

# Filling the Frame

5th anniversary of the entry into force of the  
Framework Convention for the Protection of National Minorities

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## Workshop 1

### **Creating the Conditions necessary for the Effective Participation of Persons belonging to National Minorities**

*A critical evaluation of the first results of the monitoring of the Framework Convention for the Protection of National Minorities 1998-2003*

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The views expressed are those of the author only.

## Introduction

This report assesses the results of the monitoring of the Framework Convention for the Protection of National Minorities (hereinafter “FCNM”) in relation to the issue of effective participation of persons belonging to national minorities. The presentation is principally focused on Article 15 of the FCNM. The use of this provision, and the level of achievement in relation to it, will be illuminated on the basis of the State reports furnished according to Article 25 of the FCNM, the Opinions and Recommendations of the Advisory Committee (hereinafter “ACFC”)<sup>1</sup> and the views of the Committee of Ministers. References to individual examples in footnotes should be seen as illustrations, rather than as a complete listing of all applicable cases. On occasion, reference is also made to parallel reports, other instruments and scholarly views. Before turning to an analysis of practice in relation to the individual aspects of effective participation, it may be prudent briefly to locate this principle within the overall field of human and minority rights.

### 1. Effective Participation as a Foundational Right

Full and effective participation in cultural, social and economic life and in public affairs is at times considered to be a ‘third generation’ minority entitlement. Chronologically speaking, this is undoubtedly true.<sup>2</sup> Initial legal protection of national minorities was principally focused on the protection from destruction and discrimination on account of ethnic, linguistic or religious distinctiveness. During the second stage of development, it was recognized that national minorities must also be given the space to maintain and develop their linguistic, ethnic and religious identity within a diverse society. To this end, a variety of provisions were proposed and eventually included in the relevant international instruments. Effective participation, on the other hand, has only recently become the focus of debate on minority rights. Article 15 of the FCNM remains the principal ‘hard’ legal standard in this respect, expanded upon in the ‘soft’ Lund Recommendations on the Effective Participation of National Minorities in Public Life and the Flensburg Recommendations Towards Effective Participation of Minorities.<sup>3</sup> These were generated under the auspices of the OSCE and the European Centre for Minority Issues respectively.

The label of ‘third generation right’ in relation to effective participation might be taken to imply a certain gradation of legal quality. So-called first generation provisions are firmly part of the corpus of classical human rights law. Indeed, the provisions addressing discrimination on linguistic, racial, ethnic or religious grounds are probably among the best entrenched human rights, and those concerning the destruction of nominated groups are undoubtedly also part of international *jus cogens*.<sup>4</sup> This relates to their universality of

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<sup>1</sup> The references to the AC Opinions given below relate to the sections on Article 15 in the respective Opinion that is cited. Individual paragraph numbers have generally only been provided in cases of direct quotations. Page numbers or paragraph numbers in State reports have only been added where available, given the electronic format of most documents that were consulted.

<sup>2</sup> On the development of the field overall, see the standard works by Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991) and Pentassuglia, *Minorities in International Law*, (Council of Europe Publishing, 2002), *passim*.

<sup>3</sup> One might also consider the lesser known Central European Initiative *Instrument for the Protection of Minority Rights*, adopted on 19 November 1994.

<sup>4</sup> International Convention for the Elimination of All Forms of Racial Discrimination, Article 5, International Covenant on Civil and Political Rights, Articles 2 and 25, Convention on the Prevention and Punishment of the Crime of Genocide.

application, to the hard legal character of the obligations, their substantive clarity and concreteness and their resilience to claw-back clauses and derogations.

The second tier of obligations, namely to protect and foster minority identity, was more hesitantly established. In positive terms, it had to be read into Article 27 ICCPR by the Human Rights Committee.<sup>5</sup> The right to minority identity was only fleshed out at the universal level in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities - albeit in soft law. At the regional level, of course, the FCNM remains unique in establishing the obligation to foster minority identity expressly over a number of more substantive legally binding provisions.<sup>6</sup> Nevertheless, even within the context of the FCNM, it is mainly through the ACFC process that the at times fairly programmatic provisions touching upon minority identity are gradually being endowed with more specific meaning.

Where effective participation of persons belonging to national minorities is concerned, the FCNM is the first major international instrument that introduces this right into hard law. Of course, political participation in general terms has been addressed in the ICCPR and other standards on political rights for some time.<sup>7</sup> However, political participation specifically of persons belonging to minorities was generally considered too sensitive to be addressed in legally binding form. Moreover, the right to effective participation goes beyond political participation, also covering the economic and social dimensions. In that sense, Article 15 is indeed a groundbreaking provision.<sup>8</sup>

Nevertheless, one might best avoid designating effective participation, and with it Article 15 of the FCNM, as a provision that seeks to establish a new, third generation minority right. This would indeed carry with it the connotation of a provision that is only slowly emerging from soft law and that, even where established in a treaty, is too undefined to be able to develop concrete meaning and effect. Rather, effective participation of minorities is a foundational right, closely linked to other types of minority rights provisions. True, this requires a departure from the traditional reliance on the chronology of the development of rights. But here we are, of course, not concerned with a historical account of minority rights discourse. Instead, we are concerned with the substance of rights and obligations concerning minorities. And in terms of substance, effective participation does indeed underpin most aspects of governance. Simply put, at least in the Council of Europe area, it is not possible to conceive of fully democratic governance in the absence of full and effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs. After all, the uncontested understanding of the State as an instrument of democratic governance implies the need to mediate the interests of diverse ethnic, linguistic or religious constituencies, and to facilitate representation all of these interests in public decisions and actions.<sup>9</sup> A failure to achieve this aim undermines the legitimacy of the entire political structure of the State concerned.

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<sup>5</sup> CCPR General Comment 23 (50), adopted at the fiftieth session of the Human Rights Committee, 1994, para. 6.2.

<sup>6</sup> Again, at the sub-regional level might one also not the Central European Initiative *Instrument*, *supra* note 3.

<sup>7</sup> In particular, Article 25 ICCPR, and General Comment 25, adopted at the fifty-seventh session 1996.

<sup>8</sup> It was closely followed by the rather more detailed provisions of the Central European Initiative *Instrument*, *supra* note 3, devoting three substantive articles to the subject (Arts. 20-22).

<sup>9</sup> In this sense the OSCE Copenhagen Document, Second Conference on the Human Dimension of the CSCE, 5 June-29 July 1990, para. 35.

The link between effective participation and other types of minority rights is obvious. If minorities are effectively represented in public life and cultural, social and economic affairs, discriminatory standards and practices may be more readily excluded. If, on the other hand, persons belonging to national minorities are systematically discriminated against, they manifestly cannot participate fully in a given society. Similarly, effective participation ensures that representatives of persons belonging to minorities can participate in public decisions that generate space for the maintenance and development of minority identities. Conversely, persons belonging to national minorities that are enabled fully to develop their identity with other members of the minorities will be better able to contribute to the functioning of a given society, and to seek effective representation within it.

It might be argued that this foundational understanding of effective participation is in itself programmatic and not reflective of present realities. However, this report confirms that effective participation, in concert with non-discrimination and the protection and advancement of minority identity, has established itself as a substantive right, at least among the States Parties to the FCNM. Indeed, all the States that have reported to the ACFC have addressed the issue of effective participation. At times, of course, such information is also given in relation to other relevant provisions. Most prominent amongst these would be the requirement to promote full and effective equality in all areas of economic, social, political and cultural life, contained in Article 4 (2) of the FCNM.

When considering in greater detail the practice of States in relation to full and effective participation, it is convenient to address this issue under three main headings:

1. *State construction*: Members of all segments of a population, whatever their distinctive ethnic, religious or linguistic characteristics, must be able fully and equally to participate in the definition of the economic, social and political system of the State and in the democratic process. The resulting political and legal structure must take due account of the need to ensure protection and representation of members of national minorities. In relation to this level of analysis, non-discrimination ensures that the State is not constructed in a way that would result in the structural disenfranchisement of minority communities. Moreover, the basic legal provisions of the State must provide the space for the development of the identity of members of minorities acting together.
2. *Executive representation*: Members of all segments of the population must, in principle, be able to exercise public functions at all levels that sustain the State and they must occupy such functions in adequate numbers in actual fact. There must be no discrimination in this respect. There is also a particular entitlement to executive representation in areas of special concern to national minorities, such as culture and linguistic affairs, education and the media. The same may apply with particular force to regions where national minority concerns are particularly pressing.
3. *Equal chances*: Members of all segments of the population, including national minorities, must be able to enjoy the full range of the cultural, social and economic benefits that flow from life within the State. There must be no discrimination in terms of life-chances both by public and by private agencies. Indeed, the equal, full and effective enjoyment of all benefits of participation in society may require special measures on behalf of non-dominant groups, including in particular members of national minorities.

