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REPORT
ON ELECTORAL RULES AND AFFIRMATIVE ACTION
FOR NATIONAL MINORITIES' PARTICIPATION
IN DECISION-MAKING PROCESS
IN EUROPEAN COUNTRIES

Adopted by the Council for Democratic Elections
at its 12th meeting
(Venice, 10 March 2005)
and the Venice Commission
at its 62th Plenary Session
(Venice, 11-12 March 2005)

on the basis of comments by

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INTRODUCTION

1. *A motion for a resolution on “Electoral rules and affirmative action for national minorities’ participation to the decision-making process in the European countries” was submitted to the Parliamentary Assembly of the Council of Europe by Mr Frunda and others on 23 June 2004. It deems in particular that the well-known expertise of the European Commission for Democracy through Law (The Venice Commission) would be valuable in order to draft a comprehensive analysis and recommendation in this regard.¹ On 25 June, the Bureau of the Assembly sent this motion to the Venice Commission for consultation. A formal request was sent to the Venice Commission on 22 September 2004. The Venice Commission then decided to do a comparative study on this question first, on the basis of the practice of the member states of the Council of Europe.*

2. *The aim of this report is to review the electoral rules on affirmative action in the European countries. The members of the Venice Commission provided information about provisions in this field in the following countries: Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Italy, Hungary, Poland, Romania, the Russian Federation, Slovenia, Switzerland and “The Former Yugoslav Republic of Macedonia”. Electoral legislation, in general, is very dynamic and it will continue to adapt to the new challenges of policies and practices of the affirmative action.*

3. *The material that was reviewed is presented country by country followed by general conclusions. The analysis of the accessible national electoral rules is based on the conceptual and classificatory frameworks developed in social science during the last decades, presented briefly in the following sections. The report also refers to studies, documents and recommendations of the Council of Europe, OSCE, UN and other international organisations relevant in the field of interest. Yet, we need to be aware that the issue of affirmative action is controversial in science and law as well as in politics and policy. From this perspective the definitions accepted need to be taken only as working tools.*

4. *This report was adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005).*

1. Affirmative action

5. The idea of affirmative action is a very controversial one. In politics but also in social science contested concepts and definitions are in use. Even the terminology is not universally and unanimously accepted. There is a number of competing terms denoting this idea. Our term used here, "affirmative action" is sometimes equivalent to and sometimes different from the terms of "positive action", "preferential treatment", "positive discrimination" and sometimes even "reverse discrimination". Affirmative action is sometimes considered as transitional in nature. In connection to this, it needs to be emphasised that the concept accepted here encompasses also the notion of protection measures for minorities in the field of electoral rules, which are permanent and lasting in nature.

¹Doc. 10227 revised.

6. With this controversy in mind, the Commission favours a broader concept of affirmative action. It is based on two general presumptions:

- a. In the every day functioning of the social systems (economy, education, legislation, culture etc.) there are different historical and structural inequalities and stereotypes
- b. The affirmative action is a mechanism for overcoming these inequalities by creating equal opportunities with the historically privileged groups.

7. On the basis of these presumptions, the affirmative action is defined as a set of "policies and practices which favour groups (mainly ethnic groups and women) who have historically experienced disadvantages".² This definition does not neglect the relevance of the function and, in particular, of the practical aim of policies and practices implied. The emphasis is rather on the political and the legal grounds on which the policies are developed and justified. On these grounds, the definition overrides the distinction between the narrow concept of "affirmative action" *stricto sensu*, and the concept of "special measures".³

8. Somehow traditional arenas of the policies and practices of affirmative action have been education and employment. Yet in the last two decades the affirmative action has been introduced in the field of conflict management and prevention, and particularly in the area of protection and development of national minorities. Among the ground breaking efforts in this area the opinions of the Advisory Committee on the Framework Convention for the Protection of the National Minorities in connection with Article 15 of the Convention are to be recognised. Here we would also mention Recommendation 1623 (2003) of the Parliamentary Assembly of the Council of Europe. The Assembly recommends to the "...state parties to pay particular attention ... to ensure parliamentary representation of minorities".⁴

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.⁵

²The above mentioned elements of the definition of affirmative action are taken from the *Oxford Dictionary of Sociology*, by Gordon Marshal. Oxford University Press, 1998. The definition accepted here is also common to many other social scientists (Richard F. Tomasson, Faye J. Crosby and Sharon D. Hersberger, *Affirmative Action: The Pros and Cons*, American University Press, 1996; John D. Skrentny, *The Ironies of Affirmative Action*, The University of Chicago Press, 1996).

