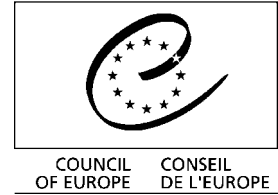


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THE PARTICIPATION OF MINORITIES IN DECISION MAKING
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***The views expressed in the paper submitted do not necessarily reflect the views of
the Working Group, its members or the United Nations.**

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**THE PARTICIPATION OF MINORITIES
IN DECISION-MAKING PROCESSES**

Expert study submitted on request of the DH-MIN of the Council of Europe

by the

Max-Planck-Institute for Comparative Public Law and International Law,

Heidelberg

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Introduction

International Law concerning the protection of minorities knows provisions for political participation of minorities in the State where they are living. However, the relevant provisions are formulated in rather vague, programmatic terms which remain a far cry from creating any standards as to the different mechanisms to be applied in order to reach the aim of securing participation. Article 15 of the Framework Convention may serve as an example:

”The 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.”

Also the Explanatory Report contains only a number of very general examples for the promotion of minorities’ participation. For instance, it is said that one way of enhancing participation could be ”consultation with these persons [belonging to national minorities], by means of appropriate procedures and, in particular, through their representative institutions”.¹ This approach is not limited to the Framework Convention which by its very nature only sets out certain aims to be pursued by member States but even the most detailed documents on minority protection such as the 1990 CSCE Document of the Copenhagen Meeting on the Human Dimension² do not provide any specific guidance as to which concrete measures shall be adopted.

As the answers to a questionnaire sent out by the Council of Europe’s DH-MIN show, State practice varies. Therefore, it will be difficult to identify any common European standards.

However, it remains an important task to analyse the measures adopted in different States with a view to guaranteeing the participation of minorities and to determine those elements which speak in favour of a certain approach in view of the minority situation to be addressed. To this end, the DH-MIN has commissioned this study which has the aim to develop a typology of different forms of participation of minorities in decision-making processes and identify parameters relevant to the choice of a specific form for a given situation.

This study addresses measures adopted in the following fields:

¹ Explanatory Report, Council of Europe Doc. H (95) 10, para. 80.

² Para. 35 of the Copenhagen Document reads: ”Participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.” ILM 29 (1990) 1305.

- parliamentary representation of minorities and exercise of parliamentary control
- representation of minority interests in governmental agencies
- informal channels of participation (in particular, round tables or councils)
- different forms of autonomy
- approaches in federal systems.

The typology has been developed on the basis of the answers to the questionnaire which has been supplemented by further information available in the literature. It presents the distinguishing features of different approaches to minority participation in the political process.

Moreover, the different typological elements are discussed with a view to determining parameters relevant for the choice of a certain approach. By taking into consideration the constitutional implications and the minority situation addressed by an identified type of participation it shall be examined in how far these factors determine the choice and feasibility of one or the other type of solution.

A. Democratic participation: parliamentary representation and exercise of control through parliamentary bodies

1. Representation of minorities in national or State parliaments: election procedures

a) Basic requirement: freedom of association

The fundamental precondition for the integration of minorities into a State seems to be the full implementation of the right to freedom of association including the possibility to form organisations and political parties which are able to transmit the specific interests of the minority into the political sphere.³

This is also reflected in general terms in international standards as expressed in Art. 11 of the European Convention on Human Rights (**ECHR**), Art. 22 of the International Covenant on Civil and Political Rights (**ICCPR**), Art. 7 of the Framework Convention on the Protection of National Minorities (**FCNM**), or paragraph 24 of Part VI of the CSCE 1992 Helsinki document.⁴ An express prohibition to create parties on a religious, ethnic or regional basis⁵ is not in line with these international standards as long as the respective parties peacefully promote the identity of the group without inciting hatred. However, these standards allow for interference under certain conditions.

According to the European Convention on Human Rights an interference with the right to freedom of association must be prescribed by law, pursue one of the enumerated aims such as national security including territorial integrity⁶ and be necessary in a democratic society. The jurisprudence of the European Court of Human Rights suggests that an interference may be justified if the party calls "for the use of

³ As Stefan Oeter formulated strikingly: "Without the possibility to organise themselves as a 'particular' group and to put forward their particular interests as a group through their independent organisation including the pleading of their own cause in the political sphere through a specific party representing the minority, the integration of the minority will remain a phantom." (Translation by the authors. Original: "Ohne Spielräume, sich als 'besondere' Gruppe zu organisieren und in ihrer eigenständigen Organisation dann auch ihre besonderen Interessen als Gruppe zu vertreten, die Vertretung eigener Interessen im politischen Raum durch eine spezifische, die Minderheit repräsentierende Partei eingeschlossen, bleibt Integration der Minderheit ein Phantom.") S. Oeter, Minderheiten im institutionellen Staatsaufbau, in: Frowein/Hofmann/Oeter (eds.), Das Minderheitenrecht europäischer Staaten – Teil 2, Berlin 1994, 492-522 (496).

⁴ The latter document expressly commits the CSCE/OSCE participating States "to ensure the free exercise by persons belonging to national minorities, individually or in community with others, of their human rights and fundamental freedoms, including to participate fully, (...) in the political (...) life of their countries including (...) through political parties and associations."

⁵ This approach is adopted in Albania, cf. Synthesis of the replies to the questionnaire on participation of minorities in decision-making processes, Council of Europe Document No. DH-MIN (99) 2prov., 5. Also Bulgaria prohibits the foundation of political parties on an ethnical, racial or religious basis, Art. 11 para. 4 of the Bulgarian Constitution of 13.7.1991 and Art. 3 para. 3 of the Law on Political Parties. The Bulgarian Constitutional Court, however, interpreted these provisions as constituting only a formal but not substantial prohibition, cf. Judgment no. 4 of 21.4.1992 in: Drumeva, ZaöRV 1993, 112 ff. (128 f.). In Turkey, parties are prohibited if they promote the "regionalist or racist aims" contrary to the unitary system of the Turkish State (Art. 82 Law on Political Parties), cf. C. Rumpf, Die rechtliche Stellung der Minderheiten in der Türkei, in: Frowein/Hofmann/Oeter (eds.), Das Minderheitenrecht europäischer Staaten – Teil 1, Berlin 1993, 448-500 (476).

⁶ ECHR, *ÖZDEP v. Turkey*, judgment of 8 December 1999, para. 32 f.

violence, an uprising or any other form of rejection of democratic principles.”⁷ Moreover, the Court rejected the justification of an interference with the freedom of association on the grounds that the party in question made reference to the rights to self-determination of the ”national or religious minorities” without in any way encouraging separation from the State the respective minority is living in.⁸ However, it cannot be deduced from this that any peaceful activity in favour of secession justifies the dissolution of a party but rather that it constitutes a relevant factor in the review of any measures taken by the State to that effect.

In contrast, it is plainly clear that a party which advocates national, racial or religious hatred and thereby incites discrimination, hostility or violence provides reasons for an interference with the freedom of association. According to Art. 20 ICCPR, it constitutes one of States parties’ obligations to prohibit such advocacy of hatred. Read together with Art. 22 ICCPR, it may be said that the prohibition of advocating racial hatred represents a restriction on freedom of association required under the Covenant.⁹

Due to its character as a fundamental political right the freedom of association is also frequently guaranteed under national constitutional law.

An approach which provides an express constitutional guarantee of freedom of association to national minorities and for purposes of preserving the identity of the group may provide a way to comprehensively protect minorities against discrimination in the exercise of this right. However, such an approach is adopted only rarely.¹⁰

b) Systems not privileging minorities’ representation in parliament: integration of minorities in the political party system

In the parliaments of some States, minority parties have not obtained any seats and therefore are not represented. This result may go back to an approach which aims at fostering integration of minorities within the general structures of a political system instead of supporting structures emphasising the possibilities for minorities to elaborate and pursue interests as a group. When comparing this approach with that of privileging minority parties it has to be kept in mind, that the absence of minority parties in parliament does not necessarily mean that minority interests are not represented.

In particular, members of minorities may pursue minority interests as members of general political parties. If this approach works and minority interests are respected in this way it may be considered as a positive sign to the end that political preferences are not or no longer following ethnic or linguistic boundaries.

⁷ ECHR, ÖZDEP v. Turkey, supra note 6, para. 40.