When considering each of these three issue areas, it will not be necessary to emphasise local governance and economic and social participation. These two topics will be covered in separate presentations.

## **2. Effective Political Participation and State Construction**

Effective political participation of members of minorities can be facilitated in a number of ways. These relate to the constitutional design of the State, electoral representation and the establishment of institutions and practices to ensure national minority input.<sup>10</sup>

### *2.1. A State for all Citizens: Constitutional Design*

#### **2.1.1. General Equality**

When introducing Article 15, one of the drafting bodies involved, the *ad hoc* Committee for the Protection of National Minorities (CAHMIN) emphasized that the principal aim of this provision is to generate a real sense of equality between persons belonging to national minorities and those forming part of the majority.<sup>11</sup> Virtually all States report on the formal equality of all citizens (and in relation to local government at times non-citizens) in terms of voting in elections, the right to stand for office or to form, or participate in, political parties. One might argue that such equality should be evident in the very designation and design of the constitutional system. For instance, the designation of the State as the State of a particular nation or ethnic group, rather than as the State of all its citizens, in the constitution could give rise to concern.<sup>12</sup> Where particular national or ethnic groups are so nominated, the ACFC has requested particular steps to enhance effective participation also for other groups.<sup>13</sup> More substantively, the layering of public authority in ways to accommodate members of national minorities is at issue. This can be achieved through a transfer of authority to territorial units, or through the functional assignment of special rights of participation.

#### **2.1.2. Territorial Layering of Public Authority**

Initial drafts for what was to become Article 15 referred not only to an especially strong right of effective participation in relation to matters particularly affecting members of national minorities. Such a right would also exist in relation to “decisions affecting the regions where they live”.<sup>14</sup> This formulation would have pointed towards an acknowledgement of a special

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<sup>10</sup> For general surveys, see, Minority Unit of the Directorate of Human Rights of the Council of Europe, *Overview of Forms of Participation on National Minorities in Decision-making Processes in Seventeen Countries* (1998); Frowein and Bank, *The Participation of Minorities in Decision-making* (E/CN.4/Sub.A.C.5/2001/CRP.6); Ghai, *Public Participation of Minorities*, Minority Rights Group International Report (2001).

<sup>11</sup> CAHMIN, *Draft Explanatory Report of the Framework Convention for the Protection of National Minorities*, CAHMIN (94) 32, Appendix V, para. 80, adopted at the 7<sup>th</sup> Meeting, 10-14 October 1994, subsequently adopted by the Committee of Ministers as ETS. 157), H (95) 10, February 1995.

<sup>12</sup> This debate has been prominent in relations to the states that emerged from the former Socialist Federal Republic of Yugoslavia. The Ohrid Agreement of August 2001 expressly avoided such a designation and instead determined that the Former Yugoslav Republic of Macedonia is a state of its citizens.

<sup>13</sup> Opinion on Croatia, ACFC/INF/OP/I (2002)3.

<sup>14</sup> European Commission for Democracy through Law, *Proposal for a European Convention for the Protection of National Minorities*, CDL-MIN (93), 22 February 1993, Article 14. See also the Commentary to this article, *ibid*, para. 44, emphasizing that “[t]he word ‘region’ must be understood in this article and throughout the Convention in its geographical meaning of an entity of national territory rather than its political, judicial or administrative meaning”.

right of consultation or participation in decision-making of persons belonging to national minorities living in territorially compact areas.

Of course, regional layering of authority can range from a confederal system to a federal or a devolved State structure.<sup>15</sup> This may include autonomy arrangements for areas where national minorities constitute a local majority. However, among some governments, this is considered a rather sensitive area. Nevertheless, the CSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension provides:<sup>16</sup>

“The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.”

The OSCE HCNM has expanded on this issue in quite some detail in the Lund Recommendations.<sup>17</sup> Autonomy has also occupied the Working Group on Minorities of the Sub-Commission of the UN Commission on Human Rights for some time.<sup>18</sup> Yet, in the context of the FCNM, the situation is different. The final version of Article 15 as adopted does not fully reflect the emphasis on local self-governance found in other documents. In contrast to the corresponding provision in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the rather cautious reference to decisions specially affecting ‘regions where they live’ was struck from the final version of Article 15 of the FCNM.<sup>19</sup> Nevertheless, when addressing Article 15, the official FCNM Explanatory Report encourages governments to consider, for instance, decentralized or local forms of government as a means of achieving effective participation.<sup>20</sup> This is fully in accordance with Article 4(3) of the European Charter of Local Self Government, which emphasizes that “public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizens.”

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<sup>15</sup> Indeed, one state emphasizes that its strong federalist structure provides for maximum participation of minorities. Switzerland State Report, ACFC/SR(2001)2, para. 237. The Advisory Committee pronounced itself highly satisfied with this arrangement, Opinion on Switzerland, ACFC/INF/OP/I(2003)007. The Advisory Committee has also acknowledged the importance of devolution in relation to effective participation of the persons concerned in Scotland, Wales and Northern Ireland, Opinion on United Kingdom, ACFC/INF/OP/I(2002)6.

<sup>16</sup> OSCE Copenhagen Document, Second Conference on the Human Dimension of the CSCE, 5 June-29 July 1990, para. 25. *See also* the CSCE *Meeting of Experts on National Minorities*, 1-19 July 1991, IV, para. 7.

<sup>17</sup> Lund Recommendations, paras. 19-21, where the word autonomy is mostly avoided and instead reference is made to self-government.

<sup>18</sup> The UN Working Group on Minorities has for some years had the issue of autonomy on its agenda, as has the UN General Assembly, which has addressed autonomy as a means of avoiding self-determination disputes. For instance, in the *Report of the Working Group on Minorities on its Fifth Session*, (E/CN.4/SUB.2/1999/21, 24 June 1999), it is stated at para. 82(g): “Decentralization of powers based on the principle of subsidiarity, whether called self-administration or devolved power, and whether the arrangements are symmetrical or asymmetrical, would increase the chances of minorities to participate in the exercise of authority over matters affecting themselves and the entire societies in which they live.” *See e.g.*, De Varennes, *Towards Effective Participation and Representation of Minorities* (E/CN.4/Sub.2/AC.5/1998/WP4).

<sup>19</sup> Proposals to include a reference to subsidiarity were opposed in CAHMIN as these “would touch upon the constitutional systems of the Parties”. CAHMIN (94), 13, 15 April 1994, 1<sup>st</sup> meeting, 25-28 January 1994, para. 46. A stronger regional dimension was proposed by Hungary, Norway and Portugal. CAHMIN, *Proposals concerning the Preliminary Draft Framework Convention for the Protection of National Minorities*, CAHMIN (94) 12 rev, 10 June 1994, pp. 11-14. On Article 2 of the UN Declaration, *see* the *Commentary* provided by the Chairman of the UN Working Group, Asbjørn Eide (E/CN.4.SUB.2/AC.5/2001/2, 2 April 2001), paras. 38 *et seq.*

<sup>20</sup> *Ibid.*, para. 80.

In subsequent practice before the ACFC, autonomy has been addressed expressly in several types of circumstances.<sup>21</sup> First, there are instances of historically well-established autonomy regimes, at times triggered by previous conflicts and border changes. Paradoxically, the historically-based examples tend to feature more advanced and broad autonomy provisions than those that have been more recently created. These will tend to be established in treaties and/or be formally constitutionally entrenched. There are broad powers of decision-making for autonomous parliamentary assemblies and executive institutions. This is matched by local judicial structures.

While the functioning of the two principal instances of historically based autonomies has been acknowledged by the ACFC, some difficulties have emerged in relation to other cases. For instance, one more recently negotiated autonomy arrangement was noted with approval by the ACFC.<sup>22</sup> However, in the end, that arrangement was not fully implemented and is now under review in the context of an overall constitutional restructuring.<sup>23</sup> One might also note in passing a case that has not yet been addressed in an opinion of the ACFC. This instance highlights the difficulties involved in attempting to restore a former provincial autonomy regime after a period of unilateral abrogation.<sup>24</sup> This experience suggests the need to ensure firm constitutional entrenchment of autonomy where it has been granted, and the need for mechanisms to redress claims of hesitant implementation of newly agreed autonomy settlements.

