and economic life and in public affairs, in particular those affecting them, is not easy to answer. Minority participation is promoted through a range of measures and special structures within the executive branch. Furthermore, there are important institutional elements of participation in Romania such as minority representation in Parliament, the Council of National Minorities and the newly envisaged system of cultural autonomy.

The Commission is not in a position to assess whether or not this institutional framework actually results in an effective participation of persons belonging to national minorities in public life. This would require an in-depth monitoring of the situation, including on how the existing system is implemented in practice. Such a monitoring is periodically conducted under the Framework Convention, where the latest evaluation *inter alia* strongly welcomed the constitutionally guaranteed representation in Parliament, but at the same time stressed certain shortcomings in the consultation of the Council of National Minorities. The Commission can therefore not exclude that it may ultimately prove necessary to reinforce the participation of representatives of national minorities in the decision-making process. “

> CDL-AD(2005)026, Opinion on the draft Law on the status of national minorities living in Romania.

“[…] Is the State obliged, under Article 10 §2 FCNM (and provided the other conditions in that article are fulfilled such as “inhabited traditionally or in substantial number and where there is a real need”), to ensure conditions under which the minority can use their own language in relations with the authorities? The ACFC seems to admit that non-citizen individuals who are affiliated with a group traditionally residing in the territory must be entitled, together with those who lived there before, to use their own language in such contexts, but that ‘new minorities’ as such cannot generally demand this. On the other hand, could resident minorities affected by a sudden territorial/constitutional change (such as the restoration of the independence of the Baltic States or the dissolution of former Yugoslavia) demand that the language they have

traditionally used in relation to authorities can still be used ? It seems that no general answer can be given but rather that each country-specific situation, including from a socio-historical perspective, plays a crucial role […]."
[…]
"In principle, the requirement by a State wishing to establish consultation mechanisms and/or provide support for cultural and other initiatives, namely that a sufficient number of persons belonging to a minority are legal residents, is justifiable and does not seem to have met with objections from human rights treaty bodies. Lawful and effective residence actually testifies to the existence of a factual and legal link between a group of persons and the State. The latter may therefore legitimately ask for some evidence of such a link, including through the requirement of a lawful and effective residence, before creating new consultation structures, taking positive measures and thereby committing public money for minority groups."

"It should be stressed, however, that an additional requirement such as the citizenship criterion has often been criticised in the same context by different international bodies in that it could not be reasonable or might in some cases lead to arbitrary exclusions. The Venice Commission itself has already questioned the admissibility of restricting certain cultural and linguistic rights to citizens only and highlighted in this regard the exclusion of non-citizens from membership in a system of cultural autonomy as well as in associations established to promote and protect the identity of minorities."

CDL-AD(2007)001, Report on non-citizen and minority rights, §§41, 119-120.

"Article 11(4) prohibits the existence of political parties on ethnic, racial or religious lines. A concern to protect the unity and integrity of the state is of course fully acceptable. Like the second paragraphs of Articles 9 and 10 of the Convention on Human Rights, paragraph 2 of Article 11 of the European Convention allows limitations to the right of association. However, according to the case law of the European Court of Human Rights such limitations have to be proportional (see for example *United Communist Party of Turkey and Others v. Turkey*, Reports no. 1998-I and *Sidiropoulos and Others v. Greece*, Reports 1998-IV). It is therefore the Commission's concern that such provisions could be used to prevent minority linguistic, ethnic or religious groups from organising themselves at all."

CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §64.

"[…] the ban on political parties based on *national and ethnic* grounds is also potentially overbroad and inconsistent with freedom of association. In order for such a provision to be accepted as a reasonable restriction on freedom of association, which is strictly necessary in a democratic society, it should be established that the activities or aims of the political party constitute a real threat to the state and its institutions. It is difficult to accept that all political parties based on nationality or ethnicity should, as a matter of pure legal text without regard to any existing facts, be considered as a threat to the state. Although it may be acceptable, as expressed by the European Court of Human Rights, to ban a political party that has "an attitude which fails to respect" the state constitutional order, evidence of this attitude should be based on facts and not a blanket presumption applicable to all nationalities and ethnicities. For such prohibitions to be acceptable, they must be interpreted and applied very narrowly by judges and officials. In contrast, if the provisions are read broadly – for example, as a ban of parties, whose membership or leadership is predominantly from a certain ethnic (minority) group – the bans may be construed as undemocratic. The opportunity for various interpretations, which the formulation of the provision allows, creates possibilities for abuse. […] "

CDL-AD(2009)041, Joint opinion on the Draft Law on Political Parties of the Kyrgyz Republic, §13.

"[…] The material criteria for political parties are laid down in Article 68 (4), which states that neither the statutes and programmes nor the activities of a political party should be "in conflict" with:
[…]
- the indivisible integrity of its territory and nation,
[…]
It has been argued by Turkish legal scholars that the Law on political parties interprets and extends several of the criteria of Article 68 (4) beyond the wording of the Constitution. This in particular applies to the important provisions in Article 80 on "Protection of the principle of unity of the state" and Article 81 on "Preventing the creation of minorities", which have been invoked in several cases as the basis for prohibiting parties representing mainly Turkish citizens of Kurdish origin. According to the critics, while Article 68 (4) of the Constitution protects the "territorial integrity" of the state, Article 80 of the Law extends this to protect the unitary nature of the state as such, thus for example banning calls for a more federal system of government. This clearly goes beyond the ordinary meaning of "territorial" integrity.