⁸ ECHR, ÖZDEP v. Turkey, supra note 6, para. 41.

⁹ Cf. M. Nowak, CCPR Commentary, 1993, Art. 22, para. 19.

¹⁰ For instance in Slovenia, cf. Art. 64 para. 1 of the Constitution of 23.12.1991.

Particular interests of minorities may also be reflected in the structure of a party or parliamentary group, for instance, if these parties nominate a minority spokesperson.¹¹ Moreover, the representation of minority interests within general political parties may be supported by a voting system allowing for ‚panachage‘ and ‚cumulation‘. ‚Panachage‘ allows voters to vote for more than one candidate across party lines; ‚cumulation‘ means that voters can cumulate more than one vote on a preferred candidate. This system would enable members of a minority to support more vigorously a candidate which seems best to represent minority interests or who is declared to become the minority spokesperson of the party if elected. However, the accommodation of minority interests within general party structures only seems to have realistic prospect for success if the minorities form a part of the population which is substantial enough to attract the attention in the concurrence of political programmes.

c) Direct or indirect privileges for minorities‘ representation

States can facilitate the democratic representation of minorities in parliament through a variety of measures. A basic distinction between different approaches in this respect lies in the decision whether such measures are applied exclusively to minorities or are designed as general rules equally applied to other groups as well.

Most of the States that have replied to the questionnaire have implemented measures of one or another type which specifically privilege minority parties. However, some other States limit the representation of minority interests in the composition of the national parliament to those channels equally open to all interest groups.

All the same, certain provisions of an election system applying to all parties may result being favourable to minorities, in particular, if they are generally favourable to smaller parties.

The electoral system may facilitate minority representation by :

- lowered thresholds for entering parliament,
- reserved seats,
- reduction in the quorum for registration of a party,
- favourable delimitation of the constituencies, in particular, in the case of majority voting, and
- privileged funding for minority parties.

aa) Lowered threshold

Election systems based on proportional representation frequently include a certain threshold of a percentage of votes that must be won by a party in order to enter parliament. The object of such thresholds is to avoid a splintering of parliament into extremely small political groups with the potential of impeding efficient functioning of the legislature. Minorities often represent only small percentages of the population.

¹¹ Cf. Council of Europe, *supra* note 5, 9 (Austria).

Thereby they may be deprived of any political representation by their own parties if thresholds are applied to them without any modification.

In national parliamentary elections, a number of States apply a specific threshold for minority parties that is lower in comparison to other parties. A particularly far-reaching model is applied in Romania, where parties registered as organisations of citizens belonging to a national minority gain a seat if they win at least 5 % of the votes of the average number of votes cast for one deputy.¹²

This system allows also for very small minorities to be represented in parliament. On the other hand it neglects the differences in the size of minorities since a minority which wins one regular seat is only represented to the same extent as that minority that wins 5 % of the votes necessary for a regular seat.¹³

In federal systems, it may also be that a threshold for a minority is lowered or withdrawn on State level – in that State where the minority is living. In such cases, increased representation of minority interests is limited to the competencies assigned to the State. For instance, in Germany, the threshold is removed for political parties of the Danish national minorities in Schleswig-Holstein.¹⁴ However, the Danish minority party will only gain a seat in parliament if they obtain enough votes necessary for the last seat. The same system is applied in Brandenburg to the Sorbian minority.¹⁵

However, identical provisions may lead to very different results: whereas the Danish minority has an own party which is represented in the "Landtag" of Schleswig-Holstein the Sorbs in Brandenburg preferred to represent their interests through membership in other political parties. In Saxony, the idea of representation through general political parties was pursued from the outset. Consequently, there are no provisions for the removal of a threshold for Sorb minority parties in Saxony.¹⁶

However, also a low general threshold of, for instance, 2 % of the votes¹⁷ or the general removal of a threshold for all parties may facilitate the entry into parliament of minority parties or smaller parties with the potential for addressing specific minority questions in their programme.

A possibility to lower a threshold indirectly is to allow for alliances of two or more political parties. Although there seems to be no example of a State limiting this

¹² Cf. Council of Europe, supra note 5 (Romania).

¹³ G. H. Tontsch, Die Rechtsstellung der Minderheiten in Rumänien, in: G. Brunner/ B. Meissner (eds.), Das Recht der nationalen Minderheiten in Osteuropa, Berlin 1999, 231-254 (245).

¹⁴ § 3 para. 1 Wahlgesetz für den Landtag von Schleswig-Holstein, in der Fassung der Änderungen vom 30.5.1985 (GVBl. Schleswig-Holstein, 136), vom 26.1.1988 (GVBl. Schleswig-Holstein, 51) und vom 20.6.1990 (GVBl. Schleswig-Holstein, 419).

¹⁵ § 3 para. 1 Wahlgesetz für den Landtag Brandenburg, GVBl. Brandenburg 1994 I, 38 (40).

¹⁶ Cf. C. Thiele, Rechtsstellung der sorbischen Minderheit in Deutschland, in: H.J. Heintze (ed.), Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt, Bonn: Dietz 1997, 342-378 (376 f.).

¹⁷ For instance in Albania, cf. Council of Europe, supra note 5, 5 (Albania). However, Albania has adopted a provision prohibiting parties on a religious, ethnic or regional basis.

possibility to minority parties this is clearly a provision in favour of small parties. Sometimes the threshold is higher for coalitions than for political parties.¹⁸

bb) Reserved seats

Some countries have reserved a certain number of seats in their national or State parliament(s) for representatives of minorities. That usually means that a seat or a specified number of seats is assigned to one particular minority whose members will directly elect their representative(s) in national elections.¹⁹ If there is a certain number of very small minorities, sometimes one seat is assigned to more than one minority at a time.²⁰

In Croatia, a further criterion of differentiation is whether the number of minority members constitutes a share of more than 8 % of the population or not. A minority of more than 8 % of the population is entitled to compete for proportional representation in Parliament. All those minorities below this threshold are assigned an overall number of 5 seats. For the purpose of electing minority representatives to these seats a particular constituency has to be determined in which the representative shall be elected with the simple majority of votes. In the 1992 elections, only four constituencies for minority representatives were established – the fifth seat reserved for these groups was assigned to a member of a minority who had been elected on the list of an ordinary party.²¹

Another relevant factor in this context pertains to the registration of voters. If minority representatives are directly elected by members of the minority this implies that voters will have to declare their minority affiliation upon registration in order to be entitled to participate in the election of minority representatives. The choice whether to be registered as a member of a certain minority or not must be free in order not to violate, for instance, Art. 3 para. 1 of the Framework Convention, which obliges States parties to guarantee the freedom to every member of a minority to freely decide whether or not to be treated as a member of the minority.²²

cc) Reduced requirements for registration

¹⁸ For instance, in Lithuania the threshold is 5 % for political parties and 7 % for coalitions, cf. Council of Europe, supra note 5, 55 (Lithuania).

¹⁹ Slovenia: Hungarian and Italian national minorities elect their own deputies to the National Assembly, Replies to questionnaire on Forms of Participation of Minorities in Decision-making processes, Council of Europe Document DH-MIN (99) 1 add., 1.

²⁰ For instance, in the Croatian House of Representatives there is one seat for the Czech and Slovak Minorities and another seat for Ruthenian, Ukrainian, German and Austrian minorities, cf. Council of Europe, supra note 5, 13 (Croatia).

²¹ Cf. J. Marko, Die rechtliche Stellung der Minderheiten in Kroatien, in: Frowein/Hofmann/Oeter (eds.), supra note 3, 83-128 (122); according to the Law on Election to the House of Representatives 7 of 127 are reserved for minority representatives (3 for Serbs, 1 for Hungarian, 1 for Italian, 1 for Czech and Slovak and 1 for Ruthenian, Ukrainian, German and Austrian minorities), cf. Council of Europe, supra note 5 (Croatia).

²² Although this provision is clearly formulated in a way conferring rights to individual members of minorities as in contrast to the other provisions of the Convention, it remains doubtful whether these provisions may be applied directly since the Preamble of the Framework Convention limits the effect of the Convention to the obligation to implement the principles "through national legislation and appropriate governmental policies". This is also underlined by the Explanatory Report, Framework Convention for the Protection of National Minorities and Explanatory Report, 1995, Council of Europe Doc. No. H (95) 10, para. 29.