One instance features a very complex system of regional layering of public authority. Some of these layers have been established specifically with certain national or ethnic populations in mind, essentially providing ethnically-based governance at the local or regional level. It should be noted, however, that often regions of autonomous government that form part of this system may themselves include significant minority populations.<sup>25</sup> These may, in turn, require particular provisions guaranteeing effective participation within the autonomous entity. While the number of express autonomy regimes noted above is not small, the regional layering of authority has been mainly addressed through the related notion of devolved local governance. The link between local governance and territorial autonomy is drawn expressly by one State.<sup>26</sup> In another instance, enhanced local self-governance has been advanced as being 'equal' to regional autonomy.<sup>27</sup>

It is one of the most consistent features of the State reports submitted thus far that they consistently focus on structures of locally devolved governance as a means of satisfying the requirements of Article 15.<sup>28</sup> Mostly States note the number of local councils and other bodies

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<sup>21</sup> Finland State Report, ACFC/SR(99)3, p. 2; Italy State Report, ACFC/SR(99)7; Moldova State Report, ACFC/SR(2000)2; Russian Federation State Report, ACFC/SR(99)15, p. 44 *et seq.*; Slovenia State Report, ACFC/SR(2000)4.

<sup>22</sup> Opinion on Moldova, ACFC/INF/OP/I(2003)002.

<sup>23</sup> A constitutional commission is at present addressing the complex political situation in the territory of Moldova. An interesting feature of the Gagauz autonomy is, however, the provision establishing the head of the regional government as a member of the central government.

<sup>24</sup> Serbia and Montenegro State Report, ACFC/SR(2002)003.

<sup>25</sup> Russian Federation State Report, ACFC/SR(99)15, p. 44 *et seq.*

<sup>26</sup> Slovenia State Report, ACFC/SR(2000)4.

<sup>27</sup> Hungary State Report, ACFC/SR(99)10, p. 126.

<sup>28</sup> One might distinguish devolved from decentralized governance. In cases of devolved governance, actual competence is transferred to the regional or local level. In the case of decentralized governance, decisions may be taken by officials that are based locally, but that operate within the overall national framework and in the exercise of nationally established competences.

that are filled by representatives of persons belonging to national minorities. Areas of difficulty appear to relate principally to the adequate resourcing of local minority self-governance. There are also issues of genuine local minority representation that will be considered below.

In the context of local administrative reform, it has been emphasized that governments should design such measures in a manner that contributes also to the effective participation of persons belonging to national minorities.<sup>29</sup> This would imply an obligation not to implement reforms that would have a detrimental effect on effective participation - or even to engage in such reform with the aim of demographic or electoral manipulation.

### 2.1.3. Functional Layering of Public Authority

As was noted above, Article 15 emphasizes the need to generate the conditions necessary for the effective participation of persons belonging to national minorities in particular in relation to issues 'affecting them'. Hence, it is logical to expect an emphasis on mechanisms enhancing participation in areas where cultural, social, economic or political issues are at stake that have a particular relevance to members of national minorities. Mainly, this will be achieved through the institutions and processes of consultation that will be addressed in section C. below. However, at the level of State construction one may perhaps expect a specific design that preserves space for such enhanced involvement in policy-making. One such design would rely on the functional devolution of powers of decision and administrative functions to persons belonging to national minorities. This model is applied in instances where a national minority is endowed with a formal legal status. As opposed to the usual emphasis on individual rights collectively exercised, in these cases the minority itself is recognized as a legal subject, or as a 'public legal person', exercising functions of decision-making and administration.<sup>30</sup>

In this context, some States have pioneered a very interesting mechanism of co-decision between representative institutions of persons belonging to national minorities and national legislative and executive bodies.<sup>31</sup> In another instance, 'self-government' in the fields of the use of language and script, education, information and media, and culture is provided for through the election of 'National Councils'. These Councils are to have a membership of 15 to 35 representatives, depending on the total number of persons belonging to the national minority.<sup>32</sup> The way of choosing the representatives for the Councils is regulated by law, drawing upon members of parliament or regional assemblies representing persons belonging to a national minority, local councillors, persons nominated by prominent minority organizations, etc.<sup>33</sup> There are also somewhat less institutionally developed mechanisms also relating principally to cultural affairs, although economic, social and language issues may also be included.<sup>34</sup> Finally, the special case of functional autonomies for indigenous peoples may be noted.<sup>35</sup>

While some of the functions and powers of these bodies come close to consultative mechanisms, it is envisaged, at least in theory, that they also perform executive roles and

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<sup>29</sup> Opinion on Slovak Republic, ACFC/INF/OP/I(2001)1.

<sup>30</sup> Slovenia State Report, ACFC/SR(2000)4, para. 65.

<sup>31</sup> Hungary State Report, ACFC/SR(99)10.

<sup>32</sup> Serbia and Montenegro State Report, ACFC/SR(2002)003.

<sup>33</sup> *Also* Slovenia State Report, ACFC/SR(2000)4, para. 92.

<sup>34</sup> *E.g.* Estonia State Report, ACFC/SR(99)16.

<sup>35</sup> Sweden State Report, ACFC/SR(2001)3, p. 37.



attract appropriate State funding for these purposes. A full assessment of the effectiveness of this type of design by the ACFC is however not yet available.

## 2.2. Electoral Representation

In the Explanatory Report accompanying the FCNM, States are encouraged to promote the ‘effective participation of persons belonging to national minorities in the decision-making process and elected bodies both at national and local levels’.<sup>36</sup> The Parliamentary Assembly of the Council of Europe required in its Recommendation 1201 (1993) of 1 February 1993 that this should include the right of persons belonging to national minorities to set up their own political parties.<sup>37</sup> The European Commission for Democracy Through Law, in its Draft Convention on the Protection of Minorities of 1990 had gone even further, contemplating a provision requiring that ‘minorities must be represented in Parliament in proportion to their size’.<sup>38</sup> This proposal was subsequently dropped, given the difficulties in implementing such a mechanical formula.<sup>39</sup> Nevertheless, adequate representation of minorities both at the parliamentary and at the local level has been repeatedly raised in the implementation dialogue following the first round of State reports.

### 2.2.1. Registration of Parties and Candidates

One issue concerns the registration of parties or candidates that profess to represent members of national minorities. Direct restrictions on ‘minority parties’ remain controversial, even where governments have argued that persons belonging to national minorities are able to seek representation through the other principal parties.<sup>40</sup> The ACFC has opposed language requirements for candidates in parliamentary and local elections.<sup>41</sup> In some instances, States Parties have formally revoked such restrictions.<sup>42</sup> It should be noted, however, that disguised restrictions may exist that may not be specifically targeted at excluding representatives of one or more minority, but that are, in practice, applied in this way. For instance, a requirement for all parties to have a branch in more than half the subjects of a federal State may make the establishment of a minority party representing persons living in a territorially compact area impossible.<sup>43</sup> Hence, it is prudent not only to scrutinize the legislative framework for the registration of parties and candidates, but also practice and outcomes.

Where elections are concerned, the issue of citizenship is of particular concern. It is now wide-spread practice that non-citizens who are long-term residents can participate in local elections - a fact commended by the ACFC.<sup>44</sup> While non-citizens would ordinarily be excluded from national elections, the situation may be more complex where large segments of a population have been excluded from citizenship due to extraordinary developments.

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<sup>36</sup> CAHMIN, *supra* note 11, para. 80.

<sup>37</sup> Article 6.

<sup>38</sup> European Commission for Democracy through Law, *Preliminary Draft Convention on the Protection of Minorities*, DAJ.SC.DEMOCRACY, Conv.Min, 21 May 1990, Draft Article 8 (2).

<sup>39</sup> European Commission for Democracy through Law, *Draft Report of the 4<sup>th</sup> Meeting*, 25-26 May 1990, CD-PV-(90)4, para. 19.

<sup>40</sup> Such criticism has led Albania to abolish one such restriction. On this issue also Bulgaria State Report, ACFC/SR(2003)001, although not as yet subjected to opinion from the Advisory Committee.

<sup>41</sup> Opinion on Estonia, ACFC/INF/OP/I(2002)5; *see also e.g.*, Latvia in CCPR, Communication No. 884/1999, CCPR/C/72/D/884/1999; Russian Federation AC, ACFC/INF/OP/I(2003)005.

<sup>42</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004.

<sup>43</sup> Opinion on Russian Federation, ACFC/INF/OP/I(2003)005.

<sup>44</sup> Opinion on Estonia, ACFC/INF/OP/I(2002)5.