³The first implies policies and practices that are temporary and transitional in nature while the second implies measures that are more continuous and long lasting. With this conceptual clarification it can be accepted that the measures taken or contemplated by this report, due to their predominantly continuous (not temporary or transitional) nature fall under the category of special measures. This position on the report was expressed in the opinion given by the Office of the OSCE High Commissioner on National Minorities.

⁴Adopted by the Parliamentary Assembly on its 27th sitting on 29 September 2003.

⁵The Framework Convention for the Protection of National Minorities in its Article 15 states that: "Parties shall create the conditions 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."

10. 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.

11. 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.

2. Affirmative Action and electoral rules

12. As mentioned above, the extension of the interest for the protection of national minorities in the field of their participation in the decision making is a relatively late development. But its importance has already attracted the attention of the relevant international organisations and bodies. Among the most prominent ones in this area, the efforts and achievements of the OSCE High Commissioner on National Minorities (HCNM) and Office for Democratic Institutions and Human Rights (ODIHR) need to be mentioned.⁶ The Venice Commission has also accepted the challenge and conducted its study on Electoral law and National Minorities.⁷

13. Both studies are focused on the more general issue of the "importance of the electoral process for facilitating the participation of minorities in the political sphere". In this respect, the Lund Recommendation on elections: No. 7 appeals that the "States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including the rights to vote and stand for office without discrimination."⁸

14. The study of the Venice Commission on the Electoral Law and National Minorities, includes important general conclusions which provide a solid starting ground for the future efforts to develop the discussion on affirmative action in the field of electoral rules for national minorities' participation in the decision making. According to this conclusion the participation of members of national minorities through elected office is more a result of the implementation and adaptation of the general rules of electoral law than of the application of rules peculiar to the minorities. The unabridged text of the conclusions of this study is appended.

15. In the light of this position, the present report intends to take the discussion one step further, by focusing on specific rules applying to national minorities in the electoral field.

⁶The OSCE HCNM has generated a number of documents in this field starting from 1998. *Guidelines to assist National Minority Participation in the Electoral Process* were developed by the ODIHR in conjunction with the International Institute for Democracy and Electoral Assistance (International IDEA) and the Office of the HCNM. The draft Guidelines were thus largely prepared by international experts.

⁷CDL-INF(2000)004.

⁸*Guidelines to assist National Minority Participation in the Electoral Process*, Warsaw January 2001: 6.

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 benefitting 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.

16. 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.

17. In what follows we present the findings on the presence of the various affirmative action electoral rules at two levels: the constitutional law and electoral law. The countries presented have been selected because they have already introduced some affirmative action electoral rules. Some of them are still today treated as such, i.e. as affirmative action measures, *stricto sensu*, while others or the same measures in other countries are understood as protection measures for minorities.

18. This study does not aim at providing a definition of national minorities. Actually, its scope is not limited to minorities as recognised in national or international law, but refers more broadly to ethnic, linguistic or religious communities when they benefit from specific rules of electoral law.

2.1 Belgium

19. *The Constitution* of Belgium (1970)⁹ does not use the concept of national (ethnic or linguistic) minorities, and therefore, there are no special constitutional provisions regarding electoral participation of such groups. The concept of minority is used only in terms of ideological and philosophical minorities (Article 11). Yet a number of constitutional and legal provisions regulating the complex constitutional relations are interesting from the affirmative action perspective.

⁹Source: <http://www.uni-wuezburg.de/law/be00000.html>.

