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DRAFTING DOMESTIC LEGISLATION PROVISIONING NATIONAL MINORITY RIGHTS: THE DOS AND DON´TS ACCORDING TO THE COUNCIL OF EUROPE

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I. INTRODUCTION

Since the early 1990s, an *acquis* has been developing for the protection of national minority rights both in international and domestic law in Europe. At the international level, the leading institution has been the Council of Europe, under the auspices of which the only two international legal documents on national minorities have been adopted. It goes without saying that the Framework Convention for the Protection of National Minorities (FCNM) is a central part of the *acquis*, which has significantly influenced legal developments in national minority protection in numerous European states. In this respect, the opinions and thematic commentaries issued by its monitoring body, the Advisory Committee (ACFC), have provided useful guidelines for the improvement of national minority protection. The European Charter for Regional or Minority Languages has, despite its primary focus on languages and not speakers, yet contributed to states' sensibilization to minority languages and their usage in different contexts. The work of the European Commission for Democracy through Law (Venice Commission) has particularly assisted the forming of an *acquis* in that the Venice Commission not only compiles relevant aspects from Council of Europe monitoring bodies, but that it also issues its own opinions on draft legislation under development in the member states. As a result of the conditionality imposed by the European Union (EU) on candidate

countries, the Venice Commission has been able to review a number of laws on national minorities over the last two decades. However, one must not neglect work done outside of the Council of Europe. There seems to be consensus that the international norm setting started with the CSCE Copenhagen conference and its Concluding Document in 1990. The activity of the OSCE High Commissioner on National Minorities has undoubtedly incited positive changes, mainly in East European countries. Although less influential, the United Nations have also contributed, rather through soft law, to the acquis on national minority protection. This is mainly through adoption of the Declaration on the rights of persons belonging to national minorities, establishing the Special Rapporteur on Minorities, and the activity of the Human Rights Committee. Finally, the impact of the EU on the improvement of minority protection in accession countries has been, and still is, enormous, bearing in mind that "respect for and protection of minorities" has been included in the political membership criteria. Yet, the leverage of the EU decreases after the state becomes a member and, unfortunately, the quality of minority protection can decline after the state has joined the EU.

The emergence of the international minority rights regime after the end of the Cold War combined with the enlargement of European international and inter-governmental organizations, has urged a number of European countries to establish strong guarantees for the protection and promotion of national minority rights. Domestic legislation on national minority rights has become part of diversity management policies in many European countries. Some countries adopted domestic legislation earlier, mainly as a result of specific historical circumstances and a need to secure domestic social unity. Several countries have provisioned constitutional guarantees for national minority rights and whilst some have adopted organic laws subsequently, others have opted for ordinary legislation. Although in Europe there is no universal approach towards regulation of minority issues, some degree of convergence has nevertheless been achieved, mainly though the leverage role of the FCNM.

This paper deals with the issues considered to be of most relevance when drafting domestic legislation on national minority rights. This covers both technical/procedural issues and substantive issues. Among the technical/procedural issues it is important to: make clear the structure of the legal framework (should one comprehensive law on national minority rights be adopted or not) and the hierarchical relations within the legal framework, to ensure inclusive enacting procedure, and to bear in mind the processes/dynamics after the adoption of the law. Substantive issues refer to some of the central, conceptual questions (such as definitions, the self-identification principle, the character of national minority rights and similar), but also to the very core

of regulations set out in the law. In the case of the latter, the paper focuses on the principle of equality, language rights of national minorities, and minority participation in public affairs.

II. OVERVIEW OF STUDY

The study has covered four types of sources: legislation of the states which have ratified the FCNM, state reports and opinions of the ACFC in the monitoring process for the implementation of the FCNM, four thematic commentaries of the ACFC, and opinions of the Venice Commission related to minority issues.

The survey of legislation of the states participating in the FCNM has shown that in Europe, there is no universal approach towards regulation of minority issues, let alone one universal model of a law (act) on national minority rights. This is understandable bearing in mind that states have different legal frameworks and legal traditions, as well as different social circumstances in which a plural society operates. Nevertheless, this does not mean that there is no convergence between different national regulations on national minority rights. Many issues are similarly regulated in different national legislations and this convergence is mainly the result of the states' efforts (at least at the normative level) to meet the standards set out in the FCNM.