It has also been asserted that minority candidates often obtain places through parties that are not dedicated to the representation of members of national minorities.<sup>45</sup> However, this argument cannot be taken as a ground to justify restrictions on the establishment and functioning of parties, especially those representing persons belonging to national minorities.

### 2.2.2. Proportionate Representation and Quotas

Quotas for the representation of persons belonging to national minorities are a comparatively rare phenomenon, mainly, but not exclusively, in evidence in States that have recently suffered from ethnic tension or conflict. One State, for instance, provides for proportional representation of national minorities with a share of the population exceeding eight per cent in the lower Chamber. Pending a new census, it is specified that there are 8 members representing persons belonging to national minorities, three of whom representing the largest of these. This is matched by representation in the upper house. Smaller national minorities are guaranteed at least one seat in the upper Chamber.<sup>46</sup> However, the ACFC had to note in that instance that these provisions were not, in fact, implemented, the relevant legislation having been suspended. Moreover, not all persons belonging to sizeable minorities were included in the minimum representation of at least one seat.<sup>47</sup> Happily, this situation has now been addressed through a new constitutional law and other provisions, and remains to be addressed anew in the next upcoming monitoring cycle.

In another instance, the constitution provides a saving clause, guaranteeing a right of one representative in parliament of persons belonging to national minorities that have failed to obtain sufficient votes.<sup>48</sup> Another example reserves one seat each for two sizeable national minorities, elected through separate lists, without precluding, of course, the election of persons belonging to or representing national minorities through the ordinary electoral process.<sup>49</sup> In one case it was noted that the establishment of special electoral districts with the aim to ensure that minority candidates will achieve a mandate could raise concerns relating to the rights of persons not belonging to that minority; moreover, there might also be an issue of inequality in relation to groups that are not treated to the same benefit in similar circumstances elsewhere.<sup>50</sup>

Where the absence of special provisions to ensure effective participation of persons belonging to minorities in parliament has been noted, the ACFC has encouraged the government to devise and implement measures to create conditions conducive to the views of such persons being heard more clearly during the decision-making process, especially when decisions are likely to affect them directly.<sup>51</sup> This appears to be a rather cautious suggestion, possibly offering to trade direct representation of what are in fact sizeable minority populations for consultation.

In another instance, the ACFC has noted that the question of establishing electoral arrangements for parliamentary representation is a domain where, from the point of view of international standards, States enjoy a broad margin of appreciation. “Clearly, the Advisory

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<sup>45</sup> Comments of the Government of Albania, GVT/COM/INF/OP/I (2003)004.

<sup>46</sup> Croatia State Report, ACFC/SR(99)5, p. 154.

<sup>47</sup> Opinion on Croatia, ACFC/INF/OP/I(2002)3.

<sup>48</sup> Romania State Report, ACFC/SR(99)11, p. 53.

<sup>49</sup> Slovenia State Report, ACFC/SR(2000)4, para. 97.

<sup>50</sup> Opinion on Russian Federation, ACFC/INF/OP/I(2003)005, para. 105.

<sup>51</sup> Opinion on Czech Republic, ACFC/INF/OP/I(2002)2.

Committee cannot and would not wish to trespass thereon”.<sup>52</sup> In that instance, the Committee nonetheless considered itself entitled fairly to criticise the relevant government for having failed to achieve appropriate representation of persons belonging to national minorities in parliament in view of that government’s own standards in this field. In another case already noted above, the ACFC took a rather robust view when provisions that provide for minimum representation of persons belonging to national minorities were left unimplemented.<sup>53</sup> The withdrawal of such provisions, once granted, even through ordinary legal processes, has also given rise to concern. Hence, in relation to an autonomous republic, the ACFC regretted the reduced representation of Crimean Tatars in the regional legislature caused by the removal of reserved seats.<sup>54</sup>

In a number of instances, however, the ACFC has been more forthright, measuring governments not only according to whether or not they have complied with their own targets and provisions, but according to the level of representation that has been achieved in relation to the population balance.<sup>55</sup> In these cases, the ACFC has expressly called for authorities to devise and implement measures to create conditions for increased participation by persons belong to national minorities in the decision-making process and in elected bodies, at both a national and a local level.<sup>56</sup>

### 2.2.3. ‘Small’ and Dispersed Minorities

The representation of members of ‘smaller’ national minorities poses particular difficulties. The same applies to territorially dispersed members of national minorities, especially Roma.<sup>57</sup> While larger groups may manage to obtain parliamentary representation through ordinary processes, others may be structurally unable to achieve this, given the demographic situation. State reports will generally focus only on the larger groups in claiming adequate representation.<sup>58</sup> Nevertheless, the ACFC has insisted on adequate provision also for persons belonging to non-territorial minorities, for instance travellers.<sup>59</sup>

The ACFC has emphasized that it would be permissible to give special consideration to ways of achieving representation in spite of demographic obstacles.<sup>60</sup> Such mechanisms may include the removal of a national threshold of minimum votes for parliamentary representation in relation to representatives of persons belonging to smaller national minorities.<sup>61</sup> The ACFC has noted that the maintenance of a five per cent threshold in one

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<sup>52</sup> Opinion on Hungary, ACFC/INF/OP/I(2001)4, para. 49.

<sup>53</sup> Opinion on Croatia, ACFC/INF/OP/I(2002)3.

<sup>54</sup> Opinion on Ukraine, ACFC/INF/OPI(2002)010, relating to Autonomous Republic of Crimea.

<sup>55</sup> Opinion on United Kingdom, ACFC/INF/OP/I(2002)6, para. 126: “... finds that the representation of ethnic minorities in legislative bodies is low and considers that the United Kingdom should examine the legal, procedural and institutional barriers that may hinder ethnic minority representation in these legislative bodies.”

<sup>56</sup> Opinion on Czech Republic, ACFC/INF/OP/I(2002)2.

<sup>57</sup> E.g., Opinion on Germany, ACFC/INF/OP/I(2002)008.

<sup>58</sup> E.g., Bulgarian Helsinki Committee, *Report* of September 1999, p. 63; *but note* the example of Croatia, *supra* notes 46 and 47.

<sup>59</sup> Opinion on Switzerland, ACFC/INF/OP/I(2003)007.

<sup>60</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004.

<sup>61</sup> Germany and the German Land of Schleswig-Holstein, Opinion on Germany, ACFC/INF/OP/I(2002)008; Serbia and Montenegro notes that its own failure to remove a five per cent threshold in such instance is “not affirmative towards national minorities - if they do not form a coalition, parties rallying persons belonging to national minorities cannot easily win seats in parliament”. Serbia and Montenegro State Report, ACFC/SR(2002)003. *See also* Slovak Republic State Report, ACFC/SR(99)8, para. 38.

instance reportedly reduced the chances of members of national minorities to be represented in parliament.<sup>62</sup>

In another instance, the requirement for registration of candidates by the collection of signatures was waived for candidates representing persons belonging to national minorities.<sup>63</sup> Such steps are more urgent where there is no minority representation in parliament at all, despite the possible absence of any factors that actively preclude such representation.<sup>64</sup> To this proposal, some governments have answered that such action might infringe the rights of the majority.<sup>65</sup> However, as was noted above, the ACFC has nevertheless increasingly required that targets for actual representation should be met, irrespective of obstacles of this kind.

Where parliamentary representation is indeed impossible because of small numbers of persons belonging to a national minority, governments are encouraged to seek other means to take account of minority interests.<sup>66</sup> Presumably this refers to consultative mechanisms, which will be addressed below.

#### 2.2.4. Regional and Local Representation

There are also examples of enhanced chances of representation of persons belonging to national minorities at the regional or local level. For instance, the statute for one autonomous province requires that the composition of the regional parliament must be consistent with the size of the linguistic groups present in the territory.<sup>67</sup> Another example provides for minimum representation of members of national minorities in local councils in ethnically mixed local areas. This is coupled with safeguards against the simple mechanical outvoting of representative of persons belonging to national minorities.<sup>68</sup> A notable problem has arisen where candidates stand for election for a slot reserved for candidates representing persons belonging to national minorities without actually representing these.<sup>69</sup>

With respect to local government, most governments report on minority representation in areas where persons belonging to a national minority live in larger numbers, claiming that there is adequate representation at regional or district level and at the level of village or town councils and mayors. In some instances, there are formal commitments to the proportionate representation of population segments, or minimum quotas, at the local level.<sup>70</sup> However, certain groups, in particular Roma, remain excluded in a number of instances.<sup>71</sup>

#### 2.2.5. Electoral Districts, Rules and Practices

In some instances, electoral districts could have been designed to offer a more realistic change for representatives of persons belonging to national minorities. In others, it was noted that

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<sup>62</sup> Opinion on Lithuania, ACFC/INF/OP/I(2003)008.