20. The Constitution stipulates that the establishing of the constituencies or electoral colleges is governed by law, and that the elections are carried out by the system of proportional representation, as determined by the law. Concerning elections to the Senate, for which voters in the whole country are divided into two electoral colleges, the French electoral college and the Flemish electoral college, responsible for electing 15 and 25 senators respectively, voters from the constituency of Brussels-Hal-Vilvorde can vote for a Flemish list or a French-speaking list and thus belong, according to the choice made, to the one or the other college. Brussels-Hal-Vilvorde is also a special constituency for the elections to the House of Representatives and to the European Parliament. Every province is a constituency for the House of Representatives, except Flemish Brabant (which includes the district of Hal-Vilvorde); the Belgian Court of Arbitration found this situation discriminatory in principle and asked the legislator to modify it.¹⁰ Finally, for both Chambers, voters from the two districts with linguistic facilities of Fourons and Comines-Warneton have the right to vote in a district situated on the other side of the linguistic border.¹¹

21. Among the different linguistic communities of Belgium the Dutch speaking and the French speaking communities are in a co-dominant position at federal level, even if the French speaking one is numerically in a minority. In order to protect the interest of both groups the Constitution establishes a number of procedures such as laws to be voted with a double majority, i.e. a general majority and a majority in each linguistic group, the parity in the Council of Ministers (Article 99), in the judicial bodies as well as in the highest administrations and the so called "alarm-bell procedure" (Article 54). Both communities are also considered as co-dominant in the region of Brussels-capital, where the Dutch speaking one is in a numerical minority and the executive level is based on quasi-parity. Only the German speaking community is generally recognised as a national minority.

22. Bearing in mind Articles 87, 87bis and 89bis of the Code on elections it is obvious that electoral rules are establishing legal grounds for citizens who are from different linguistic communities to be represented in the elected bodies (Senate and House of Representatives).

2.2 Bosnia and Herzegovina

23. In Bosnia and Herzegovina, the various affirmative action electoral rules are built at three levels: local, entities and federal elections. Guaranteed seats, proportional model of elections, special list of national minority candidates are mechanisms chosen.

24. The Election Law of Bosnia and Herzegovina¹² does not use the term national minority in the context of the election of the deputies at the elected body on any level. In its Article 10.10, the Law stipulates that among fifty eight (58) delegates to the House of Peoples of the Federation of Bosnia and Herzegovina, seventeen (17) from among Bosniaks, seventeen (17) from among Serbs, seventeen (17) from among Croats and seven (7) delegates will be elected from "others". The term "others" can be considered as referring to those who are members of

¹⁰Decision 73/2003.

¹¹See Articles 87, 87bis and 89bis of the Code Electoral, dossier numéro 1928-08-12/30, publication: 19-08-1928 (amended 1991, 1994, 1998).

¹²Election Law of Bosnia and Herzegovina "Official Gazette" of Bosnia and Herzegovina No. 23/01.

national minorities. Bearing in mind this presumption we may say that the Law does use the mechanism of **guaranteed seats** for members “of others”.

25. Another mechanism used in this Law is **proportional representation** of the population of the canton as reflected in the last census of each constituent people and group of others to the House of Peoples of the Federation of Bosnia and Herzegovina. In Article 10.12 the Law prescribes that the number of delegates from each constituent people and group of others to be elected to the House of Peoples of the Federation from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census. The Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of others that will be elected from each cantonal legislature.

26. Yet, the term national minority is used in the context of *local elections* under Chapter 13A, Participation of Members of National minorities in the Elections for Municipality Level. In this part of the law, the affirmative action electoral rules are more obvious. The legislator states that members of all national minorities in Bosnia and Herzegovina shall have the right to elect their representatives in Municipal Councils/Municipal Assemblies. To achieve this in Article 13.14 it is stipulated that members of all national minorities which make up to 3% of the total population of a municipality shall be **guaranteed** at least one seat in a Municipal Council/Municipal Assembly.

27. Members of all national minorities, which make over 3% of the total population of a municipality, shall be guaranteed at **least two (2) seats** in a Municipal Council/Municipal Assembly. This law leaves it to the Municipal Statute to establish the number of members of national minorities to be elected in a Municipal Council/Municipal Assembly. For that purpose the representation of national minorities is established on the basis of the last census conducted by the state of Bosnia and Herzegovina.