Likewise, the prohibition in Article 81 of the Law against "the creation of minorities" clearly seems to go further than the concept of "indivisible integrity" of the state in Article 68 (4) of the Constitution. Indeed, many states have and recognise "minorities" without this being regarded as threatening the "integrity" of the state as such.

Taken as a whole, it would seem in effect that Article 68 (4) and the supplementary statutory rules can be invoked against almost any party programme that would argue for changes in the constitutional model, regardless of whether this is advocated through the threat of violence or merely through peaceful democratic means.

The Venice Commission is also concerned about the chilling effect which the legal provisions together with the case law of the Constitutional Court may have on freedom of association in Turkey, in particular for political parties. The Commission recalls in this respect that the ECtHR stated in the case of *Informationsverein Lentia v. Austria* that the state is the ultimate guarantor of the principle of pluralism and that it has the obligation to ensure that free elections take place at reasonable intervals under conditions ensuring the expression of the opinion of the people in the choice of the legislature. Such expression of the people's will is inconceivable without the participation of a plurality of parties representing the different shades of opinion to be found within a country's population.

> CDL-AD (2009)006, Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey, §§73, 76-78, 103.

Registration [of political parties] may be a pure formality in some countries, where the only condition is to produce a certain number of signatures. In other countries, however, the authorities make sure that the party fulfils material requisites concerning its activities. Regardless of the nature of the requirements, the essential rule governing this issue is the principle of equality, requiring states to remain neutral when dealing with the establishment and registration procedures and to refrain from any measures that could privilege some political forces over others. The requirements based on territorial representation and on minimum membership, in particular, have the potential to limit the possibilities of persons belonging to national minorities to organise in political parties. Hence, countries applying registration procedures to political parties should refrain from imposing excessive requirements for territorial representation as well as for minimum membership.

In general for certain vulnerable groups, measures like reserved seats, lower electoral thresholds, special parliamentary committees, adapted constituency boundaries, voting rights for non-citizens and constitutionally guaranteed representation of minorities in parliament are particularly welcomed to promote their political participation and representation. They are specially desirable in those member states where the strict requirements of minimum membership and regional representation are likely to affect the possibilities of persons

belonging to national minorities that are regionally concentrated to form political parties (as occurs in Moldova, Ukraine or the Russian Federation) or where the establishment of political parties based on ethnicity or region is plainly prohibited (such as in Bulgaria and the Russian Federation)"

CDL-AD(2009)021, Code of Good Practice in the field of Political Parties, §§68, 113.

"[...] the possibility of using regional or minority languages in contacts with the public authorities only in areas in which 20% of the population belong to the relevant minority amounts to a territorial reservation which is incompatible with the Charter. While the Charter does not set up a general right for users of regional or minority languages to demand the use of their language in their relations with the public authorities, they require the State to adopt a positive attitude towards the practice of a regional or minority language in contacts with the public administration and services whenever this is possible without excessive constraints on the part of the public authorities.
[…]
In conclusion, the Venice Commission considers that the obligation to use the State Language should be imposed on public authorities (art. 3. 1) and their employees, civil servants and members, acting in their official capacity, only to the extent that this can be done without prejudice to the linguistic rights which private individuals can draw from the separate regulations or international treaties on human rights and on the protection of national minorities (notably the European Charter for Regional or Minority Languages), irrespectively therefore of the mere criterion of the 20% threshold."

CDL-AD(2010)035, Opinion on the Act on the State Language of the Slovak Republic, §§53, 57.

"In addition to these specific provisions, Article 8.7 more generally imposes the obligation on "*state and local self-government bodies, associations of citizens, establishments, organizations, enterprises, their officials, public servants and citizens – subjects of entrepreneurial activity and natural persons*", in regions where 10% or more of the total population speak the regional or minority language, to take "measures for development, use and protection" of this language.

The Venice Commission welcomes the fact that, in this way, public use of minority languages, alongside the state language, is protected, at the local level, in areas where persons belonging to national minorities live in a compact manner.

Nevertheless, the criterion used in these provisions - "*regions where a regional or minority language is spoken by 10 % of the population*" - lacks clarity and fails to ensure the legal certainty necessary to assess their exact meaning.
[…]
The concept of "speaking the language" also lacks clarity: does it mean that 10 % or more of the population "are able to speak the regional or minority language", "predominantly" speak it or "preferably" speak it? If the criterion stands for "the ability of speaking the minority language", the Russian language would in most parts of Ukraine meet the criterion, as many inhabitants of Ukraine are bilingual. If the criterion stands for the "predominantly spoken language", it will, as the HCNM rightly pointed out, "disadvantage speakers of smaller minority languages who are not always free to use their language of preference. […] The use of language will not necessarily coincide with that of the preferred choice of the individual as that person will almost certainly be under economic or social pressure to use the dominant language of that area." An alternative and for the smaller minorities less detrimental criterion could be the "native language", on the condition that the criterion is clearly defined as the "mother tongue" or the "first language learnt in early childhood".