<sup>63</sup> Denmark State Report, ACFC/SR(99)9, p. 46.

<sup>64</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001; Austria State Report, ACFC/SR(2000)3, pp. 120-123.

<sup>65</sup> Comments of the Government of Armenia, GVT/COM/INF/OP/I(2003)001; Denmark State Report, ACFC/SR(99)9, p. 45.

<sup>66</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001.

<sup>67</sup> Italy State Report, ACFC/SR(99)7, concerning not only the German and Italian language groups, but also the Ladin speakers.

<sup>68</sup> Slovenia State Report, ACFC/SR(2000)4, para. 95.

<sup>69</sup> Opinion on Hungary, ACFC/INF/OP/I(2001)4.

<sup>70</sup> Croatia State Report, ACFC/SR(99)5, p. 155.

<sup>71</sup> Opinion on Germany, ACFC/INF.OP/I(2002)008.

certain rules on registration (say, minimum numbers of signatures for a party or candidate to enter the elections) do not assist in encouraging effective participation. Moreover, specific provisions and guarantees to ensure that the drawing up of electoral districts should be adopted to take account of the need to represent persons belonging to national minorities have been requested by the ACFC.<sup>72</sup> To help avoid conflicts over such issues, it is good practice to include minority representation in electoral commissions and other bodies concerned with the preparation and conduct of elections.<sup>73</sup>

#### 2.2.6. Parliamentary Working Practices

Where minority representatives constitute significant parliamentary groups, it is good practice to assign to all of these significant parliamentary positions, including the right to representation in parliamentary committees, the right to chair these, and even the right to occupy the post of Vice President of the Parliament.<sup>74</sup> For smaller groups, or individual parliamentary representatives of persons belonging to national minorities, the waiver of certain restrictions relating to parliamentary working practices (in particular committee representation) is encouraged.

### 2.3. *Institutions and Mechanisms for Effective Participation*

The Explanatory Report proposes a number of ways of ensuring effective participation outside of parliamentary representation. The establishment of representative institutions of persons belonging to national minorities that can be consulted when “contemplating legislation or administrative measures likely to affect them [members of national minorities] directly” has been encouraged.<sup>75</sup> There are two elements that need to be fulfilled here: first, persons belonging to national minorities must be able to set up their own organizations to articulate and defend their interests. Secondly, such bodies must be given a means of influencing relevant decisions. The FCNM Explanatory Report notes that persons belonging to national minorities may be directly involved in the “preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly”, and in the preparation of studies on the impact of projected development activities.<sup>76</sup>

#### 2.3.1. Ministries or National Offices or Officers for Minorities

Virtually all States Parties have set up special offices to address minority issues. Where this has not yet occurred, the ACFC has pointed out that such a body can be most useful to develop a ‘coherent policy’ in this field.<sup>77</sup> At times, special ministries have been proposed or established towards this end. In one instance, the ACFC and Committee of Ministers criticised the termination of such a Ministry after only a very short period and invited the State concerned to consider re-establishing that post.<sup>78</sup> Where a ministerial appointment is not available, other options to ensure high level interest in minority issues have been

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<sup>72</sup> Opinion on Ukraine, ACFC/INF/OPI/I(2002)010.

<sup>73</sup> Azerbaijan has reported such a process, Azerbaijan State Report, ACFC/SR(2002)1.

<sup>74</sup> Bulgaria State Report, ACFC/SR(2003)001.

<sup>75</sup> *Ibid.*, para. 80.

<sup>76</sup> *Ibid.*, para. 80.

<sup>77</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001.

<sup>78</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004.

established.<sup>79</sup> For instance, a Presidential Commissioner may be established to raise minority concerns at the highest levels of policy-making.<sup>80</sup>

Another variant, often established in parallel with national offices for minority issues, is the creation of focal points for minority issues within the principal ministries that are of relevance (for instance, education, central ministries of local government and administrative affairs). Ministries may also use Advisory Boards to help inform them of the concerns of persons belonging to national minorities.<sup>81</sup> In this way, minority concerns can be 'mainstreamed' in the most relevant areas of public policy. This kind of provision is combined in some examples with a national office for minority affairs that can ensure coordination of policy across ministries. An interesting development also relates to the appointment of officials with special responsibility for minority affairs in local authorities.<sup>82</sup>

### 2.3.2. Consultative Bodies

In some instances, persons belonging to national minorities may be represented directly in the principal decision-making bodies, for instance through a second chamber of parliament, or through other mechanisms that may be endowed with delaying or blocking powers on the part of national or religious 'communities'.<sup>83</sup> However, more often there is provision for softer forms of participation through consultation. Generally, this is facilitated through National Minority Advisory or Consultative Councils.<sup>84</sup> These can function at a national but also at a regional level and will facilitate consultation between the legislature or government in relation to a variety of issues.<sup>85</sup> These may include:<sup>86</sup>

- Participation in the preparation of governmental strategies and measures addressing issues of concern to persons belonging to national minorities;
- Commenting on draft legislative measures, decrees, etc.;
- Monitoring the situation of persons belonging to national minorities and issuing of reports;
- Providing a forum for coordination among different minorities;
- Providing a forum for exchange with governmental and parliamentary officers;
- Issuing of policy guidance for public authorities;
- Coordination of minority policy across public agencies;
- Coordination of minority policy across regions and units of local governance;

<sup>79</sup> The establishment of a 'Special Department of Interethnic Relations' in Moldova may be noted in this context. Opinion on Moldova, ACFC/INF/OP/I(2003)002.

<sup>80</sup> Noted with approval by the AC in Opinion on Cyprus, ACFC/INF/OP/I(2002)4 - however, this institution has since been suppressed by the authorities.

<sup>81</sup> Finland State Report, ACFC/SR(99)3, p. 28, in relation to Sami and Roma, with the AC requesting a similar mechanism for Russian-speakers, Opinion on Finland, ACFC/INF/OP/I(2001)2.

<sup>82</sup> Opinion on Moldova, ACFC/INF/OP/I(2003)002.

<sup>83</sup> Mostly, such designs can be found in states that have been subjected to ethnic conflict or tension, for instance Bosnia and Herzegovina after the Dayton accords. In Cyprus such blocking powers exist in principle for the Turkish community, but are not applied, in view of their small number outside of Northern Cyprus, according to the Comment of the Government on the AC Opinion, GVT/COM/INF/OP/I(2002)004, para. 7. With reference to the autonomous Province of Bolzano, Italy State Report, ACFC/SR(99)7.

<sup>84</sup> An interesting example falling between representation and consultation is furnished by Cyprus, providing for co-representation of representatives of religious groups in the House of Representatives, but without legislative powers.

<sup>85</sup> On the regional example, e.g., Russian Federation State Report, ACFC/SR(99)15, p. 44; Slovenia State Report, ACFC/SR(2000)4.

<sup>86</sup> E.g., Austria State Report, ACFC/SR(2000)3, pp. 120-123, Czech Republic State Report, ACFC/SR(99)6, para. 40.

- Support for the external representation of persons belonging to national minorities on the part of the government, including engagement with international monitoring bodies.

In addition to such consultative functions, these bodies may also fulfil executive functions in their own right. For instance, it is good practice that such bodies take a prominent role in the distribution of resources directed towards cultural activities of organizations serving persons belonging to national minorities.

While the range of activities enunciated here is broad, practice under the FCNM shows that the competence and working practices of such bodies, especially as it relates to legislative scrutiny, need to be clearly established to ensure effectiveness.<sup>87</sup> In principle, this should take the form of legislative entrenchment.<sup>88</sup> On occasion, the ACFC has questioned whether a purely advisory function of consultative bodies is sufficient.<sup>89</sup> The status of such councils (a State organ, an NGO, a mixture of the two) also needs clarification in some instances.<sup>90</sup>

At times, the question of which minorities are represented in the consultative body may be at issue - the ACFC taking an expansive view, emphasizing the need to include also 'small' minorities and perhaps also moving beyond so-called traditional or autochthonous minorities. When establishing consultative bodies, it is important to take account of organizations that may already exist to articulate the interests of persons belonging to national minorities. In one instance, the ACFC noted the problems of a lack of coordination or even competition that may otherwise ensue.<sup>91</sup>

The personal membership of such councils is also a matter of interest. One may expect nomination of members from established parties and organizations representing persons belonging to national minorities, from church organizations and similar bodies. A balance in political/ideological orientation among groups representing the same national minority population is desirable. Due account must also be taken to ensure that the organizations chosen are indeed genuinely and widely representative. Where the government appoints representatives, it appears prudent to provide a means of redress for these organizations. This may even involve access to courts.<sup>92</sup> An over-emphasis on just one of several representative organizations has been criticised.<sup>93</sup>

In some instances, consultative bodies may include a sizeable representation of governmental officers or junior ministers - indeed, at times these may be chaired by senior officials who will not normally be representatives of persons belonging to national minorities.<sup>94</sup> This practice has generally not been directly questioned in the published opinions of the ACFC. Still, one may infer from a set of opinions that the ACFC is not satisfied with the fact that some consultative bodies are made up of a majority (or even

<sup>87</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001.