28. Another mechanism of affirmative action implemented in this part of the Law is the **special list of national minority candidates**. Political parties, coalitions, lists of independent candidates, independent candidates, national minorities’ associations and citizen groups consisting of at least forty (40) citizens who have a general right to vote shall have the right to nominate candidate members of national minorities to Municipal Councils/Municipal Assemblies.

2.3 Croatia

29. Affirmative action electoral rules in Croatia are to be found in the Constitution, the Constitutional Act and in the electoral laws.

30. Article 15 of the *Constitution* of Croatia¹³ stipulates that besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law.

¹³*Ustav Republike Hrvatske (Constitution of the Republic of Croatia) Narodne novine No. 56/90, 135/97, 113/00, 28/01, 41/01 - consolidated text, 55/01 - correction of consolidated text.*

31. The *Constitutional Act on the Rights of National Minorities* from 2002¹⁴ in its Article 19 stipulates that the Republic of Croatia shall guarantee to the members of national minorities the right of representation in the Croatian Parliament.

32. According to the *Act on the Elections of Representatives to the Croatian Parliament*¹⁵ two different types of electoral systems are provided in parliamentary elections in the Republic of Croatia: the (general) proportional electoral system and the (special) **relative-majority electoral system for the election of national minority representatives**.

33. The law specifies that out of 140 seats, eight seats are **guaranteed** in advance for national minority members and they shall be distributed among the minorities: the Serb national minority elect three representatives; the Hungarian national minority elect one representative; the Italian national minority elect one representative; the Czech and Slovak national minorities elect one representative together; the Austrian, Bulgarian, German, Polish, Roma, Rumanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minorities elect one representative together; Albanian, Bosniac, Montenegrin, Macedonian and Slovenian national minorities elect one representative together.

34. The Constitutional Act on the Rights of National Minorities in its Articles 20-24 stipulates that the Republic of Croatia **shall guarantee** to members of national minorities the right to representation in the representative bodies of local self-government units and in the representative bodies of regional self-government units. On the basis of this Act and as a result of the Law on the amendments to the Law on the Election of Members of Representative bodies of Local and Regional Self-government Units¹⁶ a new Chapter (VIIIa – Elections of Members of the Councils of National Minorities in Self-government Units) was introduced.

35. According to the above mentioned legislation if at least one member of a national minority, which participates in the population of the local self-government unit with more than 5 % and less than 15 %, is not elected in the representative body of the self-government unit on the basis of universal suffrage, the number of members of the representative body of the self-government unit shall be increased by one member. If a national minority which accounts for at least 15% of the population of a local self-government unit is not represented by a number of members proportional to its share in the population of the local self-government unit, the number of members of the representative body of the self-government unit shall be increased up to the number that is necessary to exercise the representation. Those members of a certain minority, who were not elected, according to the order of proportional success of each slate in the elections, shall be considered elected. The legislator prescribes that in situations when even by adopting such an approach the number of national minority representatives will not be achieved, by-elections shall be called in the self-government unit in compliance with the Constitutional Act and law regulating the election of members of representative bodies of local and regional self-government units. To achieve such results the proportional model will be used. The official

¹⁴*Constitutional Act on the Rights of National Minorities*, “*Narodne novine*” No. 155/02.

¹⁵*Act on the Elections of Representatives to the Croatian Parliament* “*Narodne novine*” No. 116/99, 109/00, 53/03, 69/03 - consolidated text.

¹⁶*Law on the Amendments to the Law on the Election of Members of Representative Bodies of Local and Regional Self-government Units adopted by the Parliament on 11 March 2003 published in “Narodne novine” and entered into force on 21 March 2003.*

census results shall be relevant to the determination of the number of members of a national minority for the implementation of this mechanism.

36. Each minority group that accounts for more than five percent of the regional self-government unit's total population is entitled to proportional representation. If proportional representation was not achieved during the regular elections, the number of representatives in the county government is to be increased by a number necessary to reach this level for each such minority group.