Moreover, the draft does not offer a clear suggestion on how to deal with the cases of bilingualism or multilingualism (see art. 3.1). While everyone has the right to freely determine the language he/she considers "native", the "native" language appears not to be relevant in the identification of the regional languages that deserve specific protection. The main criterion taken into account in this context is, according to the Draft Law, the "use" of the language, which in many cases is de facto imposed by the specific conditions available in the concerned area."

CDL–AD(2011)008, Opinion on the Draft Law on Languages in Ukraine, §§80-82 and 88-89.

XII. ELECTORAL MATTERS

"According to paragraph 19 of the Bill minorities will have the right to parliamentary representation. This, in the opinion of the Commission, is one of the most important rights in a democratic society. This raises the question, whether the right is not too important to leave its elaboration to other legislation."

CDL-MIN(1993)4rev, Opinion on the Hungarian bill n° 5190 on the Rights of National and Ethnic Minorities §12.

"[…] it was necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies."

CDL-INF(1996)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, §3.b.

"[…] Proportional sharing of seats among territorial entities or lists of candidates cannot therefore be regarded as a positive measure even if applied –*inter alia*– to minorities. The situation is different as regards measures designed to secure a definite proportion of civil service appointments to members of minorities. In this case, the apportionment of posts between the majority and the minority or minorities, and their allocation within the majority or the minorities, are in fact governed by different principles." – rather pos. discrimination, under 4

CDL-MIN(1998)001rev, Summary report on participation of members of minorities in public life, §2.2.

"[…] it is highly unusual, in practice, for political parties representing national minorities to be prohibited. As this would be a restriction upon the freedom of association, which is a fundamental part of the common constitutional heritage across the continent, it can be justified only in very special and individual cases, and not in a general manner. The principle of proportionality must always be fully respected. It should be noted that the prohibition on using «minority» arguments in an electoral campaign can lead, in fact, to a prohibition on participating in parliamentary life, even if minority parties as such are not formally prohibited".

CDL-INF(2000)4, Electoral law and national minorities, III.A.b.

"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, III.B.1.

“Indeed, the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body. Other elements also have a bearing, such as the choice of candidates by the political parties and, obviously, voters' choices, which are only partly dependent on the electoral system. The concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society, and, above all, its numerical size”.

CDL-INF(2000)4, Electoral law and national minorities, Conclusion.

“[…] The participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the minorities, as from the implementation of general rules of electoral law, adjusted, if need be, to increase the chances of success of the candidates from such minorities.”

CDL-INF(2000)4, Electoral law and national minorities, Conclusion.

“The existence of a second chamber representing the entities does not necessarily entail their equal representation”.

CDL-INF(2000)016, A general legal reference Framework to facilitate the settlement of ethno-political conflicts in Europe, §II.B.2.

“[…] If the requirement of citizenship is abolished so that the application of the Draft Law is not restricted to citizens only […] those entitlements which require specific qualifications such as citizenship or residence or the existence of a genuine link with Bosnia and Herzegovina should be regulated separately. In particular, the right to vote and to stand for office would be regulated in the relevant laws on elections and the Draft Law would merely set out the principle of an adequate representation of citizens (or, where relevant, residents) belonging to national minorities at the levels of the State, entities, cantons, cities and municipalities.”

CDL-INF(2001)12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, §4a.

“In Bosnia and Herzegovina, State powers are divided by ethnic lines and the constituent peoples are given a clear advantage (for example, on the State level : the House of Peoples; the Chair and Deputy Chairs of the House of Representatives; the Presidency - see Articles IV and V of the BiH Constitution). Citizens not belonging to these constituent peoples risk being excluded from representation in the decision-making process. Provisions on the political representation of national minorities in the legislative and executive bodies at all levels are therefore of the utmost importance. Representation of minorities in the judicial bodies is also important, in order to ensure their appearance of impartiality.

[…]The Draft Law, in its Articles 19 to 22, contains the principles of (a) the proportional representation at the State, entities, cantons, cities and municipalities level, of the numerically most significant national minorities and (b) of a given number of representatives for the other minorities. The manner of election of the representatives is to be set out in the relevant election laws.

The Draft Law should, however, specify:
a) whether the right to elect special representatives of the minorities is coupled with the right of persons belonging to national minorities to be elected as such;
b) whether members of national minorities are granted the right to elect special representatives in addition to the general and equal right to vote for the members of the relevant bodies of authority (double vote system: which however would be contrary to the principle of “one man one vote”);

c) (if the system of the double vote is accepted) the impact of the outcome of the elections on the fixed number of seats to be allocated to persons belonging to national minorities (in particular, what if a candidate belonging to a national minority gets the number of votes required for a seat, but the allocation of a seat to him or her would exceed the number of seats proportionally allocated to the minority concerned?)"

> CDL-INF(2001)12, Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, §17.

"If the seats for representatives of national minorities are indeed additional seats, fixed on the basis of the outcome of *universal and equal* suffrage, this would lead to a system of double vote for members of national minorities. In that context, the Commission recalls that the Guidelines on Elections of the Venice Commission state in Principle 2.a. that "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". According to Principle 2.d.bb., "Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities do not in principle run counter to equal suffrage".

"Under what circumstances the needs of minority protection may justify a derogation from the principle "one man, one vote" is a complex question which deserves careful consideration (see the Code of good practice in electoral matters, Guidelines and Explanatory report, CDL-AD (2002) 23, §23). To the extent that this question appears to have been shifted to the Law on Elections, at present under revision, the Commission is at the disposal of the Croatian authorities for a co-operation on this issue.