Another possible measure to facilitate parliamentary representation of minorities by their own parties is to diminish the requirements for registration of a party for elections, in particular by reducing or withdrawing the quorum for voters' statements of support required for election registration.²³ This measure allows a minority party to register with less expenses and without a broadly planned campaign for obtaining statements of support.

Of course, an easier registration in no way guarantees the way of the respective party into parliament. Relief in election registration therefore rather constitutes a measure which is complementary to a lowered threshold.

dd) Favourable delimitation of constituencies

Another important element with a view to guaranteeing the representation of minorities in parliament is the delimitation of constituencies, in particular, in absolute or relative (first past the post) majority voting systems. If voting practices in certain areas follow minority / majority lines constituencies may be drawn up in a way that allows for adequate chances of minority parties or even privileges minority representation by building smaller constituencies for minority communities in order to raise their potential number of seats.

If a minority is concentrated in a certain area in a way that it constitutes the majority in that area, majority voting would usually lead to sufficient representation of the minority since their candidates would be able to win the majority in the respective area. In this context, it should be emphasised that majority voting systems are inadequate to guarantee the representation of minorities which are scattered in small numbers over the territory of a State.

In the case of local concentration of a minority caution must be taken that constituencies are not construed in a way that a minority's potential for winning the appropriate number of constituencies is hampered.²⁴ According to Art. 16 of the Framework Convention States shall refrain from measures aimed at restricting the rights and freedoms flowing from the Convention by redrawing administrative borders which change the proportion of the population.²⁵ Therefore, a change in the design of constituencies which is aimed at discriminating against minorities and inhibiting their political representation is contrary to the Framework Convention. Of course, this provision does not inhibit a reassessment of administrative boundaries in favour of increased minority representation.

If the minority is concentrated in a certain region, their representation can also be reflected in the assignment of a certain number of seats in the national parliament to members from that region. Similarly, in federal systems there is the possibility of

²³ The quorum is withdrawn in Denmark for the German minority organisation, cf. Council of Europe, *supra* note 5, 33 (Denmark).

²⁴ This problem is well known from the conflict in Northern Ireland where during the era of 'home rule' from 1922 to 1972 the constituencies were repeatedly manipulated to the disadvantage of the catholic nationalist parties and in favour of the protestant unionist parties. This process was called 'gerrymandering'. Cf. R. Grote, *Die Friedensvereinbarung von Belfast – ein Wendepunkt in der Geschichte des Nordirland-Konflikts*, *ZaöRV* 58 (1998), 647-702 (656).

²⁵ "Gerrymandering" is expressly mentioned in the Explanatory Report as a measure within the scope of Art. 16, cf. Framework Convention for the Protection of National Minorities and Explanatory Report, Council of Europe Doc. No. H (95) 10, para. 81.

minorities forming a majority in one or more States or having established a politically influential position on State level be represented in that chamber of parliament which is composed of deputies from the States.²⁶

ee) Privileged funding of minority parties

An aspect which is very important for the effective participation of minority organisations and parties in political life in general and in elections in particular is the question of financing. Due to their often small size and low number of voters they are often excluded from public funding for parties. A possible solution to this problem is to grant minority parties a right to public funding already if their electoral success is limited to a certain region in contrast to other parties which need to show nation wide success in order to obtain funding.²⁷

On the other hand, the access of minority parties to funds sometimes may be affected by the exclusion of funding by sources from abroad.²⁸ Such a prohibition seems particularly relevant with a view to minorities belonging to a people which forms the majority in another State. However, minority parties may also be expressly excluded from the prohibition of funding from abroad, as it is the case in Germany.²⁹

ff) Constitutional implications

From a constitutional point of view, all measures privileging minorities in election procedures raise questions of equal treatment. On the other hand, it is plainly clear that particularly small and scattered minorities do not stand a chance of being represented in parliament through their own parties without any kind of affirmative action.

Particular problems arise if the equality of votes enjoys special protection, as for example in Germany. The German Federal Constitutional Court consequently had to deal with minority privileges pertaining to elections. In particular, the Court upheld the application of a lowered threshold for minority parties arguing that their situation was fundamentally different from all other parties since international law and eventually also another State took particular interest in their status.³⁰

²⁶ This may be the case in a multi-ethnic federation like Russia, where two seats are assigned to each of the 89 subjects of the Federation, Council of Europe, *supra* note 5, 93.

²⁷ This approach has been adopted in the Italian law on party funding, cf. K. Oellers-Frahm, *Minderheiten in Italien*, in: Frowein/Hofmann/Oeter, *supra* note 5, 192-224 (223).

²⁸ Cf. D. Richter, *Vereinigungsfreiheit und Parteienrecht*, in: Frowein/Hofmann/Oeter, *supra* note 3, 451-491 (478).

²⁹ A minority exception has been introduced with an amendment to the German Political Parties Act which entered into force on 1.1.1994, BGBl. 1994 I, 149. The respective passage in the Art. 25 of the Act reads as follows: "(1) Parteien sind berechtigt, Spenden anzunehmen. Ausgenommen hiervon sind: (...) 3. Spenden von außerhalb des Geltungsbereiches dieses Gesetzes, es sei denn, daß (...) b) es sich um Spenden an Parteien nationaler Minderheiten in ihrer angestammten Heimat handelt, die diesen aus Staaten zugewendet werden, die an die Bundesrepublik Deutschland angrenzen und in denen Angehörige ihrer Volkszugehörigkeit leben, (...)."

³⁰ Judgment of the German Federal Constitutional Court of 23 January 1957, BVerfGE 6, 84 (97 f.). Cf. also J.A. Frowein, *Die Rechtsprechung des Bundesverfassungsgerichts zum Wahlrecht*, AöR 99 (1974) 72-110, 92. Critics of this decision argue that exceptions to the equality of votes privileging national minorities are only admissible in as far as the protection of national minorities is guaranteed in the constitution since only such constitutional reference would provide a sufficient justification for differentiation, cf. M. Morlock in: H. Dreier (Hrsg.), *Grundgesetz Kommentar*, Bd. II, Tübingen: Mohr Siebeck 1998, Art. 38, para. 105.

Similar problems arise regarding the admissibility of coalitions among different lists with the aim of jumping over a general threshold. The German Federal Constitutional Court ruled that such coalitions were only admissible if one joint list of candidates ("Listenvereinigung") was established instead of keeping different lists of candidates which are only added up for the purpose of jumping the threshold ("Listenverbindung").³¹ The latter approach would lead to a severe inequality in the value of votes since a voter for one list contributes to the success of another list for which in fact he or she has not voted.³²

Problems of an even more serious nature are raised by reserving a certain number of seats to minorities since such a system may be detached from any result obtained by a specific party. This may lead to a situation where the value of one vote cast for an ordinary party is grossly unequal to that cast for a minority party.

These considerations show that a certain balance has to be struck between the legitimate and necessary promotion of minority representation and considerations pertaining to arising inequalities in the voting system.

2. Position and rights of minority parties in parliament

a) Special procedural rights, in particular, veto right on minority issues

Once representatives of minorities have made their way into parliament, their position may be further reinforced by certain measures. In particular, they may be given special procedural rights regarding questions pertaining to minority issues which may range from certain rights to initiative for new legislation to vetoing bills on minority questions.³³

An interesting approach in this regard is contained in the provisions of the Good-Friday Agreement on Northern Ireland with regard to the Assembly of Northern Ireland, where certain matters of great importance (key decisions) to Unionists and Republicans must be decided on a "cross community basis". This requires either parallel consent of both blocks independently or in a weighed majority of 60 % of votes with 40 % of voting members of each block.³⁴ Therefore, these key decisions can only be adopted on a broad consensus and press the blocks to negotiate on compromises.

Similarly, in Belgium, the Assembly and Senate are divided into language groups (one Dutch and one French language group, the German speaking group being defined to constitute a part of the French group) for certain questions which then have

³¹ Judgment of the German Federal Constitutional Court of 29 September 1990, BVerfGE 82, 322 (346).

³² *Ibid.*

³³ Cf. Council of Europe, *supra* note 19, 2 (Slovenia).