The legislative frameworks of the state parties to the FCNM show that not all states have opted for the adoption of one comprehensive legal act on national minority rights. Such a comprehensive act can be found in Albania,[1] Austria,[2] Bosnia and Herzegovina,[3] Croatia,[4] the Czech Republic,[5] Hungary,[6] Italy,[7] Kosovo,[8] Latvia,[9] Moldova,[10] Montenegro,[11] Poland,[12] Serbia,[13] Sweden,[14] and Ukraine.[15] The nonexistence of such a law in other states does not mean that national minority issues are in the legal vacuum. Some states have laws regulating specific issues of the national minority status and some have opted to incorporate minority relevant norms into "general" (sectoral) regulations. For example, Estonia has the National Minority Cultural Autonomy Act,[16] whereas the Language Act[17] or Place Names Act[18] are also relevant for the exercise of minority rights. Finland has several acts regulating the status of Sami and Swedish Fins[19] as well as having norms relevant for national minorities within general regulations. An interesting case is that of Macedonia, where the law on national minority rights covers only communities amounting up to less than 20% of the population[20] whereas the status of the community with more than 20% (Albanians) is under a different legal regime. Slovenia is also an interesting example, since it opted for constitutional regulation in combination with an uncodified legal framework for the minority protection (three acts are relevant: the Self-Governing National Communities Act,[21] the Act Guaranteeing Special Rights to

Members of the Italian and Hungarian National Communities in the Field of Education,[22] and the Roma Community Act[23]). The case of Germany is indicative to show that a federal structure of a state can influence regulation of national minority rights. There is no federal law on national minority rights in Germany, but in the *Länder* of Brandenburg and Saxony there are comprehensive laws on the status of Sorbs.[24] On the other hand, some states have opted to regulate national minority issues through the prism of language rights, adopting appropriate language laws. For example, the Slovak Republic has the Act on the Use of Languages of National Minorities,[25] the Netherlands has the Law on Frisian Language Use,[26] or the German *Land* Schleswig-Holstein has the Frisian Act[27]. Another interesting case is Lithuania, which had the Act on Ethnic Minorities but the act subsequently became null and void on January 2010.[28] Ever since, Lithuania counts among the states without a comprehensive act on national minorities. To this group belongs also Armenia, Azerbaijan, Bulgaria, Cyprus, Denmark, Georgia, Ireland, Norway, Portugal, Romania, Spain, and the UK. In some of these states, the drafting of a comprehensive act on national minorities is not on the agenda, since the focus lies on the anti-discrimination regulation (this concept is predominant in the West European states listed in this group). Yet, the drafting of the comprehensive act is on the agenda in Armenia,[29] and Romania.[30]

The focus of this study is on the states with a comprehensive law (act) on national minority rights, thus the arrangements in the states with no comprehensive act remain out of the scope of this study. In addition, the fact that there is a comprehensive act on national minority rights does not mean that all issues are exclusively regulated in this one act. On the contrary, norms relevant for the status of national minorities can be also found in sectoral laws or in laws regulating specific issues of the minority status. In case of the former, relevant norms are to be found in acts regulating education, media, administrative and court procedures, local self-governance, etc. In case of the latter, the indicative examples are Austria, which in addition to a comprehensive act also has two acts on minority education (in Carinthia and Burgenland, respectively);[31] Italy, with additional act in favour of the Slovenian Minority of Friuli Venezia Giulia,[32] or Serbia with an additional Law on National Councils of National Minorities.[33] The norms of these laws have only been considered in this study if necessary to interpret the concepts and norms of a comprehensive act.

State reports and the opinions of the ACFC in the monitoring over the implementation of the FCNM were relevant in the first place to the extent they provide information on the legal framework and accurate drafting or amending processes. In this respect, the especially informative were state reports of and/or opinions on Albania, Armenia, Austria, Azerbaijan, Bosna and

Herzegovina, Croatia, Hungary, Italy, Lithuania, Romania, Serbia, and Ukraine.[34] The state reports and the opinions of the ACFC also contain information on a wide range of substantive issues related to national minority rights. These were taken into account only as long as they refer to the core of the standards set out in the FCNM.

The ACFC has issued four thematic commentaries so far, "with the aim of summarising its experience and views on the most important issues it has come across in its monitoring work."[35] These commentaries refer to the issues of education,[36] participation,[37] language rights,[38] and the scope of application of the FCNM.[39] As such, they provided useful guidelines for substantive issues addressed in this study.