2.4 Cyprus

37. The members of the Maronite, Armenian and Latin religious groups are entitled to the same political rights as other Cypriot citizens and a Maronite was once elected to the House of Representatives. Furthermore, according to the Religious Group (Representation) Laws of 1970 to 1996 (Sections 3 and 4), a representative of each of these religious groups is elected to the House of Representatives with a consultative status. Each representative is entitled to submit the views of his group on any matter relating to such group or to make necessary representations on such matters relating to his group before any organ or committee of the House of Representatives or any organ or authority of the Republic, with regard to the matters which fell within the competence of the Greek Communal Chamber before this Chamber was abolished and its legislative functions were undertaken by the House of Representatives in 1965, by virtue of Law 12 of 1965.¹⁷

2.5 Germany

38. National minorities are those groups of German citizens who are traditional residents of Germany, but who differ from the majority population through their own language, culture and history and who wish to preserve their identity (the Danish minority, the Sorbian people, the Frisians in Germany, and the German Sinti and Roma). Except for the latter, they have their respective traditional settlement areas in some federal states of the Federal Republic of Germany. These are the Land of Schleswig-Holstein, the Free State of Saxony, and the Brandenburg and Lower Saxony.¹⁸

39. As an affirmative action electoral rule, Germany has chosen to implement **no limitation of threshold** for political parties representing national minorities. While for other political parties the threshold is 5%, political parties representing national minorities are exempted from the five percent threshold established by the Electoral Act.¹⁹

¹⁷Information provided by Mr Panayotis Kallis, member of the Venice Commission for Cyprus.

¹⁸First Report submitted by the Federal Republic of Germany under Article 25, paragraph 1, of the Council of Europe's Framework Convention for the Protection of National Minorities (Received on 24 February 2000) - ACFC/SR (99).

¹⁹German Federal Electoral Law (1993, last amended 1999)

40. In practice, minorities are not so important at national level that this exemption from the threshold regulation helped them to obtain seats at federal level. This is different for the election of the parliaments of *Länder* where minorities are also exempted from the 5% threshold (Schleswig-Holstein, Danish minority; Brandenburg, Sorbian minority).

41. In this way, members of national minorities are encouraged to register political parties that will represent their interests and needs. The final participation of national minorities in the elected bodies further depends on the electoral model, and other electoral rules.

2.6 Hungary

42. Hungary implements the affirmative action electoral rules in the electoral laws. Such laws are based on the Constitution of the Republic of Hungary.²⁰ Article 68 of the Constitution prescribes that the Republic of Hungary shall protect national and ethnic minorities and ensures their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the right to use their names in their native languages. The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country (paragraph 4). Such laws or pieces of legislation were up to now not adopted in order to ensure the representation of minorities in elected bodies. National and ethnic minorities shall have the right to form local and national bodies for self-government (paragraph 4).

43. On this basis, the *Act on Election of Local Municipal Government Representatives and Mayors* (1990),²¹ under chapter XI – Protection of the Rights of National and Ethnic Minorities, provides that the provisions of the Minorities Act with the alterations and amendments contained in this part of the law shall be applied for the nomination and election of national and ethnic minority self-government representatives. If no candidate of the same minority receives a mandate as a result of list voting, then the **number of votes**, which is equal to the half of the number of votes that were validly cast on the candidate receiving a mandate by the smallest number of votes, shall be calculated. Every minority candidate who did not receive a mandate shall receive it in the case that the number of votes cast on them shall be greater than the number determined in the above way; should there be more than one such minority candidate, then the one with the greatest number of received votes is elected. If there are two or more such candidates who have an equality of received votes, then the mandate shall be decided according to the drawing of lots specified in paragraph (4) of Article 28 of the same law.