³⁴ Cf. Grote, *supra* note 24, 675.

to be decided upon by a majority in each of the groups and an overall majority of two thirds of votes.³⁵

Such special rules may also be confined to regional or local parliaments.³⁶ For very important legislation which does not allow for a stalemate between the different groups special procedures of arbitration may apply. In the Italian region Trentino-Alto Adige and the province of Bolzano, for instance, if a budget bill does not obtain the majority in each language group a special commission composed equally of representatives of the language groups will decide. If no decision can be reached in this commission the administrative court will function as court of arbitration.³⁷

b) Group status

If certain parliamentary rights such as assignment of positions in legislative committees is made dependent on a certain group status of members representing one party which is linked to the number of deputies, this may impinge on the working position of members of those parties with only very few representatives.

The problem is all the more evident in cases where the access of minority parties is privileged. One possibility to improve minority representation is to grant those rights which are, in principle, depending on group status to members of minority parties irrespective of their number of deputies.³⁸

3. Parliamentary committees for minority issues

Since the main workload of a parliament is usually dealt with in committees it is plainly clear that the composition and powers of committees working on minority questions is of crucial importance for the quality of minority representation.

In some States, the discussion of minority issues is addressed within committees dealing with broader mandates such as human rights,³⁹ constitutional questions,⁴⁰ or State and local administration.⁴¹ Sometimes these committees have sub-committees on minority rights.⁴² In other States there are also committees specialised in minority issues.⁴³

³⁵ Cf. R. Mathiak, *Minderheiten in Belgien*, in : Frowein/Hofmann/Oeter, *supra* note 5, 1-61 (54 f.).

³⁶ On application, any law to be adopted in the Italian areas Trentino-Alto Adige (region) and Bolzano (province) must obtain the majority of the language groups. Cf. K. Oellers-Frahm, *supra* note 27, 224.

³⁷ *Ibid.*

³⁸ In Germany, for instance, the two members of Danish party which have been elected to the parliament of Schleswig-Holstein are granted the status of a parliamentary group (*Fraktionsstatus*) irrespective of their number.

³⁹ E.g. Albania, cf. Council of Europe, *supra* note 5, 5 (Albania).

⁴⁰ E.g. Austria, cf. Council of Europe, *supra* note 5, 9 (Austria).

⁴¹ Cf. Council of Europe, *supra* note 5, 98 (Slovak Republic).

⁴² Cf. Council of Europe, *supra* note 5, 14 (Croatia).

⁴³ Cf. Council of Europe, *supra* note 5, 111 (Macedonia); Germany: in a Land parliament, Council of Europe, *supra* note 19, 4 (Germany).

The mandate of these committees usually requires them to participate through the submission of proposals, recommendations and comments in the process of legislation affecting the position of minorities and monitor the implementation of minority rights. In order to reinforce the position of such committees in the legislative process hearing them could be made mandatory with a view to legislation directly or indirectly affecting minority rights. However, no such provision has been reported in the answers to the questionnaire.

Although usually not exclusively composed of members representing national minorities a special position is often granted to such members, in particular by reserving the chair for a member of a minority group.⁴⁴

4. Minority parliaments

Functions similar to those of parliamentary committees for minority issues may be assigned to minority parliaments. Such parliaments may be elected by the members of the minorities⁴⁵ or be composed of members of regional or local parliaments indirectly elected among those bodies.⁴⁶ The typical powers of such minority parliaments seems to be limited to a regular or mandatory hearing on legislative projects affecting the situation of the respective minority.⁴⁷ Such minority parliaments may also be granted certain powers amounting to a form of personal autonomy.⁴⁸

5. Bodies appointed by parliament for examining complaints or conducting inquiries

Most of the States having replied to the questionnaire have introduced the institution of a parliamentary ombudsperson with a mandate covering all possible misconduct on part of the authorities or specialised in human rights questions, or a parliamentary committee for examining petitions. These bodies are usually also responsible for complaints or malpractice concerning minorities.

As far as can be seen, only Hungary has opted for a parliamentary ombudsperson specialised in minority issues on the national level. Irrespective of whether minority questions are accommodated in a broader mandate or accorded an

⁴⁴ For instance, the Commission for Ethnic Communities of the Slovenian Parliament is presided over by minority representatives but comprises representatives of all parliamentary parties, cf. Council of Europe, supra note 19, 2 (Slovenia). Also the Croatian Committee on Human Rights and the Rights of Ethnic and National Communities or Minorities is chaired by a minority representative, cf. Council of Europe, supra note 5, 14 (Croatia).

⁴⁵ For instance, the Sami Parliaments in Norway and Finland, cf. Council of Europe, supra note 5, 73 (Norway), 45 (Finland), R. Hofmann, *Die rechtliche Stellung der Minderheiten in Finnland*, in: Frowein/Hofmann/Oeter, supra note 5, 108-125 (121).

⁴⁶ As in the case of the Swedish-Finnish Assembly in Finland, cf. Hofmann, supra note 45, 120.

⁴⁷ The Sami Parliament in Finland must be heard on all Sami matters whereas the Swedish-Finnish Assembly will be heard regularly, cf. Hofmann, supra note 45, 121.

⁴⁸ See D.2.b).

elevated position by creating a specialised institution the potential for efficiently addressing minority questions depends on the powers granted to the ombudsperson.

Among the crucial points in this respect range the ombudsperson's ability to act on his or her own initiative, the access to potential evidence and the existence of any measures likely to foster implementation of conclusions drawn after the examination of a case.

Those bodies or ombudspersons appointed by parliament without specialisation in minority questions have the general task to monitor the activities of public bodies and protect citizens' rights by investigating complaints and frequently also examining misconduct *ex officio*.⁴⁹ To that end, they are usually equipped with broad fact-finding powers: they are entitled to request all relevant documents and data from public bodies, carry out inspections and conduct interviews.

Intervention by an ombudsperson tends to be excluded if the case is pending in court. As a consequence of misconduct on the part of the authorities the ombudsperson may normally issue recommendations. In some States the position of the ombudsperson in giving recommendations is reinforced by certain procedural requirements: for instance, a refusal to implement recommendations has to be reasoned in writing⁵⁰ or allows the ombudsperson to address the superior authority or make the case public.⁵¹

The Hungarian, Parliamentary Commissioner for the Rights of National and Ethnic Minorities' is elected by National Assembly upon nomination by the President. He or she has the power to investigate irregularities concerning national and ethnic minority rights, examine abuses which have come to his attention, and take the initiative to redress abuses.⁵²

6. Representation of minorities on regional or municipal level

In principle, the representation of minorities on regional or municipal level can be fostered by the same means as applied on national or State level. In particular, a reservation of seats or a lowered threshold for minority parties can be important factors in this respect. Sometimes, also commissions on inter-ethnic relations are accorded an important role.⁵³

However, in cases of a regional or local concentration of a certain minority it is much more likely that minorities are adequately represented on the regional or municipal level even if they only form a marginal figure on the national scale. In such cases, it seems of utmost importance which powers are accorded to local bodies.

In particular, a form of local self-government which grants to communities the right to organise and regulate all questions pertaining to matters of community life

⁴⁹ For instance, cf. Council of Europe, *supra* note 5, 14 (Croatia), 10 (Austria), 89 (Romania).

⁵⁰ Cf. Council of Europe, *supra* note 5, 10 (Austria).

⁵¹ Cf. Council of Europe, *supra* note 5, 113 (Macedonia).

⁵² Cf. Council of Europe, *supra* note 5, 47 (Hungary).

⁵³ Cf. Council of Europe, *supra* note 5, 111 f. (Macedonia).

allows for a better involvement of minority representatives than a more centralised form of government. For mixed communities, it may be helpful to require the consent of municipal councillors elected on behalf of a minority for all measures concerning the rights of the minority.⁵⁴

B. Governmental agencies specialised in minority issues

1. Ministerial responsibilities for minority issues

Whereas the establishment of a ministry specialised in minority affairs seems rare,⁵⁵ responsibility for minority questions is usually expressly assigned to one or more ministries. In particular, the ministries of interior or justice, in some cases also the Ministry for Local Government and Regional Development⁵⁶ or that for agriculture⁵⁷ are responsible for minority issues. Cultural minority questions are sometimes split off and dealt with by the ministry responsible for cultural affairs. In federal systems, also ministries of the States play an important role in as far as the States are responsible for minority issues.