If, on the contrary, the minority seats are not additional but are part of the "regular" number of seats, the question arises of how the number of seats to which the persons belonging to minorities are entitled is guaranteed and what procedure will be followed if the outcome of the elections shows that insufficient minority candidates have been elected.

An additional point of concern is the fact that any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of a census). Persons belonging to certain minorities may be reluctant to do so out of fear for discriminatory treatment and other forms of harassment. Principle 2.d.cc. of the Guidelines on Elections of the Venice Commission states: "Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority". The same observation is valid for the census provided in Article 21 of the draft. In this context it should be recalled that there are many possibilities to secure the confidentiality of the information provided (see, for instance, the regulations in force in South Tyrol). The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it. "

> CDL-AD(2002)030, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia §§29-32.

"The Commission recalls that the election law still has to solve several important issues, such as the issue of double vote for members of national minorities and the issue of additional seats in Parliament in derogation of the number of seats fixed in the Constitution. Moreover, any electoral system guaranteeing proportional representation of national minorities will make the identification of voters as belonging to a national minority necessary. As the Commission had stressed before, this may require a certain safeguards of confidentiality for those persons belonging to national minorities for whom this identification may create a certain risk. "

> CDL-AD(2003)009, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia §22.

"Article 40 sets out the conditions organisations of citizens belonging to national minorities have to meet in order to be registered as such. Paragraph 2 of this provision stipulates that "the number of members of a minority organization may not be smaller than 10% of the total number of citizens who declared their affiliation to the respective minority at the last census". This represents a lower threshold than the 15% contained in the Law on Local Elections. While acknowledging this as an improvement, the Commission is still of the opinion that a 10% threshold of this type would be too restrictive a condition. This is especially the case for those organisations which operate at the local level in administrative units where there is a concentration of members of the minority concerned, but which cannot meet the requirement of 10% at the national level.

The same holds true for the requirement in Article 40, paragraph 3, which states: "in case 10% in the last census is equal to or surpasses 25.000 persons, the list of founding members must contain at least 25.000 persons, *domiciled in at least 15 counties from Romania, but no less than 300 persons for each of these counties*". This is also likely to exclude the founding and registration of organisations at the local level in units where there is a significant concentration of persons belonging to a sizeable minority at national level. It is true that Article 46 provides for the possibility to establish territorial divisions within any organisation of citizens belonging to a national minority, but this does not satisfactorily address the excessive difficulty to set up another, distinct organisation.

There is a legitimate concern for the state to introduce some legal safeguards for associations to be authorised to take part in elections as "organisations of citizens belonging to national minorities". It is therefore perfectly understandable that the state expects serious guarantees of representativity from such organisations as electoral privileges must not be abused. However, the Commission is of the opinion that the conditions for registration may not be of such a severity that they disproportionably favour groups which are represented in Parliament to the disadvantage of (new) groups which wish to participate in public life. In the draft law at issue, the proposed restrictions, which (with the exception of the 10% threshold) largely mirror the corresponding provisions of the Law on Local Elections, are not reasonable and do not meet the requirement of proportionality.

This is all the more problematic since electoral privileges are not the only element at stake. Indeed, in addition to participation in elections, the qualification as "organisations of citizens belonging to national minorities" entails several competences listed in Article 48 of the draft law. These competences include the right to be represented in the Council of National Minorities, the right to administer special funds and receive yearly allowances from the State budget, the right to propose the appointment of representatives in certain institutions and to notify the National Council for Combating Discrimination of cases of discrimination.

As a consequence, the whole Chapter III of the draft law may potentially result in excluding significant parts of national minorities from representative and consultative bodies, as well as from a range of participation rights, which would seem out of proportion. Indeed, the organisations of citizens belonging to national minorities are associations and the conditions they are required to fulfil to be registered have to be analysed as restrictions to the freedom of association. If the authorities consider that more restrictive conditions are necessary for these organisations to be allowed to take part in elections, it is recommended to reserve only the competences spelled out in Article 48 lit a to the organisations mentioned in Article 39, paragraph 1 lit. b; by contrast, the competences spelled out in Article 48 lit b to h should not be excluded for organisations of national minorities mentioned in Article 39, paragraph 1 lit. a. Article 47 of the draft law, which will oblige the organisations already represented in Parliament and/or in the Council of National Minorities to re-register, does not seem able to remedy this inherent shortcoming of the system.

While the Commission has serious concerns about the aforementioned conditions for registration, it considers it extremely positive that the election process leading to the setting up of the National Councils of Cultural Autonomy has been conceived in a much more open way. Article 62, paragraph 5 indeed makes it clear that the members of the organisations mentioned

in Article 39, paragraph 1 lit. a and lit. b will all be allowed to stand as candidates. This arrangement will ensure a fair electoral competition, without unduly favouring the candidates from the organisations of citizens taking part in the parliamentary, presidential and local elections.

The Commission notes that the registration process of organisations of citizens belonging to national minorities necessarily requires to process personal ethnic data. In this context, it is essential to make sure that individual declarations of affiliation made in the census, which are mentioned in Article 40 as a tool to evaluate the numerical size of the minority concerned, cannot be publicly disclosed. The list of the signatures of the members of the organisations, mentioned under Article 42, should also be protected in an appropriate way. It is self-evident that any special voting system for national minorities require that the voters and the candidates reveal their belonging to a minority. This does not mean, however, that the list of voters should be made publicly accessible. There are indeed many possibilities to secure the confidentiality of these personal data.