<sup>88</sup> Estonia State Report, ACFC/SR(1999)16.

<sup>89</sup> Cyprus State Report, ACFC/SR(1999)002 rev.

<sup>90</sup> Croatia, for instance, reports that its Council is established as an NGO. Croatia State Report, ACFC/SR(1999)005, p. 162. However, important changes in legislation and practice since that time should be noted.

<sup>91</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001.

<sup>92</sup> An instructive example on all of these points is furnished by Austria State Report, ACFC/SR(2000)3, pp. 120-123, and the Opinion on Austria, ACFC/INF/OP/I(2002)009.

<sup>93</sup> Opinion on Romania, ACFC/INF/OP/I(2002)1.

<sup>94</sup> Czech Republic State Report, ACFC/SR(1999)006, p. 41 *et seq.*

exclusively) of public officials.<sup>95</sup> One may also ask whether it could be better practice to enhance control over the proceedings on the part of representatives of persons belonging to national minorities. Moreover, the ACFC has commended one State for changing the majority in its Council of National Minorities and Ethnic Groups to ensure a majority of representatives of persons belonging to national minorities.<sup>96</sup> In one instance, the ACFC noted that the governing body of an institution intended to support the interest of persons belonging to a particular national minority, was composed of only 6 members representing persons belonging to national minorities out of 15.<sup>97</sup> However, this institution was a grant-giving foundation, rather than a mechanism principally devoted to consultation.<sup>98</sup>

Of course, the mere establishment of consultative bodies is insufficient. The government must ensure that these bodies can effectively function by providing for timely contact with parliamentary committees and government departments, providing early consultation on legislative and other projects and furnishing adequate resources to these bodies. This includes regular consultation and the offering of reasons by government or parliament for failing to respond to the recommendations of consultative bodies.<sup>99</sup> Where the government retains an influence on the working practices of such councils (not a practice to be encouraged) it bears responsibility for the effectiveness of their functioning.<sup>100</sup>

In addition to general consultative bodies, specialist bodies also exist which only address the concerns of persons belonging to one particular national minority, for instance Roma, or other persons belonging to minorities who are in a unique position.<sup>101</sup> Similarly, functional consultative bodies may be established within individual ministries covering issues of particular concern for persons belonging to national minorities.<sup>102</sup> The ACFC has, however, had occasion to remind governments that consultation should not be limited only to narrow functional areas, such as culture.<sup>103</sup>

Finally, consultation can be facilitated in the absence of standing consultative bodies. In one case, the Parliament Act provides generally for a right of representatives of a national minority to be heard by parliament and negotiate in relation to matters of special consequence to them. Similar provisions exist at the level of State and municipal authorities.<sup>104</sup> The ACFC, however, found that the *ad hoc* nature of such arrangements leads to uncertainty and proposed the establishment of guidelines clarifying the obligation to negotiate.<sup>105</sup> In another case, the ACFC suggested that *ad hoc* consultative structures should be transformed into permanent bodies and processes.<sup>106</sup>

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<sup>95</sup> Opinion on Switzerland, ACFC/INF/OP/I(2003)007, para. 77, Opinion on Norway, ACFC/INF/OP/I(2003)003, para. 61, Opinion on Lithuania, ACFC/INF/OP/I(2003)008, para. 79, Opinion on Ukraine, ACFC/INF/OP/I(2002)010, para. 10.

<sup>96</sup> Opinion on Slovak Republic, ACFC/INF/OP/I(2001)1.

<sup>97</sup> Opinion on Germany, ACFC/INF/OP/I(2002)008.

<sup>98</sup> Comments of the Government of Germany, GVT/COM/INF/OP/I(2002)008.

<sup>99</sup> Opinion on Romania, ACFC/INF/OP/I(2002)1.

<sup>100</sup> Opinion on Croatia, ACFC/INF/OP/I(2002)3.

<sup>101</sup> *E.g.*, Czech Republic State Report, ACFC/SR(1999)006, p. 41; Sweden State Report, ACFC/SR(2001)003, p. 36; on non-Roma, for instance the Liaison Committee Concerning the German Minority in Denmark, Denmark State Report, ACFC/SR(1999)009, p. 47.

<sup>102</sup> Czech Republic State Report, ACFC/SR(1999)006, p. 42; on the Estonian Cultural Council of National Minorities, Estonia State Report, ACFC/SR(1999)016.

<sup>103</sup> Opinion on Moldova, ACFC/INF/OP/I(2003)002.

<sup>104</sup> Finland State Report, ACFC/SR(1999)003, p. 27.

<sup>105</sup> Opinion on Finland, ACFC/INF/OP/I(2001)2.

<sup>106</sup> Opinion on Norway, ACFC/INF/OP/I(2003)003.



### 2.3.3. Remedies

In some instances, petition bodies of Parliaments will be available to persons belonging to national minorities, or specialized parliamentary petitioning bodies may be contemplated.<sup>107</sup> Provision may be made for specialized Ombudspersons, who may also in themselves engage in consultative functions. The good practice in this respect pioneered by Hungary is now also being adopted in a number of other instances. Where no specialized Ombudsperson is available specifically for members of national minorities, it can be noted that more general human rights Ombudspersons institutions are developing sections dealing particularly with minority issues.<sup>108</sup> Overall, however, State reports tend to offer few insights into remedies that may be available.

## 3. Effective Participation and Executive Representation

A previous Austrian drafting proposal relating to a proposed Protocol to the ECHR envisaged suggested that members of an ethnic group should have the right to access to public offices. In regions inhabited by ethnic groups, public offices “have to be filled with due consideration to the principle of proportional representation”.<sup>109</sup> The principle of executive representation is not directly addressed in Article 15, but dialogue between governments and the ACFC, and the findings of the Committee of Ministers, confirm that this is indeed an important element of effective participation.

### 3.1. National

At the national level, executive representation relates to ministerial posts at the top level. At times, attempts will be made to reserve certain portfolios for representatives of persons belonging to national minorities. However, minority representatives will normally only achieve a ministerial appointment if they are affiliated with a party that has joined a governing coalition.<sup>110</sup> Exceptions relate to post-conflict settlements in the Western Balkans, which have however not yet been subject to review by the ACFC, and to regional autonomous governments.<sup>111</sup> There are also instances where informal arrangements operate to ensure minority representation at a high level of government, or where care is taken to ensure that the post of Minister for Ethnic or National Questions (where it exists) is filled by a representative of persons belonging to a minority.<sup>112</sup>

While representation at senior governmental level remains rare, provision must be made for equal representation of public servants in public agencies serving central governmental functions. In exceptional instances, States have committed themselves to achieving proportional representation in public service, but the ACFC had to note the disconcerting situation of having failed to meet such targets.<sup>113</sup> In relation to several States

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<sup>107</sup> Czech Republic State Report, ACFC/SR(1999)006, p. 41 *et seq.*, and Comments of the Government of the Czech Republic, GVT/COM/INF/OPI/I(2002)002.

<sup>108</sup> Opinion on Lithuania, ACFC/INF/OP/I(2003)008.

<sup>109</sup> Steering Committee for Human Rights (CDHH), *Draft Protocol to the European Convention on Human Rights Guaranteeing the Protection of Ethnic Groups*, CDHH (1991), 46, 20 December 1991, Draft Article 6.

<sup>110</sup> Slovak Republic Report, ACFC/SR(1999)008, p. 37.

<sup>111</sup> Italy State Report, ACFC/SR(1999)007.

<sup>112</sup> Serbia and Montenegro State Report, ACFC/SR(2002)03.

<sup>113</sup> Croatia State Report, ACFC/SR(1999)005, p. 157 - a pledge not yet fulfilled, especially in relation to ethnic Serbs.

Parties, the ACFC has noted that no adequate provision has been made in this respect.<sup>114</sup> While it has been answered that there exists a level playing field and candidates for such posts are not excluded due to their belonging to a given minority, it has been clarified that governments should take positive action to remedy such a situation.