The respective ministries frequently have established a special division or governmental office for minority affairs, which is endowed with the preparation of general policy lines, drafting of minority legislation, and funding of minority activities. Sometimes these divisions are specialised in questions pertaining to a certain minority.⁵⁸ In order to improve coordination, an inter-ministerial working group on minority issues may be established.⁵⁹

2. Minority members as civil servants

⁵⁴ In Slovenia, the consent of the Hungarian or Italian municipal councillors is necessary for matters concerning minorities' rights, cf. Council of Europe, supra note 19, 8 (Slovenia).

⁵⁵ An exception is Estonia which has appointed a Minister of Ethnic Relations who is responsible for certain issues related to the integration of the Russian speaking minority and heads the governmental commission working on questions related to the Estonian demographic situation and integration of ethnic minorities into Estonian society, cf. Council of Europe, supra note 5, 38 (Estonia). In Romania, a Minister for National Minorities in the Prime Minister's Office has been appointed, cf. Council of Europe, supra note 5, 89 (Romania). Another example is the Netherlands' Minister for Urban Policy and Integration of Ethnic Minorities which, however, is rather concentrating on integration of immigrants. He or she heads the Minorities Integration Policy Department with a view to coordinating the outplacement of asylees, implementing legislation providing health and social services for people with a provisional residence permit, and developing re-migration policies, cf. Council of Europe, supra note 5, 68 (Netherlands).

⁵⁶ Cf. Council of Europe, supra note 5, 72 (Norway).

⁵⁷ Cf. Council of Europe, supra note 5, 102 (Sweden).

⁵⁸ For instance, the Norwegian Ministry of Local Government and Regional Development has established a special department on Sami affairs, cf. Council of Europe, supra note 5, 72 (Norway).

⁵⁹ Cf. Council of Europe, supra note 5, 78 f. (Poland).

Representation of minority interests may be particularly effective if members of the minorities are working as civil servants in those governmental bodies dealing with minority questions. A possible approach in this respect is to commit employment policy of public institutions to the principle of proportional representation: in Italy, a statute requires that appointments of civil servants to public institutions must reflect the proportion of language groups in the respective population of the region Trentino/Alto Adige.⁶⁰ In another region, the Aosta Valley, where both French and Italian are used in administrative practice, it is a criterion for recruitment that public servants should know both languages.⁶¹ Of course, this criterion is privileging members of the French speaking minority who are much more likely to have a good command of both languages.

If a certain autonomy has been granted to a minority, staff working in governmental offices responsible for minority affairs may also be appointed by autonomous bodies from among minority members.⁶²

3. Government commissioner for minorities

The consideration given to minority issues by the government may be further reinforced by the appointment of a governmental ombudsperson, commissioner, contact person or committee for these questions. The mandate of such an institution can be related to problems of a specific minority,⁶³ or cover all minorities and immigrants.⁶⁴ It may be assigned comprehensive responsibility for all areas of minority questions, focus on combating discrimination,⁶⁵ or rather constitute a channel of communication between minorities and the government.⁶⁶

Of course, ombudspersons appointed by the government are structurally less independent from the executive than those elected by parliament. It therefore may be open to doubt whether a government-appointed commissioner is best equipped for monitoring government activities. Tasks for which a governmental commissioner or ombudsperson seems to be better suited include reviewing the implementation of

⁶⁰ Cf. Oellers-Frahm, *supra* note 27, 206.

⁶¹ *Ibid.*, 206 f.

⁶² In Norway, board members of the governmental offices concerned with Sami affairs (the Reindeer Herding Administration and the Sami Educational Council) are appointed at least partly by the Sami parliament and the administrative staff of the Council is all Sami, cf. Council of Europe, *supra* note 5, 72 (Norway).

⁶³ In Germany, an ombudsperson for minority issues (Border Region Commissioner) has been appointed by the government of one Land (Schleswig-Holstein), cf. Council of Europe, *supra* note 19, 2 (Germany).

⁶⁴ Cf. Council of Europe, *supra* note 5, 84 (Portugal).

⁶⁵ In Sweden, the government appoints the Ombudsman against Ethnic Discrimination with the mandate to combat ethnic discrimination in working life and other spheres of social life, cf. Council of Europe, *supra* note 5, 101 (Sweden); in the United Kingdom, the Commission for Racial Equality reviews the working of the Race Relations Act, submits proposals for amendments, provides legal assistance to complainants in cases of discrimination, and seeks to raise public awareness, cf. Council of Europe, *supra* note 5, 124 (United Kingdom).

⁶⁶ For instance, in Denmark the secretariat of the Liaison Committee concerning the German Minority provided for by the Ministry of Interior, cf. Council of Europe, *supra* note 5, 34 (Denmark). A contact person has been nominated in Albania, cf. Council of Europe, *supra* note 5, 6 (Albania).

certain minority related legislation, providing legal assistance to complainants in cases of discrimination, and raising public awareness for minority issues.

4. No specialised governmental bodies

As far as can be seen, it remains the exception among European States not to provide for any governmental body specialised in minority issues. This general practice seems to recognise a common principle of respect for minority concerns in as far as the institutional composition of the executive is concerned. Of those States that have replied to the questionnaire, only Macedonia argues that interests are represented through the participation of persons belonging to minorities in all levels of power and therefore special bodies or ministries would be superfluous.⁶⁷

C. Informal channels of participation: Round tables, advisory councils and liaison committees

As informal channels of participation, round tables and the like have been established in most of the countries with most different features. Generally speaking, this reflects the commitment of OSCE participating States to ensure the participation of minorities in political life "including through democratic participation in (...) consultative bodies at the national, regional and local level."⁶⁸

Most of these bodies serve the purpose of advising the government on minority issues by giving a voice to representatives of the minorities. Such bodies may be composed of representatives from among minority NGOs, churches, political parties, independent experts, members of the minority parliament, and the government, the latter of which sometimes do not have the right to vote in the respective body.⁶⁹

The exact composition of such bodies varies from one country to the other; the degree of representation of minority interests depends on the number of minority members in relation to the overall number of members of the respective body and on the question whether the minority representatives are elected by the minorities or rather picked by the government.

The bodies in question may be entrusted with addressing the full range of minority questions but may also be focussed on examining problems pertaining to one minority only.⁷⁰ They may also be convened for special topics such as an exchange of

⁶⁷ Cf. Council of Europe, supra note 5, 113 (Macedonia).

⁶⁸ Para. 24 of Part VI of the 1992 CSCE Helsinki Document.

⁶⁹ For instance, Council of Europe, supra note 5, 11 (Austria) and 103 (Sweden).

⁷⁰ For instance, foundations or consultative committees on issues concerning Sorbs or Danes in Germany (Federal and Land representatives, NGOs), cf. Council of Europe, supra note 19, 4 f. (Germany).

views between government and minority NGOs with a view to the implementation of international conventions.⁷¹

The task of such bodies usually comprises recommending measures for solving minority problems or commenting on government bills impinging on the position of minorities. Sometimes the advisory body may also decide on funding for specific cultural projects.⁷² Increasing public awareness of problems related to the situation of minorities may also range among the tasks.⁷³ A composition exclusively of minority representatives as practised in certain countries may emphasise the monitoring function of such committees.⁷⁴ Of course, such advisory councils can also be established on a local basis with a view to policies to be adopted by municipal authorities.

The usual function of such bodies is to secure the contact between the minority and governmental institutions. However, there are also examples for advisory or liaison committees composed of members of parliament and minority representatives elected by parliament which shall serve to foster exchange between minorities and parliament.⁷⁵ Liaison between minority, parliament and government may also be combined in one committee.⁷⁶

Some States have also agreed to work together on an intergovernmental basis. This seems particularly helpful if a minority is present in several States of a certain region as it is the case with the Sami people in Norway, Sweden and Finland. The governments of these States have established the Council for Cooperation on Sami issues which has meetings with the Nordic Sami Council, an international NGO.⁷⁷

Another channel for providing minorities with a chance to present their views is to oblige by law the competent ministry to regular consultations with minority NGOs.⁷⁸ In other countries, contact between the ministry and minority NGOs takes place on a case-by-case basis.⁷⁹

An additional factor is the provision of adequate resources which is a prerequisite for the proper and effective functioning of these bodies.⁸⁰

⁷¹ In Germany, conferences on the implementation of the Framework Convention and the Language Charter have been convened (Federal and Länder Governments meeting with NGOs), cf. Council of Europe, supra note 19, 4 f. (Germany).