It is thus necessary either to introduce in the draft law certain guarantees ensuring protection for ethnic data or at least make an explicit cross-reference to such guarantees if they are already entrenched in other legislation. Only those "persons belonging to the national minority whose Council is going to be established" will be entitled to elect their National Council of Cultural Autonomy (see Article 62, paragraph 1 of the draft law), but the Commission understands that it is not the intention of the authorities to set up a specific register of "minority" voters. Everyone who declares to belong to a given minority will therefore be entitled to take part in the election of the corresponding Council of Autonomy The list of those who took part in the elections should, however, not be used by the authorities for other purposes and its access should be restricted.

Introducing the proposed guarantees to protect ethnic data would contribute to fully respecting the right not to disclose one's affiliation with a national minority, which is in keeping with Article 3 of the Framework Convention. It is to be welcomed that Articles 4 and 13 of the draft law partly reflect this principle. However, both provisions make this right dependent on other legislation ("in compliance with the law" and "except the cases mentioned in the law", respectively). This weakens the right not to declare one's affiliation with a national minority. Exceptions to this right should therefore be more clearly defined, serve a legitimate aim and be proportionate to that aim."

"[…] That it may be legitimate for the state to restrict to citizens only the right for these organisations to take part in parliamentary and presidential elections. The draft law, however, also seem to imply that only citizens belonging to these organisations may participate in local elections. This is not in violation of any imperative rule of international or European law concerning universal suffrage. However, a tendency is emerging to grant local political rights to foreign residents."

> CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities living in Romania §§46-57.

"The Commission also wishes to stress that any special voting system for minorities requires that the voters and the candidates concerned reveal their belonging to a minority. There are many possibilities to secure the confidentiality of the information provided. The Commission would therefore strongly favour clarifying which precautions will be taken to effectively protect it."

> CDL-AD(2004)026, Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro §52.

"The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with

their historical and legal traditions, and the political system. In that direction the Venice Commissions' Code of good practice in electoral matters provides some of the basic principles for developing electoral affirmative action rules in accordance with the Europe's electoral heritage. Among them we will emphasise here the following principles:

a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
d. Electoral thresholds should not affect the chances of national minorities to be represented.
e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

Affirmative action electoral rules, as the experience of the OSCE High Commissioner on National Minorities shows, are particularly productive when applied in local elections. Furthermore, in territories where national minorities represent a substantial part of the population, the delimitation of territorial entities (constituencies, municipalities), in such a way as to prevent dispersal of the members of a national minority, may favour the representation of minorities in the elected bodies, as underlined by Recommendation 43, on Territorial Autonomy and National Minorities, of the Congress of Local and Regional Authorities of the Council of Europe.

The above mentioned principles can provide a basis for developing common European frameworks, if not yet standards for affirmative action rules, for national minorities' participation in the decision-making."

> CDL-AD(2005)009, Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries, §§67-70.

"The process of voter identification is of paramount importance for the overall integrity of the electoral process. Before voting, voters are required to prove their identity, usually through presentation of identity documents. It is important that the Election Law or instructions by the electoral administration body clearly specify what kind of identity document is valid for the purpose of voter identification. In some countries, the legal situation is complex and not very clear. International observers criticised, for example, the case of the 2003 parliamentary elections in Croatia. Special care should be taken with regard to groups that may lack necessary identity documents, like, for example, refugees, internally displaced persons or specific minority groups (e.g. Roma). Especially in those countries where "multiple voting" is a well-known problem, not effectively verifying voters' identities is considered to be a severe problem.

Sometimes there also strong demands for a better representation of national minorities in Parliament. In such cases, the electoral systems may facilitate the minority representation, for example, by the use of proportional representation systems in nation-wide or in large multi-member constituencies (without a high threshold of representation). But also PR list systems in small multi-member districts or even plurality/majority systems in single-member constituencies may ensure minority representation if the minorities are territorially concentrated. Also, the candidacy and voting form, among other things, may have an influence on minority representation. In some countries (e.g. Poland and Germany), there are "threshold exemptions" for candidates lists or parties presenting national minorities (see CDL-AD(2005)009, paras 35, 49).

Alternatively, or additionally, there are sometimes provisions for reserved seats that are separately allocated to national minorities (e.g. in Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Slovenia, Romania). However, the notion of setting aside seats reserved for minorities is debatable (CG/BUR (11) 74). While reserved seats might be a short-term mechanism to secure the representation of minorities in a transitional period, in the long term the interest of the minorities and the country itself might be better served by representation through the "ordinary" electoral system (see for discussion the Parliamentary Assembly's report on the 2002 parliamentary elections in Montenegro; Doc 9621 Addendum IV). Furthermore, with reserved seats, there is always the problem of deciding which minorities should be entitled to have such seats and who legitimately represents the respective minority in national or local parliaments (see for example CDL-AD(2004)040). "

> CDL-AD(2006)018, Report on electoral law and electoral administration in Europe, §§133, 182, 183.