2.7 Italy

44. Affirmative action in favour of minorities is provided in the Italian law on the election of the Italian representatives to the *European Parliament*. A list of candidates proposed by parties or political groups of the French-speaking minority of Valle d'Aosta, of the German-speaking minority of the Bolzano province and of the Slovenian-speaking minority of Friuli-

²⁰*Constitution of the Republic of Hungary (31 December 1990) Sources: CODICES database of the Venice Commission; The rebirth of Democracy 12 Constitutions of Central and Eastern Europe (Council of Europe publishing 2nd edition).*

²¹*Act on Election of Local Municipal Government Representatives and Mayors (1990) (Source: <http://www.legislationline.org/get.php?document=54349>).*

Venezia-Giulia is allowed to join another list of candidates of the same constituency with the purpose of sharing the distribution of seats assigned to this second list. Every voter has the right to express three individual preferences – including one for a candidate of the minority list. After the allocation of the seats to the lists, the candidates of a list or of joined lists are elected according to their number of preferences. However, when no candidate of the minority list is elected, the one with most preferences is proclaimed elected instead of a candidate of the other list if he or she obtains at least 50000 preferences.²²

2.8 Poland

45. Affirmative action electoral rules are found in the Parliamentary Election Law in the form of certain **threshold "exemptions."** As special rules on elections to the Sejm, the Parliamentary Election Law²³ in its Article 134 stipulates that the lists of election committees created by electors associated as registered organisations of national minorities are exempt from the requirement of threshold. In order to benefit from this exemption, electors associated as registered organisations of national minorities are required to submit to the National Electoral Commission a relevant declaration no later than five days before the poll.

46. Together with the declaration, the committee shall be obliged to submit a document issued by the appropriate statutory body of an organisation of a national minority in which the creation of the committee by electors – the members of such organisation – is confirmed.

2.9 Romania

47. In Romania affirmative action electoral rules are found in the Constitution and in the electoral law. In both cases the approach adopted is in the form of guaranteed representation.

48. According to Article 62 of the *Constitution* of Romania,²⁴ organisations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organisation only. The number of Deputies and Senators shall be established by the electoral law, in proportion to the population of Romania.

49. The Law No. 68/1992 on the Election to the Chamber of Deputies and the Senate in its Article 4 stipulates that legally constituted organisations of citizens belonging to each national minority, which in the elections has not obtained at least one Deputy or Senator mandate shall have the right to a deputy mandate, if they have obtained throughout the country at least five percent of the average number of validly expressed votes throughout the country for the election of one Deputy. The organisations of citizens belonging to national minorities participating in the elections shall be, as far as electoral operations are concerned, juridical equivalent to political parties.

²²Articles 12, 14 and 22 of law 24/1/1979 n.18.

²³Parliamentary Election Law (2001).

(Source:<http://www.legislationline.org/get.php?document=55898>).

²⁴Constitution of the Republic of Romania, source: CODICES database of the Venice Commission.

50. On these legal grounds, the Romanian system ensures representation of legally constituted organisations of citizens belonging to a national minority. If organisations of a national minority do not obtain a seat in either house through ordinary electoral procedures, but receive at least 5% of the average number of votes validly cast over the entire country for the election of a member of the Chamber of Deputies, one organisation of this minority is entitled to a seat in this house.

51. The Romanian law for the election of *local* public administration authorities provides that candidatures for local elections may be put forward by the organisations of citizens belonging to national minorities represented in Parliament. Candidatures may also be put forward by other lawfully established organisations of citizens belonging to national minorities, if their number of members is not less than 15 % of the total number of citizens who, at the latest census, have declared their belonging to that minority. If the number of members needed exceeds 25000 persons, the members' list shall include at least 25000 persons residing in at least 15 counties of the country and in the Bucharest municipality, but no less than 300 persons for each of those counties and for the Bucharest Municipality. In summary, candidatures from the organisations of citizens belonging to national minorities represented in Parliament are rendered easier, but the procedure is rather cumbersome for other such organisations. No special seat is ensured to national minorities at local level.²⁵

2.10 Russian Federation

52. The federal legislation provides, as a matter of principle, national minorities with the possibility to realise their electoral rights in elections and referendums.

53. In a more precise manner, provisions of *subjects of the Federation* help minorities to be represented in the elected bodies through deviations from the rule of equal representation of the population in the legislative bodies. In the Republics of Carelia and of Daghestan, the deviation from the average norm for the representation of deputies in constituencies created in areas of concentrated residence of non-numerous autochthonous people may exceed the normal deviation norm, but not by more than 40 %.²⁶

2.11 Slovenia

54. The Slovenian affirmative action electoral rules are elaborated constitutionally as well as in the law. The mechanisms used are various: guaranteed representation and guaranteed seats, dual voting right, special voting list, special district and proportional elections.