⁷² Cf. Council of Europe, supra note 5, 103 (Sweden).

⁷³ Cf. Council of Europe, supra note 5, 103 (Sweden).

⁷⁴ Cf. Council of Europe, supra note 5, 16 (Croatia), 48 f. (Hungary), 90 (Romania).

⁷⁵ In Macedonia, the Council for Inter-Ethnic Relations is established and elected by the Assembly. It is composed of 12 members representing national minorities – two for each minority – and the President of the Assembly, and advises the Assembly on all minority questions, cf. Council of Europe, supra note 5, 113 f. (Macedonia).

⁷⁶ In Denmark, a liaison committee composed of one member of parliament for each party, minister and four representatives for the German minority has been established with a view to securing the exchange between the German minority and Danish governmental and parliamentary institutions, cf. Council of Europe, supra note 5, 34 (Denmark).

⁷⁷ Cf. Council of Europe, supra note 5, 73 (Norway).

⁷⁸ Cf. Council of Europe, supra note 5, 69 (Netherlands).

⁷⁹ Cf. Council of Europe, supra note 5, 73 (Norway).

⁸⁰ Lund Recommendations, Rec. No. 13.

D. Increasing opportunities for participation through the devolution of powers to the local or regional level and to autonomous entities

1. Local self-government

Local self-government may be granted to all communities or restricted to minority communities which have obtained a special status. If local self-government is granted to all communities in a country it may provide important opportunities for self determination of minorities all the same in as far as they are living in communities predominantly or exclusively inhabited by members of the minority.⁸¹

In Croatia, a special status allowing for a far-reaching cultural autonomy is attached to districts in which more than 50 % of population belong to a minority. However, this provision has been suspended since 1995 "pending the next census".⁸²

Having in mind that in mixed communities a majority – minority situation along ethnic lines may arise it may be necessary to adopt specific provisions for the protection of the rights of those inhabitants living in such minority communities without belonging to the minority.

A slightly different form of local self-government applies if minorities are granted a certain autonomy *within* a certain local government unit. In Slovenia, self-governing communities of national minorities decide about internal problems of their group and participate in the full range of decision-making on issues concerning the entire community.

The position of minorities is further reinforced since local communities are required to obtain the opinion and in certain cases the consent of the minority representatives before any decision affecting the minority is taken.⁸³ Similarly, in Hungary, local minority self-governments are not only given the right to decide on their own structure, memorial sites, and festivities but also the right to veto against decrees of the local government in cultural, educational or language issues concerning the minority. Moreover, they may veto the nomination of directors for minority institutions and must be consulted in the preparation of legislation affecting minority issues. Finally, they are entitled to carry out the professional control of minority education.⁸⁴

Of course, the potential for minority participation depends to an important extent on the range of powers which are generally assigned to bodies on the local level in a State. On the other hand, the possibility to grant special powers to those local communities which are dominated by minorities should not be rejected out of hand.

⁸¹ For instance, the Sorb and the Friesian communities in Germany, Council of Europe, *supra* note 19, 5 (Germany).

⁸² Cf. Council of Europe, *supra* note 5, 17 (Croatia).

⁸³ Cf. Council of Europe, *supra* note 19, 8 (Slovenia).

⁸⁴ Cf. Council of Europe, *supra* note 5, 49 (Hungary).

2. Different forms of autonomy

Different models of autonomy or self-government are applied and allow for a different degree of independence of minority communities in regulating their affairs. The different approaches may be grouped under the terms territorial autonomy, personal autonomy and functional autonomy. Cultural self-determination naturally plays a central role in all of these different types of autonomy.

Given the broad variety of autonomies granted in some States on the one hand and the still prevailing reluctance to grant autonomy for fears of subsequent secession on the other hand a right of minorities to autonomy can hardly be established as a rule of customary international law.⁸⁵ Moreover, neither treaty law nor soft law contain any hints at a right to autonomy.⁸⁶ Even the CSCE Copenhagen Document of 29 June 1990 as the most far-reaching if only political document on the protection of minorities is formulated very cautiously on this point and mentions autonomy merely as a "possible means" for promoting the identity of minorities.⁸⁷ Even less guidance can be obtained from international law as to the construction of autonomy.

A crucial prerequisite for an efficient functioning of any form of autonomy is the provision of sufficient resources – either by subsidies or revenue transfer from the central government or by allowing for own sources of income such as taxes from local companies.

Moreover, all forms of autonomy need some form of guarantee in order to inhibit their removal according to the political will of the day. In particular, constitutional arrangements which require a qualified majority for general amendments⁸⁸ and a provision prescribing the consent of the population by a referendum in case of substantial withdrawal of powers from an autonomous region may constitute appropriate safeguards.

a) Territorial autonomy

The forms of territorial autonomy have in common that they establish regional executive institutions and elected representations of the people(s) for the purpose of linking the political activities within the regional unit with the will of its inhabitants.⁸⁹

Powers transferred to an autonomous region may range from a decentralisation in administrative matters⁹⁰ over far-reaching self-government with certain legislative powers⁹¹ to a virtually independent administrative, legislative and judicial system.⁹²

⁸⁵ Such a right has been claimed at least for territorial minorities by D. Sanders, *Is Autonomy a Principle of International Law?*, *Nordic Journal of International Law* 55 (1986) 17-21, at 17.

⁸⁶ H.-J. Heintze, *On the Legal Understanding of Autonomy*, in: M. Suksi, *Autonomy: Applications and Implications*, The Hague 1998, 7-33, at 13 f.

⁸⁷ ILM 29 (1990) 1305, para. 35.

⁸⁸ In this sense also Lund Recommendations, Rec. No. 22.

⁸⁹ Oeter, *supra* note 3, 511.

⁹⁰ For instance, in France with regard to Corsica, cf. J. Polakiewicz, *Die rechtliche Stellung der Minderheiten in Frankreich*, in: Frowein/Hofmann/Oeter, *supra* note 5, Teil 1, 126-159 (157 ff.).

⁹¹ For instance, in Italy with regard to the region Alto-Adige, cf. Oellers-Frahm, *supra* note 27, 223 f.

It is also possible to grant a territorially defined autonomy to a certain part of a region with regard to specific matters. This approach is applied in Belgium with regard to the German minority where the body of a German-speaking Community has been established with its own executive and legislative assembly (Council) which, however, forms part of the administrative region of Wallonia. The Council has the power to issue decrees for the German-speaking communities⁹³ in its sphere of competencies which are limited to cultural as well as "personal" issues, education including the use of languages, inter-Community cooperation and international cooperation.⁹⁴

"Home rule" has been granted by several States to certain territorially or geographically defined areas – such as Greenland and the Faeroe Islands by Denmark; the Azores and Madeira by Portugal; the Aland Islands by Finland; and Gagauzia by the Republic of Moldova. Responsibilities vary but typically include a broad range of matters, such as education, science, culture, public health, finance, ecology, social affairs. In some cases the minority language is declared primary language in the autonomous territory.⁹⁵

A particularly interesting model of territorial autonomy is applied in Spain with a view to the "comunidades autónomas", which has been accorded, in particular, to the Bask Country, Catalunya, and Galicia but also to another 14 entities. These communities have been granted a broad range of autonomous powers in areas such as culture, education, languages and economy, however to a greatly varying extent.⁹⁶ Thereby, an asymmetric system of autonomies⁹⁷ has been established.

With regard to the representation of the region in the motherland the head of the autonomous region may be accorded the rank of a member of the Government.⁹⁸ Moreover, representatives of an autonomous region may be given seats in the assembly of deputies in the motherland or the parliamentary chamber composed of regional representatives.

Territorial autonomy may be applied in favour of minorities only if the respective group lives in a clearly defined area in which it constitutes the majority. This prerequisite already points at the two fundamental problems underpinning this approach. First, all members of the respective minority living outside the autonomous territory do not benefit from the concept. Second, the territorial approach implies that the autonomous power granted to the entity will subject all persons living in the

⁹² For instance, in Finland with regard to the Aland Islands, cf. Hofmann, *supra* note 45, 121 ff.

⁹³ Therefore, the autonomy is clearly territorially defined and does not extend to all German-speaking Belgians, cf. R. Mathiak, *supra* note 35, Teil 1, 1-61 (20).