"The Electoral Code maintains an electoral system with one single constituency covering the whole country, with a proportional distribution of seats. The possibility for national minorities to be represented in the Parliament is closely related to the matter of electoral system itself. The Opinion on the Election Law quoted the Venice Commission stating that it is "necessary for States 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" (Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, CDL-INF(96)4)."

> CDL-AD(2006)001, Joint opinion on the Electoral Code of Moldova, §17.

"As noted earlier, Article 81 of the Law on Parliamentary Elections creates an exception to the legal threshold for mandate allocation for "political parties of ethnic minorities and coalitions of political parties of ethnic minorities". These political parties and coalitions participate in the mandate allocation for members of Parliament even if they receive less than 5 per cent of the votes. Although Article 81 of the Law on Parliament Elections requires a definition of "political party of ethnic minority" in order to determine which political parties and coalitions under the legal threshold are entitled to participate in the allocation of mandates, the concept is a positive one that facilitates the representation of ethnic minorities. The OSCE/ODIHR and the Venice Commission recommend that consideration be given to providing a similar provision in the Law on Local Elections."

> CDL-AD(2006)013, Joint recommendations on the Laws on parliamentary, presidential and local elections and electoral administration in the Republic of Serbia, §82.

"Article 15 of the Council of Europe's Framework Convention for Protection of National Minorities states that "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 affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commission Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with European electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of national minorities, electoral thresholds should not affect the chances of national minorities to be represented, electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

Also, the possession of dual or multiple nationality should be no obstacle for exercising voting rights in both countries. This approach is completely consistent with Article 17, para. 1 of the

European Convention on Nationality, which stipulates that those citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country. "

> CDL-AD(2005)011, Report on the abolition of restrictions on the right to vote in general elections, §§56-58.

"In particular, the Venice Commission points out that 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. For instance, an organisation of a certain national minority may be highly representative of that national minority in a certain county, even though it does not fulfil the requirement that the number of its members is equal to or more than 15 % of the total number of citizens who, at the latest census, have declared they belong to that minority, and even though it would not have at least 300 members in 15 counties of the country. The requirement concerned is even more striking since Article 44 of the Law does restrict the requirement of a certain measure of support to the constituency concerned.

The said unequal treatment also runs counter to the principle of proportional representation. In relation to national minorities a deviation from formal proportional representation may be justified to guarantee access of national minorities to representative bodies. The Code of Good Practice in Electoral Matters provides for this in Principle I.2.4 as follows: "*Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (…) do not in principle run counter to equal suffrage*". However, such a measure of "positive discrimination" should not have the effect that it favours one national minority or one group within a national minority to the disadvantage of one or more others to the extent that the latter are not able to effectuate their right to participation in public affairs.
[…]
The presence of only one list for each minority in the political game could help this minority to be represented - proportionally - in the elected bodies. However, this does not justify restricting competition between lists of the same minority. In the free play of political forces, one can assume that both voters and candidates would think, and dispute, the consequences of their vote and its possible division between rival groupings. Even in the case that miscalculations may give rise to some unwished for result of loss in representation, the lesson derived from that experience is within the usual scope of the democratic process, where electorates also learn by mistake, and not through the supposed prescient limitation of their choices.
[…]
However, the provision of Article 7 is problematic. It strongly restricts the possibility of more than one grouping of persons belonging to a national minority to be represented in authorities at local level throughout the country. In practice, this principally affects the Hungarian minority. These restrictions do not appear justified. In particular, they are not justified by the necessity of ensuring unity so as to preserve the electoral weight of a minority, inasmuch as one has to take for granted that electors know how to safeguard their minority interests. It has to be emphasised that these comments only concern local elections."

> CDL-AD(2004)040, Opinion on the Law for the election of local public administration authorities in Romania, §§46, 47, 52, 57.

"The provisions of the Draft Code on the language of electoral bodies, ballot-papers, forms and other materials should be expanded to include all the issues that have arisen in this connection during past elections.

An adequate amount of voter information and education materials should be made available in all languages used by constitutionally-recognized minorities, and electoral forms should be provided to electoral bodies located in any municipality in the minority language used by the necessary number of citizens in that municipality (20% or more).

The provisions in the Draft Code related to the use of minority languages during municipal elections should be extended to apply to all kinds of elections conducted in those municipalities.

The Draft Code should direct the relevant authorities to ensure that minority voters, especially those minorities which exceed the 20% figure as a proportion of the entire population, are able to have their voter registration recorded also in their own language. "

> CDL-AD(2006)008, Joint opinion on the draft Electoral Code of "the former Yugoslav Republic of Macedonia", par. 151 Recommendations, 3. *Language issues*

"There are very few individual rights explicitly reserved for citizens in the various international instruments which are relevant to persons belonging to minorities."

The most frequently quoted example, in terms of admissible restrictions to citizens only, concerns the field of political rights. In this context, it is worth recalling that Article 25 ICCPR, which deals with the right to participate in public affairs, voting rights and the right of equal access to public service, addresses "every citizen" and not "everyone" or "every person" as in other provisions of the same treaty. Restricting certain political rights - including those guaranteeing minority representation in the legislature - to citizens who belong to a national minority is also viewed as a legitimate requirement under the FCNM.