55. The Slovenian National Assembly consists of 90 deputies, elected by proportional electoral system. According to Article 64 of the *Constitution* of the Republic of Slovenia the Italian and Hungarian ethnic communities shall be directly represented at the local level and shall also be represented in the National Assembly. This guarantee to the members of the two national minorities is further developed in Article 80 of the Constitution which defines that

²⁵For a more detailed analysis of this law, see document CDL-AD(2004)040.

²⁶Article 9 of the law on the election of deputies to representative bodies and heads of locals self-government in the Republic of Carelia, as of 25.12.2003, and law on the elections of deputies to the people's assembly of the Republic of Daghestan, as of 12.05.2004.

"the Italian and Hungarian ethnic communities shall always be entitled to elect one Deputy each to the National Assembly." Members of these two national minorities have dual voting rights, so Italian and Hungarian deputies are elected by all members of those national minorities with voting rights but voters from national minorities can vote at the same time for ordinary candidates.

56. According to the *National Assembly Elections Act*, for the election of deputies of the Italian and Hungarian national communities, electoral commissions for special constituencies shall be nominated.

57. The Law on *Local Self-government*, in its Article 39, stipulates that Italian and Hungarian national minorities in ethnically mixed areas inhabited by members of both national minorities shall have at least one representative in the municipal council. The Law on Formation of Municipalities and the Determination of their Territories (from 1994) prescribes in detail the number of members of the Italian, Hungarian and Romany national minorities in the first municipal council. Elections for the municipal council members from among the minorities are conducted according to the majority principle in a special electoral district comprising the territory of the municipality. Candidates for members of the municipal council – representatives of the Italian or Hungarian national minority are chosen by the voters – members of the ethnic community in the municipality, with the signature of at least 15 voters.

2.12 Switzerland

58. In Switzerland, a number of provisions guarantee a representation of the language groups or regions. At federal level, care must be taken to ensure that the various language regions be adequately represented in the Federal Council (government).²⁷ A similar provision applies to the Federal Court.²⁸

59. At *cantonal level*, in the mainly German-speaking Canton of Berne, a seat in the seven-member government is reserved to a French-speaking citizen residing in one of the three French-speaking districts (Bernese Jura).²⁹ A minimum of twelve seats in the cantonal Parliament (out of 160) is guaranteed to the Bernese Jura. An equitable representation has to be secured to the French-speaking minority of the Bienne-Seeland constituency.³⁰

2.13 “The Former Yugoslav Republic of Macedonia”

60. In “The Former Yugoslav Republic of Macedonia”, the affirmative action has traditional as well as constitutional grounds. Yet the laws on elections, as well as other laws, do not contain specific affirmative action mechanisms.

²⁷Article 175.4 of the Federal Constitution.

²⁸Article 1.2 of the Federal Judicature Act.

²⁹Article 84 of the cantonal Constitution.

³⁰Article 73 of the cantonal Constitution.

61. The **constitutional grounds** are established by the Amendment 6 of the Constitution. This amendment introduced the concept of "appropriate and equitable participation of communities (i.e. national minorities) in the state organs and the public institutions at all levels" as one of the fundamental values of the constitutional order of the Republic.

62. There are a number of **political parties** established by members of the national minorities, representing them in the Parliament and local elections. Together with the introduction of a proportional election system the minorities have the chance to be better represented.

63. Another, rather strong affirmative action mechanism has been implemented in the design of the **electoral districts**. Some of the electoral districts are so designed to favour the minority representation. This is the case, for example, with the municipality of Suto Orizari, in the capital of Skopje. This district was established "to enable the election of a representative of the Roma community."³¹

64. Preferential use of Minority Language in the election materials is regulated by the Law on Election of Members of Parliament (Article 71).³²

CONCLUSION

65. The country by country reviews show that there are already in existence interesting electoral rules that have affirmative action goals, in the broader meaning of the concept accepted here. These are of course not the only rules of electoral law allowing for a representation of minorities (see appendix). In most of the countries such rules are introduced as isolated elements while in a few of the countries they are introduced in a more systematic way. In the first case, the affirmative action electoral rules are introduced directly in the law. In the second case such rules are deducted from the more general constitutional provisions. The second pattern is more common among the newly democratised countries.