⁹⁴ Art. 130 of the Belgian Constitution, printed in English translation in: A. Alen / R. Ergec, *Federal Belgium after the Fourth State Reform of 1993*, 2nd ed., Brussels: Ministry of Foreign Affairs 1998, 33 ff. (47).

⁹⁵ This is the case in Greenland and the Faeroe Islands, cf. M. Brems, *Die politische Intergration ethnischer Minderheiten*, Frankfurt a.M. 1995, 144.

⁹⁶ For details, see S. Oeter, *Die rechtliche Stellung von Minderheiten in Spanien*, in: Frowein/Hofmann/Oeter, *supra* note 5, 369-406. Cf. also D. Blumenwitz, *Volkgruppen und Minderheiten – Politische Vertretung und Kulturautonomie*, Berlin 1995, 122 f.

⁹⁷ Oeter, *supra* note 3, 519.

⁹⁸ Cf. Council of Europe, *supra* note 5, 65 (Moldova).

respective territory irrespective whether they belong to the minority or not. Since the minority population constitutes the majority in the territory in question a 'new' minority is created potentially in need of strong protection. In very extreme cases, the danger of 'ethnic cleansing' may be increased by granting territorial autonomy. This experience was made in Bosnia-Herzegovina where the territorial autonomy granted to the three peoples was misused to create 'ethnically clean areas'.⁹⁹ It should be emphasised, however, that this experience cannot easily be generalised due to the warlike situation between the different groups or entities at the time when the territorial autonomy was granted.

In order to prevent precarious situations for 'new' minorities created by granting territorial autonomy the devolution of powers to the autonomous bodies should be made conditional on the observance of human rights and minority protection.

b) Personal autonomy

Personal autonomy is granted collectively to all members of a minority irrespective of their belonging to a certain territorial administrative unit. This may include an own representative legislative body and an executive competent for areas such as culture, language and education.

The Nordic countries have created a special type of personal autonomy by creating parliaments for certain minorities: there are Sami parliaments in Sweden, Finland and Norway and a Swedish Assembly in Finland. In the beginning these bodies were merely construed as advisory bodies but recently obtained own competencies such as to decide on its own priorities within the budget assigned by the central government (Norway),¹⁰⁰ or full cultural autonomy (Finland).¹⁰¹ Similarly, the Swedish Sami Parliament may not only suggest measures in any area which it deems to be of special interest with regard to vital Sami culture but is also a public administrative body. It may allocate government subsidies and resources from the Sami fund as well as appoint the board of directors for the Sami school.¹⁰²

Other forms of personal autonomy are foreseen in Estonia, Hungary, and Slovenia.

In Estonia, minorities which are registered in the national register of national minorities may submit an application for national cultural autonomy. This requires a minority membership of more than 3000. The autonomy granted would include in particular the right to organise education in the mother tongue and form minority cultural institutions. However, it has never been applied in practice.¹⁰³

Hungary has created the possibility for self-government of minorities on the national level through an assembly composed of members elected from among

⁹⁹ Heintze, supra note 86, 19.

¹⁰⁰ Cf. Council of Europe, supra note 5, 73 (Norway).

¹⁰¹ According to Art. 51a of the Finish Constitution Act.

¹⁰² Cf. Council of Europe, supra note 5, 103 f. (Sweden).

¹⁰³ Cf. Council of Europe, supra note 5, 40 (Estonia).

representatives of local self-government bodies of minorities. The self-government body may decide on issues of broadcasting, education and public holidays.¹⁰⁴

Slovenia has accorded the right to self-government to the autochthonous minorities (Italians and Hungarians) to be exercised in defined (mixed) territories. On the national level, the Italian and the Hungarian self-governing minority communities have been established which may independently decide on matters within the scope of cultural autonomy accorded to these groups in the Constitution.¹⁰⁵

The concept of personal autonomy is detached from territorial elements and therefore does not require the concentration of a minority in substantial numbers in a certain area. Consequently, it has a much broader potential for application than the model of territorial autonomy. However, in some respects it requires a certain concentration of minority members in some areas or all over the country for reasons of practical feasibility. For instance, an autonomy in educational questions will be difficult to realise if the minority is so dispersed in the country that it is impossible to have enough teachers and pupils for own schools.

In addition, it has been asked in how far personal autonomy is to be reconciled with concepts emphasising uniform administration and homogeneity of living standards.¹⁰⁶ This observation highlights, in particular, possible collisions with a centralised form of government.

Moreover, two fundamental problems are linked to the concept. First, precautions must be taken so that personal autonomy does not lead to the disintegration of the minority concerned. In particular, in as far as own competencies in the field of education are granted to the minority there may be a danger of fostering the differences in qualifications rather promoting the identities within the same system. For instance, the promotion of the minority language in schools must keep in mind the necessity to learn the majority language as well. Without at least one common language it will be difficult to guarantee the possibility of communication between different groups as an essential component of a society's political life. Therefore, provisions must be adopted with a view to guaranteeing the equality of qualifications obtained in any of the educational systems prevailing in a country.

Second, the more intricate question arises to whom the personal autonomy will apply. It is clear from international law that it is an individual subjective choice whether or not to belong to a minority. Sometimes this is also regarded to be required by national constitutional law. For instance, in Austria a poll asserting the objective belonging of persons to a national minority or the request of proof for such belonging would be regarded as discriminatory and therefore inadmissible.¹⁰⁷

¹⁰⁴ Cf. G. Nolte, Die rechtliche Stellung der Minderheiten in Ungarn, in: Frowein/Hofmann/Oeter, supra note 5, 501-536 (527).

¹⁰⁵ Cf. Law on Self-Governing National Communities, Art. 1, 3, and Constitution of the Republic of Slovenia, Art. 64, in English translation in: Council of Europe, supra note 19, 11, 13 (Slovenia).

¹⁰⁶ Oeter, supra note 3, 502.

¹⁰⁷ P. Pernthaler, Modell einer autonomen öffentlichrechtlichen Vertretung der Slowenischen Volksgruppe in Kärnten, Europa Ethnica 50 (1993) 24-37, at 26, with references to Austrian jurisprudence.

Consequently, a person fulfilling the objective criteria of belonging to a certain minority cannot be regarded as a member of that minority if he or she decides otherwise. Therefore, the organisation of personal autonomy granted to a minority must guarantee respect for the individual choice.

Pernthaler has suggested to solve this problem by differentiating between the right to vote for the autonomous representative organs and the membership in the autonomous entity. According to this approach every member of the minority would also automatically be member of the autonomous entity. At the same time the exercise of the right to vote for representative organs of the entity allows to guarantee the freedom to profess to one's belonging to a minority. Elections could be carried out together with general elections, lists for the autonomous body distributed to each voter who then may freely decide to profess to belonging to the minority by filling in the election list for the autonomous body.¹⁰⁸

However, this approach does not solve two problems. One problem is that the approach does not provide any guarantees against a misuse of the possibility to vote for the autonomous body by members of the majority. Given the tensions frequently existing between minority and majority this is not a far-fetched reservation. The other problem is that the freedom to profess to one's belonging to a minority only makes sense if it is not limited to the exercise of rights such as the right to vote but also to duties incumbent on persons belonging to a minority. If the autonomous body is provided with any powers to be exercised over those persons subjected to it – for instance, levying taxes – some mechanism must be adopted assuring that no individual who may belong to a minority by objective criteria is subjected to the power of the autonomous body against his will.

c) Functional autonomy

This type of autonomy pertains to the devolution of certain powers with a view to culture, education, religious issues or media to minority organisations constituted as juristic persons of private law. In contrast to personal autonomy, not all members of the minority are subjected to the empowered body but only those who are members of the respective minority organisation.

For instance, in Germany, the Danish Schooling Association is running a number of schools of all levels which may be visited by children of members of that association. These schools are private schools which are funded both by the German and the Danish State; exams are recognised in Germany as well as in Denmark.¹⁰⁹

Since the subjection to autonomous bodies in a system of functional autonomy depends on the free decision to membership the problem of involuntary subjection does not apply in this context. Moreover, functional autonomy provides a very

¹⁰⁸ Ibid., at 29 f. Oeter and Heintze accept the feasibility of this approach arguing that a differentiation is possible between membership in the autonomous body de jure and being integrated to its activities de facto by professing to one's belonging to the minority, cf. Oeter, supra note 3, 503; Heintze, supra note 86, 23.