An important source for the study were the opinions of the Venice Commission, which are helpful in fine-tuning the knots and bolts of drafting good laws. Since 2006 the Venice Commission has regularly compiled its arguments with regard to national minority laws in thematically structured reports. In this respect, the latest compilation of 2011[40] was of great relevance for this study. In addition to the compilation, the opinions to the draft laws on national minority rights in individual countries were also indicative. With its opinions the Venice Commission has supported drafting laws on national minorities in Bosnia and Herzegovina,[41] Croatia,[42] Hungary,[43] Lithuania,[44] Montenegro,[45] Romania,[46] and Ukraine.[47] Finally, the Venice Commission has produced multiple thematic reports on issues relevant for the status of national minorities: the Report on Dual Voting for Persons belonging to National Minorities,[48] the Report on Non-Citizens and Minority Rights,[49] the Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries,[50] and the Report on the Preferential Treatment of National Minorities by their Kin-State.[51]

III. TECHNICAL/PROCEDURAL ISSUES

The procedure of drafting and adopting domestic legislation on national minority rights depends on constitutional rules, legal traditions, and specific dynamics of social relations and (political) power structures which articulate the majority vote in the parliament. Yet, this wide margin of appreciation, based on the principle of sovereignty of state, is limited by the Europe-wide acknowledged principles of democracy and rule of law. These principles require that the law-making procedure is democratic and based on clear legal rules. An enacting procedure can be considered as democratic if the public has access to draft legislation (at least when it is submitted to parliament) and has a meaningful opportunity to provide input, if proposed legislation is debated publicly by parliament and adequately justified, and if parliament is supreme in deciding on the content of the law.[52] The

legality of the enacting process is ensured if there are clear constitutional rules on the legislative procedures which limit arbitrariness and provide for legal certainty.

In addition to general requirements related to the democratic and legal law-making procedure, there are several issues of a more or less procedural nature which have to be considered when drafting domestic legislation on national minority rights.

3.1 A comprehensive law on national minority rights (pros and cons)

One of the central procedural, or even conceptual, issues refers to the question of whether national minority rights should be regulated with a comprehensive (to some extent, framework) law, or with specific norms integrated into the sectoral laws. As shown in the short overview in the previous chapter, both of these concepts can be found in European states, and one cannot speak of a "European standard". Indeed, arguments for both of these concepts seem plausible. The main argument for regulating national minority rights in sectoral laws is that in such a way these are stronger rooted into the areas of relevance for the status of national minorities (education, media, culture, language use, political participation etc.). Furthermore, this approach may contribute to the better awareness of the administration responsible for implementation of the laws, of the need to take into account the specific norms related to the rights of national minorities. Sometimes it seems that bureaucracy is strictly focused on sectoral laws and hence more prone to national minority rights if these are set out in the sectoral law. Yet, such an approach bears a risk of possible inconsistence, incoherence, and lack of coordination. Sectoral laws are drafted in different ministries which can have different approaches and a different level of sensibilization to national minority rights. Plus, their focus usually lies on the general substantive issues of the sectoral law, whereas accommodating norms for national minorities can remain neglected and not properly considered or formulated. If in a state the general concept of minority protection is missing, this leaves drafters of sectoral laws without basic orientation, which can result in a series of norms relevant for national minorities dispersed all over the legislation. Thus, the main challenge for this approach is to develop a structure of a legal framework out of regulations on national minority rights stipulated in different structural laws. This binding element can be established with the constitution, so that constitutional norms act as a form of a general legal framework for national minority rights (which are then further elaborated in sectoral laws). Although national minority rights certainly belong to the constitutional issues, it is questionable how detailed these can be regulated in a constitution. Since a constitution is to a great extent a value-oriented programmatic act, its norms are, despite being fundamental for the

legal order, often vague and open for interpretation. Although constitutional norms can be directly applicable, it is not in the nature of a constitution to contain detailed regulations. Hence, also with regards national minority rights, a constitution provides for fundamental conceptual orientations, basic rights, and guarantees, but it cannot regulate every day, practical issues. Such a constitutional overregulation would not only burden the constitutional text, but could be also counterproductive, making the legal framework rigid and hard to adapt to new challenges and needs of minority protection.

The answer to the shortcomings of the "sectoral approach" can be found in the adoption of a comprehensive law on national minority rights. Such a law can serve as the binding component in framing domestic regulation on national minority rights. The formula of this concept includes the constitution (which provides for fundament and basic rights), the law on national minority rights (which defines the milestones for the status and protection of national minorities), and the sectoral laws (which provide for further elaboration of rights and guaranties set out in the law on national minority rights in specific fields of sectoral regulation). It is of great importance to find a fine balance and gradation between these three levels of legal regulation. These have to be coherent, not to overlap, and to follow the principle of gradual specification of the regulation (the constitutional norms are mostly at the general macro level, the norms of the coherent law should bring more detail, and, at last, the sectoral norms should provide for concrete regulations in specific sectors).