Most governments do report on number of minority appointees in certain sectors of government. However, very rarely is there a comprehensive listing that could be placed in relation to the demographic composition of the State in question.

The ACFC has pronounced itself quite clearly in relation to instances where it found that members of minorities had suffered from systematic exclusion from public service. In such instances, it not only required the adoption of positive measures to remedy the situation, but also an individual remedy for victims of this practice.<sup>115</sup> Where, on the other hand, formal provision exists for proportionate representation of members of minorities in public service, it has been noted that such provision might only apply for some groups while others remain disadvantaged.<sup>116</sup>

### *3.2. Regional or Local*

While it may be difficult to achieve roughly proportionate representation of persons belonging to national minorities at national level, this tends to be an even more important aim at the regional and local level. Generally, a review of State reports indicates that virtually all States profess to make efforts in this respect, although the results have not always been impressive as yet. At times, it is argued that the process of appointment is an objective one, where minority applicants are neither advantaged nor disadvantaged. The need for positive measures in such circumstances has been consistently emphasized, however.

In this context one may note that several governments report on numbers of mayors or councillors belonging to national minorities. However, it is not easy to set these examples in relation to the overall picture throughout these States, including demographic factors in regions where minorities may be concentrated. It is also an interesting phenomenon that devolution of public authority to territorial units can, in certain instances, have an adverse effect on representation of persons belonging to national minorities.<sup>117</sup>

### *3.3. Functional*

Generally, there has been little comment on the failure to achieve adequate representation of persons belonging to national minorities in particular sectors of public administration. Rather, criticism tends to concern the exclusion of specific groups of persons belonging to national minorities. However, on occasion the absence of such representation in the areas of justice, policing and the military has been particularly noted and requests have been made for the enhancement of programmes of affirmative action, even where they exist.<sup>118</sup>

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<sup>114</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004.

<sup>115</sup> Opinion on Croatia, ACFC/INF/OP/I(2002)3.

<sup>116</sup> Italy State Report, ACFC/SR(1999)007.

<sup>117</sup> Opinion on United Kingdom, ACFC/INF/OP/I(2002)6.

<sup>118</sup> Opinion on Romania, ACFC/INF/OP/I(2002)1; Opinion on United Kingdom, ACFC/INF/OP/I(2002)6.

#### 4. Effective Participation in Cultural, Social and Economic Life

The Steering Committee for Human Rights (CDDH) included in its report to the Committee of Ministers of 1993 a specific provision within a draft article on cultural freedoms that emphasized the right of persons belonging to national minorities to 'participate effectively in cultural life'.<sup>119</sup> In the FCNM, this principle is now included in Article 15.

It was already noted above that some States have provided special functional consultation bodies attached to specialist ministries. This applies especially to cultural affairs.<sup>120</sup> In one instance, formal cultural autonomy has been accorded to persons belonging to a specific national minority - although this group would also qualify as an indigenous people.<sup>121</sup> The other special 'cultural autonomies' - in fact ranging beyond purely cultural matters - have already been referred to above.

Several governments report on support given to cultural associations and activities relating to persons belonging to national minorities, often down to the level of individual small project grants. This does not always facilitate an understanding of the impact of such programmes, especially when set against general expenditure in this area. A per capita formula might assist in making such comparisons. While some governments report on the involvement of organizations representing persons belonging to national minorities in funding decisions, actual accountability to the interests of minority stake-holders remains difficult to fathom. In some instances, governments report on special programmes adopted to support the cultural life of members of communities of 'travellers' - a noteworthy initiative aimed at researching and documenting their history, and enhancing their cultural identity and skills.<sup>122</sup>

Social and economic participation has also been addressed on several occasions. It was noted that in some instances members of national minorities enjoy an advantageous position in the economic sector, in part due to economic links with an ethnic kin-State.<sup>123</sup> However, in other instances, governmental agencies have engaged in economic surveys and found that in areas of compact minority population, economic and quality of life indicators are inferior.<sup>124</sup> Such surveying and reporting by government appears to be an enormously important first step in addressing such inequalities, especially if followed by a concrete governmental action plan designed to remedy the situation.<sup>125</sup> More often than not, however, there has been insufficient data available, inhibiting an assessment of the situation by the ACFC.

In relation to a number of States, the ACFC has noted shortcomings in the participation of minorities in economic life,<sup>126</sup> in one instance reaching the point of discrimination.<sup>127</sup> The objection of governments that economic divergences may be due to lagging regional development, rather than national, ethnic, religious or linguistic factors, are not likely to

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<sup>119</sup> CDHH, *Final Activity Report to the CDDH for the Attention of the Committee of Ministers*, CDHH (93) 22, Article 8 (a), 8 September 1993.

<sup>120</sup> Estonia State Report, ACFC/SR(1999)016.

<sup>121</sup> Finland State Report, ACFC/SR(1999)003, p. 27.

<sup>122</sup> Ireland State Report, ACFC/SR (2001)006.

<sup>123</sup> Comments of the Government of Albania, GVT/COM/INF/OP/I(2003)004.

<sup>124</sup> Bulgaria State Report, ACFC/SR(2003)001; interesting also the findings in the Danish report, indicating that no economic differences can be detected in relation to persons belonging to the German national minorities, Denmark State Report, ACFC/SR(1999)009, p. 45.

<sup>125</sup> Bulgaria State Report, ACFC/SR(2003)001.

<sup>126</sup> Opinion on Estonia, ACFC/INF/OP/I(2002)5.

<sup>127</sup> Opinion on Croatia, ACFC/INF/OP/I(2002)3.

persuade in this respect.<sup>128</sup> The ACFC has had to acknowledge that certain factors, such as urban development *vs.* development in rural regions (the latter often inhabited by persons belonging to national minorities) may pose a challenge in generating equal economic opportunities. Nevertheless it has requested that governments should endeavour to develop measures capable of limiting the effects of such structural differences.<sup>129</sup> Hence, the ACFC has endorsed and encouraged active and decisive measures to address economic opportunities for persons belonging to national minorities especially in economically depressed regions.<sup>130</sup> Even where governments may have presented advanced programmes to engage economic and social exclusion, the ACFC has not hesitated to propose an extension of such measures until the intended result has been achieved.<sup>131</sup>

In virtually all reports, the exclusion of Roma from economic opportunities has been noted.<sup>132</sup> Some governments have responded by referring to programmes of action in this respect, although this issue remains one of considerable difficulty and lack of actual significant progress has been a source of great concern to the ACFC.

## **5. Conclusion and Outlook**

A number of commentators have criticised Article 15 as a provision that is too general to offer any legal substance. This review tells a different story. States have generally reported seriously and in most instances extensively on their efforts to encourage effective participation, either in relation to Article 15 alone, or in conjunction with other related provisions, including articles 3, 4, 7 and others. They have done so against the background of quite specific expectations of achievement in discrete areas of public policy. These expectations have been further refined and shaped through the review process of the ACFC. In view of this extensive practice, there can be no doubt that all States Parties regard effective participation of persons belonging to national minorities as an essential (and mandatory) component of a peaceful and democratic society.<sup>133</sup>

One might also note that the Committee of Ministers, too, has directly and expressly engaged the issue of effective participation at all levels. It has recommended equal participation in the electoral process,<sup>134</sup> adequate representation in parliament and other elected bodies,<sup>135</sup> the establishment of effective consultative mechanisms,<sup>136</sup> the general participation of members of certain communities also in cultural, social and economic life,<sup>137</sup>

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<sup>128</sup> Comments of the Government of Estonia, GVT/COM/INF/OP/I(2002)005.

<sup>129</sup> Opinion on Switzerland, ACFC/INF/OP/I(2003)007, para. 103.

<sup>130</sup> Opinion on Ukraine, ACFC/INF/OPI(2002)010.

<sup>131</sup> Opinion on United Kingdom, ACFC/INF/OP/I(2002)6.

<sup>132</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004; Opinion on Croatia, ACFC/INF/OP/I(2002)3; Opinion on Finland, ACFC/INF/OP/I(2001)2.

<sup>133</sup> This is the formulation used in the General Principles of the Lund Recommendations.

<sup>134</sup> Resolution on Cyprus, Resolution ResCMN(2002)3, 21 February 2002.

<sup>135</sup> Resolution on Hungary, Resolution ResCMN(2001)4, 21 November 2001.

<sup>136</sup> Resolution on Russian Federation, Resolution ResCMN(2003)9, 10 July 2003, Resolution on Norway, Resolution ResCMN(2003)6, 8 April 2003, Resolution on Armenia, Resolution ResCMN(2003)2, 15 January 2003.