66. In general, the electoral rules that favour affirmative action have limited range. The number of beneficiaries of such electoral rules is clearly and sharply determined either by the Constitution or the Law or by other accompanying legislative acts. For example, the number of parliamentary seats guaranteed to minorities is almost always lower than the number of minorities present in the country. Affirmative action may apply only at national, regional, local or even European level, and/or only in a part of the country. This means that the original inspiration for such electoral rules is not purely legally based, but probably political. The legislators are forced to use political criteria for classifying and treating a number of national minorities as one group for the purpose of election of a joint representative. The great differences in the number of members of particular minorities reduce the electoral chances of some minorities, because seats go to the candidate of the minority with the largest number of voters. This is a particularly relevant problem of affirmative action having in mind that the definitions of national minorities applied in each country are ad hoc, vague and vary significantly.

³¹OSCE ODIHR, *Guidelines to Assist National Minority Participation in the Electoral Process*, Warsaw January 2001.

³²Law on Election of the Members of the Parliament, "Official Gazette of the Republic of Macedonia No. 42/2002 ; Source: <http://www.dik.mk>.

67. Another legal as well as political issue for the affirmative action electoral rules is the question of the nature and the meaning of the representation. The mechanism of guaranteed mandates for members of national minorities in Parliament or at local or regional level, for example, opens the question of the nature of the representation and of the mandate of those deputies. Is their mandate strictly on matters affecting minorities and minority rights only (imperative mandate) or is it an ordinary (open or political) mandate?

68. 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.³³
- 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.

69. 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.

³³The OSCE High Commissioner on National Minorities advocates the approach based on freedom of association, with a recommendation addressed to all the political parties to integrate members of minorities and their specific interests.

70. 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.

APPENDIX, ELECTORAL LAW AND NATIONAL MINORITIES (document CDL-INF(2000)004), CONCLUSION

The wide variety of electoral systems have been grist to generations of legal specialists, political analysts and mathematicians and will continue to be so. It is true that they do not all without exception guarantee that national minorities are fairly represented, but the main conclusion which may be drawn from the foregoing analysis is that there is no absolute rule in this field. 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.

Nevertheless, the electoral system is not irrelevant to the participation of members of minorities in public life. On the one hand, certain states - but they are few in number - have specific rules designed to ensure such participation. On the other hand, it may be that neutral rules - for example, those relating to the drawing of constituency boundaries - are applied with the intention of making it easier for minorities to be represented. More often than not, however, the representation of minorities is not a deciding factor in the choices made when an electoral system is adopted or even put into practice. However, as regards the presence of members of minorities in elected bodies, the following general remarks may be made.

- The impact of an electoral system on the representation of minorities is felt most clearly when national minorities have their own parties.
- It is uncommon for political parties representing national minorities to be prohibited by law and highly unusual for this in fact to happen. Only in very rare cases does this constitute a restriction upon the freedom of association, which nonetheless respects the principle of proportionality, and is consistent with the European constitutional heritage.
- Although parties representing national minorities are very widely permitted, their existence is neither the rule nor indispensable to the presence of persons belonging to minorities in elected bodies.
- The more an electoral system is proportional, the greater the chances dispersed minorities or those with few members have of being represented in the elected body. The number of seats per constituency is a decisive factor in the proportionality of the system.
- When lists are not closed, a voter's choice may take account of whether or not the candidates belong to national minorities. Whether or not such freedom of choice is favourable or unfavourable to minorities depends on many factors, including the numerical size of the minorities.

- Unequal representation may have an influence (positive or negative) on the representation of concentrated minorities, but the replies to the questionnaire do not indicate any concrete instances.
- When a territory where a minority is in the majority is recognised as a constituency, this helps the minority to be represented in the elected bodies, especially if a majority system is applied.

To *sum up*, 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.