Even though the restriction of the right to vote and to stand for office to citizens only can be regarded as admissible under international law, mentions needs to be made of a more recent tendency in Europe to extend these rights to non-citizens at the local level, provided non-citizens have been lawful residents of the area concerned for a certain period of time. It needs to be stressed, however, that all rights, facilities and measures which are reserved for citizens and aim at ensuring an effective participation of persons belonging to minorities in public affairs cannot automatically be considered admissible. Although this is beyond doubt for the right to vote and to be elected in the legislature, the restriction of other participatory rights to citizens only has already raised concerns in different contexts, including in relation to cultural rights, and does not always appear legitimate."

> CDL-AD(2007)001, Report on non-citizen and minority rights, §§138-140.

"[…] minority voters should under no circumstances be limited to voting only at special or designated stations.

> CDL-AD(2007)030, Joint opinion on the Draft Law on voters lists of Croatia, §75.

"As stated by the HCNM (paragraph 7 of the document), there are a variety of mechanisms to implement the right to effective participation in public affairs. Participation of national minorities in public life, and more precisely their representation in elected bodies, can be ensured in certain cases by applying the general rules of electoral law with a view (or the effect) of ensuring proper minority representation; in other cases, States apply specific rules providing for representation of minorities or facilitating it.

For instance, the choice of the proportional electoral system may ensure an effective participation, even when no exception is introduced to the general electoral system. But obviously when a threshold is introduced, the provision for a lower threshold for the national minorities parties implies special exceptions to the general rules. On the other side, single member electoral districts in areas where territorially concentrated minorities are present, may imply an exception to the general rules on allocation of seats 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. Reserved seats are a more obvious way of favouring minority representation.

Special provisions on minorities' voting rights do not necessarily conflict with the principle of equality but every adaptation of voting results is an example of reverse discrimination. Therefore they have to be justified according to the principle of proportionality, which means that they do not violate the principle of equality if and as far as they are necessary to cover the gaps and difficulties which hamper the participation of minorities in public life.

States may deviate from the principle of equal suffrage by adapting their electoral systems in the narrow sense (way or translating votes into seats) in a legitimate fashion and adopting special systems in respect of minorities if their purpose is lawful and necessary, and the method chosen is proportionate to the outcome sought.

States have a large scope of appreciation in the matter and many different solutions are possible. International practice does not oblige them to adopt any specific solution when ensuring the proportional representation of minorities in the public decision-making process(es). In doing so, they will take into account their constitutional principles in so far as these principles deal with the matter and provide specific guidelines for the solution of the problem, in conformity with applicable international standards. Therefore, the states may introduce special exceptions to these systems according to the principles of rationality and proportionality. Therefore, votes need not necessarily have equal weight as regards the outcome of the election.
[…]
If a state is a newly established democracy after many years of totalitarian regime and of repression of its minorities, it could be advisable, as a transitional measure, to provide for reserved seats for the minorities in the elective assemblies. But this solution does not favour the integration of the minorities in the general societies, especially not if the members of a minority are not allowed to make a choice between different political parties because the seat or the seats are reserved only to a political party which pretends to be the exclusive representative of the minority. Therefore the choice 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.

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. However it would be better to assign the seat, which is reserved for the minority, in the framework of general elections, to the person belonging to the minority, who, as a candidate, obtained a proportionally larger support in a national political party than other candidates, who also belong to the minority, of other national political parties.

All the solutions providing for reserved seats for persons belonging to national minorities imply the disadvantage that the persons concerned are obliged to declare their ethnic or linguistic identity. The danger cannot be avoided. Therefore it is necessary that the human rights and fundamental freedoms at large are guaranteed by the national legal system to all those who declare themselves to belong to a national minority.

In some specific cases, 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 an example of reverse discrimination which may be justified by the history of a country, at least until the effects of the repression and of the totalitarian regime are satisfactorily (even if only partially) cancelled. It may be the only system to ensure, on the one side, that the minority has the guarantee of being represented in public affairs, and, on the other side, that the persons belonging to the national minorities are allowed, on an equal basis, to take part in the national political debate.

Instead of taking an abstract stand on the admissibility of a dual voting system, the specific circumstances of each case have to be examined. It can only be justified in the framework of the Constitution and has to respect the principle of proportionality.

Respect of the principle of proportionality should take into account all its aspects. It concerns of course proportionality in the narrow sense, *i.e.* balancing the aim pursued and the restriction to the right in question. It includes also instrumentality of the measure, *i.e.* its ability to reach the pursued aim, the largest possible integration of persons belonging to national minorities in the political system.

The principle of proportionality implies that the dual voting system is not justified if other measures to ensure participation of minorities in public life exist which do not impinge, or impinge less, on other voters' right to equal suffrage. The possibility to apply these other measures should be taken into account. However, the mere fact that other measures than dual vote exist, and indeed have been adopted by other States, does not call for the conclusion *in abstracto* that the dual vote is unacceptable as such. Nevertheless when the pursued aim may be reached by such other measures, dual voting will not pass the test of proportionality.

In these cases, it 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. Other solutions, such as those described in this framework allow the avoidance of interference with the principle of equality or at least for less important inequalities, involving only the principle of equal voting power.

Dual voting may only be justified on a temporary basis, in view of a better integration of minorities into the political system in the future. If after a certain time this aim can be pursued by other less restrictive measures which do not infringe upon equal voting rights, the system of dual voting is no longer justified.