<sup>137</sup> Resolution on Ukraine, Resolution ResCMN(2003)5, 5 February 2003.

as well as in public affairs,<sup>138</sup> and the enhancement of economic opportunities of persons belonging to national minorities.<sup>139</sup>

Of course, Article 15 is phrased in quite general terms, lacking the breadth and depth of other standards, in particular the far more lengthy Lund Recommendations. However, virtually all of the solutions offered in the Lund document are visible in the State practice that was reported, and have been commented upon by the ACFC, in the context of Article 15 and related provisions of the FCNM.<sup>140</sup> Of course, not all possible approaches or solutions are evident in relation to each individual State. Many States do not even address all the principal issue areas through some form of mechanism (i.e., full equality, democratic and executive representation, equal chances). The challenge therefore remains to encourage States to develop provisions for the effective participation of persons belonging to national minorities in a fully comprehensive way. A review of action across States after five years of the operation of the FCNM can only assist in identifying patterns of best practice relating to each of the principal areas of concern.

Obviously, there does not exist one single specific model of performance that must be applied by all States Parties in all circumstances. This applies with particular force to issues of State construction and political systems design. However, even if States may dine *à la carte* when implementing Article 15, there must emerge a full and satisfying dinner at the end of the day. In other words, there may be a range of options for the achievement of the individual aspects of effective participation, but ultimately Article 15 is indeed a provision of hard law - and it is an obligation of result.

In its early practice, the ACFC has addressed Article 15 issues with some initial caution. Often, it has couched its suggestions in fairly general terms. Very specific requests have at times only been made in cases of evident discrimination, or where a State has failed to comply with its own, already existing provisions for effective participation. Of course, the ACFC will continue to be mindful of the fact that States enjoy a margin of appreciation where effective participation is concerned. But increasingly, it will be able to draw on the wealth of experiences that have now been considered. This experience confirms that there is quite a high level of expectation of performance in this field, covering all major issues of relevance to effective participation.

In relation to general full equality, it is now clear that the overall State structure must not be such as to exclude persons belonging to national minorities from the democratic process. As it is now fashionable to say, 'ownership' of the State must not appear to appertain to a titular or dominant group. In this area, the ACFC has found a clear voice concerning the need of "ensuring that the necessary structural guarantees - electoral or consultative - exist to allow for effective participation of all persons belonging to national minorities in the political process".<sup>141</sup>

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<sup>138</sup> Resolution on Moldova, Resolution ResCMN(2003)4, 15 January 2003; Resolution on Estonia (although somewhat indirectly), Resolution ResCMN(2002)8, 13 June 2002.

<sup>139</sup> Resolution on the United Kingdom, Resolution ResCMN(2002)9, 13 June 2002; Resolution on Croatia, Resolution ResCMN(2002)1, 6 February 2002.

<sup>140</sup> For a review of state practice according to the Lund Recommendations, see the very useful *Commentary on the Lund Recommendations on the Effective Participation of National Minorities in Public Life* by Kristian Myntti (Institute for Human Rights, Åbo Akademi University, Turku, 2001).

<sup>141</sup> Opinion on Albania, ACFC/INF/OP/I(2003)004, para. 72.

In terms of parliamentary representation of persons belonging to national minorities, the ACFC has now gone beyond an insistence that governments only meet the targets they themselves have established.<sup>142</sup> While remaining mindful of the concern of governments to avoid inequality to the detriment of majority populations, the ACFC has in its more recent practice unambiguously noted the need of “facilitating access by [persons belonging to national minorities] to parliament or, more generally bringing them into the various branches of power”.<sup>143</sup> This may require positive measures in terms of electoral systems design or electoral procedures, at least where there are significant numbers of persons belonging to specific national minorities. While there is no formal requirement of strict proportionality of members of parliament to segments of the population, States will now need to demonstrate that there is adequate representation in elected bodies, both local and national. Where this is not possible, there will be even greater pressure upon the State to demonstrate that it is balancing this deficiency through particularly well-developed consultative mechanisms.

Indeed, representation in elected bodies must generally be flanked by formally established consultative mechanisms where the numbers of persons belong to minorities so warrant. Best practice indicates that these should be established in law. Composition of these councils should be genuinely representative, taking account of a wide range of interests among persons belonging to national minorities. Appointments should be made in consultation with representative institutions or based on elections within minority organizations. Ordinarily, one would expect that representatives of persons belonging to national minorities would constitute the majority of the members of these councils and that they are in a position to control or guide its proceedings.

The functions and powers of consultative councils should be made evident in the legislation establishing them. This includes in particular the formal requirement of timely and substantive consultation relating to legislation of special interest to persons belonging to national minorities. The exercise of decision-making functions of such councils, also in relation to the expenditure of funds dedicated to the enhancement of minority culture and social life, is noteworthy. However, it is also clear that the purview of consultative councils should not only be restricted to cultural affairs.

One issue that has not been fully addressed by the ACFC as yet concerns the quality of representation of persons belonging to national minorities. While it is clear that the government is under certain obligations in establishing mechanisms for effective participation, organizations claiming to represent persons belonging to national minorities might also need to demonstrate their genuine representativeness and the transparency of their democratic and financial practices. Consultative councils might be ideal bodies to propose relevant codes of conduct.

In terms of minority self-government, it would be premature or perhaps even wrong to note that there has been a recognition of territorial autonomy as a mandatory requirement for areas mainly inhabited by persons belonging to national minorities. However, there is no doubt that subsidiarity in decision-making and an emphasis on genuinely representative local government are now to be expected. While many governments offer partial statistics of the representation of persons belonging to national minorities at the local level, a more comprehensive review of these figures in relation to local population balances would need to

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<sup>142</sup> E.g., Hungary, Croatia, *supra*. p. 11.

<sup>143</sup> Opinion on Armenia, ACFC/INF/OP/I(2003)001, para. 77.

be encouraged. In this way, the success of measures aiming to enhance effective participation can be better assessed.

Functional autonomies or minority self-government also furnish interesting examples in relation to States featuring sizeable minority populations. These should be carefully evaluated in order to establish whether such designs could also be deployed in other States.

In nearly all instances, the ACFC has had to note deficiencies in executive representation of persons belonging to national minorities. While such a general finding may be of use in relation to the first monitoring cycle, it might be possible in future to encourage governments to establish targets and to present action plans on how they intend to meet these. Such action plans would cover access to education, specific training for applicants from underrepresented groups, recruitment drives, appointment procedures, and advancement and retention programmes, etc.

It is particularly noteworthy that there appear to be instances of exclusion from positions in areas connected with justice and security (police and military). When considering the urgency of the need to redress this deficiency, one might bear in mind that exclusion from precisely these functions tends to enhance a sense of overall disenfranchisement and alienation of minority community within the State.

Disenfranchisement and exclusion is of course not only relevant in relation to elected and appointed public offices. As Article 15 makes clear, full and effective participation has a strong cultural, social and economic dimension. Most States address at least the cultural dimension at some length. However, the reports tend to employ an anecdotal technique of presentation, often providing a listing of individual cultural projects or activities that have attracted State funding. A more structured review of such State programmes would need to be encouraged.

This applies with even greater vigour where economic and social exclusion are concerned. It is by no means the case that all minorities everywhere suffer from economic disadvantage and social relegation. Nevertheless, persons belonging to national minorities tend to be at special risk of slipping into this category. Indeed, there may exist structural factors contributing to the *de facto* exclusion of entire minority populations. This applies especially, although not exclusively, to Roma. A first step in addressing this issue must be reliable and comprehensive statistical reporting. Again, the State reports often present a rather sketchy picture. Even the parallel reports furnished by NGOs tend to miss out on the opportunity to address this very fundamental issue through appropriate documentation.

Perhaps it might assist the ACFC if governments were to be reminded again of the need to put in place their own monitoring mechanisms, and to report openly and regularly on the results. Once more, it might also be useful to share expectations about concrete targets governments intend to meet when addressing economic and social exclusion, to discuss action plans and to review performance. In this context, the establishment or enhancement of national governmental coordinating bodies on minority issues remains important. This can be usefully matched by minority focal points in relevant ministries, and also at the local level. In this way, it can be best ensured that consistent national strategies can be formed in relation to all of the issue areas considered in this report, that implementation of these strategies is ‘mainstreamed’ into overall policy-making and action, and that there is a rigorous monitoring and initial self-assessment process in place. Needless to say, that self-assessment process, just like the preparation of reports for the ACFC, needs to be itself fully inclusive.