¹⁰⁹ Cf. M.J. Hahn, Die rechtliche Stellung der Minderheiten in Deutschland, in: Frowein/Hofmann/Oeter, supra note 5, 62-107 (89 ff.).

flexible means for meeting the requests of a minority for regulating their own affairs. It also allows for pluralism within the minority since in case of dissenting opinions there is always the possibility to found new concurring organisations.¹¹⁰

On the other hand, the applicability of this concept may be considered limited to small minority groups which are not too dispersed and to situations with a low potential for conflict.¹¹¹ In very tense situations or if a big minority group is involved it will probably not be sufficient to provide private minority organisations with certain powers. Moreover such solutions require some procedural safeguards in order to make sure that the autonomy is not accorded or withdrawn subject to the ever changing political will of the day.

3. Federal systems

Whereas autonomy aims at realising self-determination of a minority through the devolution of legislative and executive powers in areas of fundamental importance for the identity of the minority, entities of a federal system are also integrated in the functioning of the central State, in particular, through a chamber of parliament for representatives of the States. Since the States are usually given considerable powers of participation in decision-making on the federal level the functioning of a federal system requires that all entities work towards common aims and are ready for compromise. The fundamental criterion for differentiating between different forms of federal systems with a view to the integration of minorities is the question whether boundaries of the entities are drawn up along ethnic, linguistic or religious lines or not.

Territorial and constitutional structures of a federation may be adapted to the distribution of ethnic, linguistic or religious groups so that ethnic, linguistic or religious entities also constitute political units.¹¹² For instance, Belgium is divided into three regions (the Walloon, Flemish, and Brussels-Capital region), two of which have been established according to linguistic criteria (the Walloon region for the French- and German-speaking, the Flemish region for the Dutch-speaking inhabitants).¹¹³

A different approach has been adopted in the Swiss federation which is characterised by the presence of different linguistic and cultural identities among groups but by a delimitation of political entities according to historical factors. The "Cantons" in Switzerland constitute a structure of small units with a political identity which is not predominantly characterised by linguistic or ethnic aspects. As a consequence, each group may constitute the majority in some Cantons while being in

¹¹⁰ Brems, *supra* note 95, 132.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, 149.

¹¹³ Belgium has some complicated constitutional provisions assigning different procedures of decision-making to the French-speaking and Dutch-speaking sides. In particular, Art. 138 of the Constitution allows for a delegation of powers from the French Community Council to the Walloon Regional Council and Government and the Brussels-Capital Regional Council and its Executive Committee. A similar provision does not exist for the Dutch-speaking part of the country.

the minority in others. In practice, coalitions and conflict lines have frequently transgressed linguistic borderlines.¹¹⁴

It must not be overlooked, however, that these constructions of bi- or multi-lingual Cantons may require complex provisions in order to preserve the "linguistic peace" between different groups. In particular, not only those groups constituting the minority in a Canton must be adequately protected but also those groups constituting the majority in certain Cantons but the minority on the federal level must be protected against losing their linguistic majority position.

A balance has been struck in this respect by the new Swiss Constitution which grants the individual right to free use of languages (Art. 18), on the one hand, and obliges the Cantons to respect the language groups *traditionally prevailing* (Art. 70 para. 2), on the other hand.¹¹⁵ Similarly, the Swiss Federal Court had ruled already long before that the free use of languages may be limited on the grounds of the Cantons' obligation to protect the homogeneity of their *traditional* linguistic composition,¹¹⁶ for instance, by the prescription of the majority language for use in the courts.¹¹⁷

According to the classical model of federalism, competencies are equal for all States of a federation. It may be asked, however, whether this is necessarily so. If the situation so requires, in particular, if there are certain regions delimited on historical grounds which are traditionally inhabited by a certain minority an "asymmetric federalism"¹¹⁸ may provide viable solutions. Thereby some States may be accorded more powers and independence from the central State than other members of a federation.

E. Concluding Observations

As the analysis of provisions for the participation of minorities in different European States has shown a great variety of measures has been adopted to that end. Obviously, a common European standard cannot be identified with a view to specific measures adopted in the different areas. However, the majority of States provides for special measures designed with the specific purpose to facilitate the reflection of minority interests in the political process.

¹¹⁴ Oeter, *supra* note 3, 520.

¹¹⁵ Cf. M. Kayser / D. Richter, *Die neue schweizerische Bundesverfassung*, ZaöRV 59 (1999), 985-1063 (1005 f.).

¹¹⁶ Schweizerisches Bundesgericht, BGE 106 Ia 299 (302 f.).

¹¹⁷ *Ibid.*, 305. The Court ruled that in view of a proportion of 23 % of German-speaking population in relation to the overall population in an administrative unit and the fact that German-speakers do not constitute the majority in any of the communities the limitation of official languages to be used in court to the French language was still in line with constitutional requirements. It admitted, however, that this was a borderline case which did not prejudice the question whether such proportions could justify limitation of the use of languages to French in schools, cf. *ibid.*, 305 f.

¹¹⁸ The Spanish system of "Comunidades Autónomas" has been labelled as an "asymmetric federalism" by J.J. González Encinar, *Ein asymmetrischer Bundesstaat*, in: D. Nohlen / J.J. González Encinar (ed.), *Der Staat der Autonomen Gemeinschaften in Spanien*, Opladen 1992, 217 ff.

In view of the fact that this approach is adopted by most European States and requested by a number of international documents on minority protection, it may be regarded as a common standard to adopt some kind of measures for the promotion of minority participation.

There are few examples of States who have opted for a different approach by not allowing for the creation of minority organisations and parties. The idea behind this approach seems to be that conflicts may be best prevented and integration be fostered if there is no forum for the creation of a political will specific to an ethnic or other minority group. While such a state of affairs idealistically may be the result of a system integrating all groups of society it remains open to doubt under a political viewpoint whether a prohibition of organisations and parties provides an appropriate measure to reach that end. It is clear, however, that under international law such prohibitions are only admissible under very strict conditions.

Given the broad variety of measures applied in order to facilitate the political participation of minorities it may be asked whether any general observations can be made regarding factors determining the choice.

As has been seen, international law provides only little guidance in this field although it clearly encourages measures for privileging minorities in the political process. It rather constitutes a general framework of human rights protection which in certain cases may provide for important limitations on States' discretion to handle minority problems, in particular regarding possible interference with fundamental rights.

Apart from the protection of individual rights, national constitutional law can also play a certain role. It may even impose limitations on the possible scope of measures promoting minority participation. For instance, the principle of the equality of votes renders the justification of differentiation between the conditions imposed on 'ordinary' parties in comparison to those applied to minority parties more difficult. On the other hand, the adoption of constitutional principles such as the acknowledgement of minorities and their right to preservation of their identity may broadly impinge on the general openness for affirmative action in favour of minorities. In contrast, if the constitution insists on the idea of one single people in a given country it will be difficult to find any justification for differentiation in favour of minority groups.

Decisive factors for a certain choice of measures are the size of the minority group and the geographical distribution of its members. Regarding election procedures, these factors play a role with a view to the extent to which preferential provisions should be adopted. Here again, national constitutional law comes into play. In particular, the voting system generally opted for in a State – proportional representation or a majority voting – leads to different requirements when adopting measures to facilitate minority representation.

Size and distribution of a minority also play a key role for the choice between different forms of autonomy. Whereas territorial autonomy requires a high concentration of minority members in a substantial part of the country personal and

functional autonomy still require a minimum concentration in some areas for practical reasons.

However, apart from these factors, the choice between different measures promoting minority representation in the political life of a country is mainly a question of political discretion. In particular measures adopted for the representation of minority interests on the level of the government, e.g. ministries specialising in minority issues, as well as rather informal measures such as round tables, do not seem to display any characteristics regarding factors determining a certain choice. Regarding more formalised representation through elections and devolving of powers to minority entities the approaches range from ignorance to granting far-reaching autonomy obviously depending on the political will of the majority in a given country rather than of necessities inherent in the specific situation of a minority. However, with a view to the prevention or solution of conflicts pertaining to the situation of minorities it is clear that a fair participation of minorities in the political process is a key issue and should be accorded great attention.