Only small-sized minorities need to be represented through dual voting. Larger minorities may actually be represented by adjusting the electoral system, for example through specific constituencies, a more proportional electoral system or exemption from the threshold for minority lists.
[…]
Given the exceptional nature of dual voting, the fulfilment of the above-mentioned conditions (in particular, those that refer to its functionality as a means of integrating minorities in the political system and its limited scope) should be periodically reviewed, in order to maintain its transitional character."

> CDL-AD(2008)013, Report on dual voting for persons belonging to national minorities, §§44, 45. 48-50, 52-54, 58-64, 72.

"[…] to further enhance the participation of minority groups in elections, it is recommended that additional amendments be made to the Election Code to legally require the publishing of the Election Code, instructions, voters' lists and training manuals in other languages."

> CDL-AD(2009)001, Joint opinion on the Election Code of Georgia, §93.

"Article 64(3) states that each candidate for parliament must include "*a statement for the belonging to an ethnic community.*" This requirement is in place to allow for ballots to be printed both in the Macedonian language and Cyrillic as well as the language of the ethnic community involved. According to the Code of Good Practice in Electoral Matters13 and the Framework Convention for the Protection of National Minorities,14 no one should be obliged to declare that they belong to a national minority. Such declaration should be a right, not a duty. Removing the obligatory ethnic declaration from article 64(3) and replacing it with the possibility to have names on a list printed in an original language should therefore be considered."

> CDL-AD(2009)032, Joint opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia", §39.

"Article 7.2 of the Draft Law on the Unified Register of Voters requires that names of voters who are members of national minorities be entered into the voter register both in Cyrillic script as spelled in Serbian and also in the script and spelling of the relevant language of the national minority. It may be assumed that this provision has been included to ensure that members of national minorities are able to verify their inclusion on the appropriate voter register. However, some members of a national minority may prefer not to have their entry spelled in the relevant national minority language in order to protect their privacy or simply because they prefer not to be identified with a national minority. It would be preferable to provide such a voter the option of having the voter's entry printed in Cyrillic only should this be the desire of the voter.
[…]
The process for the printing and distribution of ballots is determined by Article 32 of the Draft Law. This Article requires that, in municipalities where languages of national minorities are in official use, ballots also be printed in the languages of such minority groups. This provision is important for ensuring the suffrage rights of all citizens.
[…]
In accordance with Article 5 of the Draft Law, "national minorities shall be proportionally represented in assemblies of local self-government units." Further, Article 42.3 creates an exception to the five percent (5 per cent) legal threshold for mandate distribution for "lists of national minorities". It follows that political parties and coalitions representing national minorities will participate in mandate distribution even if they receive less than five percent (5 per cent) of the votes. However, the law does not include a substantive definition of "list of national minority", i.e. a definition serving to determine which political parties, coalitions, and groups of citizens under the five percent (5 per cent) threshold are entitled to participate in the distribution of mandates. The provisions of Article 21.2-21.4 approach the matter in a formal way, implying as they do that such determination will have to be made by "the body competent for keeping registers of political parties", as this body "corroborates by a certificate" "the position of a political party of a national minority", presumably on the basis of materials having been filed by those concerned for purposes of entry upon the register. Unless the matter is clearly dealt with in other legislation in a democratic way, it would be beneficial if the law provided guidance for assessing what the "position" of the political party means. The OSCE/ODIHR and the Venice Commission recommend that the Draft Law be amended to include such a definition. While an enhanced clarification of these Articles should be considered, it is to be noted that this Draft Law still constitutes a substantial improvement regarding the participation of national minorities in local elections."

CDL-AD(2009)039, Joint opinion on Draft Laws on Electoral Legislation of Serbia, §§21, 45, 58.

"Political parties, election blocs, election observers and voters are provided with an opportunity to scrutinize the preliminary voters list and to request changes (Article 9(7)). Article 9(13) states that, "The Central Election Commission and the appropriate election commissions shall ensure publicity and accessibility of the general list of voters under procedures established by Georgian legislation". It is recommended that for greater clarity, instead of general reference to the "Georgian legislation", specific reference to the relevant numbered articles be inserted in this provision. In addition, to contribute to updating the voters' list, the Venice Commission and OSCE/ODIHR recommend that Article 9 provides that the voters' list be posted at election commissions for public scrutiny (as required in Article 66,(2)) also in minority languages, particularly in those areas where other election materials are provided in minority languages."

CDL-AD(2010)013, Joint opinion on the Election Code of Georgia as amended through March 2010, §34.

"Article 21 of the Draft Law dealing with Article 38(2) of the Election Law, replaces the words: "Political parties" with the words "Submitters of lists of candidates referred to in paragraph 1 of this Article". The provision extends the scope of those entitled to propose electoral lists from political parties to groups of citizens. According to Article 23, a "political party, a coalition of political parties or a group of voters taking a stand at elections" might take part in the elections.

This is a welcome amendment as it makes the participation of national minorities possible without the necessity of founding a political party.
[…]
Regarding the authentic representation of minorities, the use of a uniform model for all minority nations or other minority national communities without reserved seats is introduced by the Draft Law. The Code of Good Practice in Electoral Matters illustrates that 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. However, guaranteeing reserved seats is not an indispensable way of affirmative action."

CDL-AD(2010)023, Joint opinion on the Draft Law on amendments and supplements to the Law on the Election of Councillors and member of Parliament of Montenegro, §§20, 51.

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