In this respect, it is very important for the law on national minority rights to find a proper balance between too general and too specific regulation. The law on national minority rights serves almost no purpose if it is formulated in vague and general terms. In that case, it is only a façade, which does not ensure the effective exercise of national minority rights and leaves a great margin of appreciation for sectoral laws to interfere with the national minority rights. Moreover, according to the Venice Commission, the essence of national minority rights should be regulated in the comprehensive law and not affected by the sectoral laws. Hence, the law on national minority rights, although usually labeled as a framework law, needs to have genuine legal substance, i.e. self-executing provisions and clear rules and guidelines for a more detailed regulation in the sectoral laws. Indeed, the problem of vague formulations and generalizations in the law on national minority rights can be observed in several European countries.[53] The main reason for this is the need to answer to the demands (international or national) to adopt a comprehensive law, whereas there is no genuine interest to deal with national minority rights (or at least no genuine interest to adopt such a law). Confronted with the need to adopt a comprehensive law, some states have reached for the wording of the FCNM and, with slight adaptations,

incorporated it into the domestic law.[54] The problem of this technique is that wording of the FCNM is too vague and prerequisites state action for its implementation. If the wording of the FCNM is purely incorporated in the domestic law, such a law cannot ensure the exercise of national minority rights and as such it is useless.

However, the solution for the dilemma of how specific formulations in the law on national minority rights should be, cannot be found in overregulation. An indicative example of overregulation is the Hungarian law on nationalities, a comprehensive act of 245 articles. It is indeed the most detailed law on national minority rights in Europe, of which one could say that it covers all possible issues relevant for the protection of national minorities. However, it still cannot be perceived as a pure success and a role model. The Venice Commission has criticized the length and complexity of the law, stating that it "contains too specific and detailed provisions, of a merely technical and procedural nature, which could have been set out by the ordinary legislation or by [these bodies'] internal regulations."[55] Due to such a detailed regulation, the law significantly narrows the area of freedom and self-governance of national minorities, as it regulates a wide scope of issues which can fall into the sphere of their individual or institutional autonomy. Furthermore, overregulation can easily lead to the rigidity of the law, reducing "the possibility of adapting the law in the light of the experience in its application."[56] At last, detailed regulation is not a guaranty for the clarity of the law. As the Venice Commission has formulated it: "despite their very detailed nature, important provisions of the law lack clarity and their inter-relation is sometimes difficult to understand."[57]

A comprehensive law on national minority rights can serve as a form of a basic codification of legal standards in national minority protection in the domestic legal system. For national minorities, it is a form of a legal guarantee for their protection and a charter to which they can refer when claiming rights. It also serves as a guideline for enacting accommodation norms in sectoral laws. Yet, the law on national minority rights should not be a simple programmatic act, but should regulate the essence of national minority rights, which cannot be derogated with the norms of sectoral laws.

3.2 Structure of the law

The structure of the law depends on the general outline set in every national legal order. However, some convergence with regards to the structure can be observed, since all laws include some or most of the substantive provisions of the FCNM. Hence, the structure of the FCNM can be useful to determine the structure of the law (at least with regards to the substantive part of the law).

The analysis of the structure of the laws observed in this study shows that very

few laws include a preamble (Czech Republic, Hungary, Latvia, and Moldova). The reason for this is that a preamble is more characteristic as an introductory part to a constitution and it is not very common to start a law with a preamble. The preamble can be a longer and more solemn text (as in the case of the Hungarian law) or shorter programmatic introduction to the normative text (Latvia). It is upon legislator to define volume and tone of the preamble, but it should not overburden the law, rather it should reflect the state's dedication to democracy, rule of law, human rights (in general), minority rights, and a tolerant pluralistic society. It can refer to traditional cohabitation of diverse national groups on the territory of the state, but should be properly toned, not to imply the dominance of the majority national group. A preamble, as a rule, has no legal force, but has symbolic importance and thus its fine formulation is not irrelevant. In addition, a preamble can be indicative for interpretation of the substantive part of the law and as such it is not simply a literary text.

Whereas preambles are an exception, general or introductory provisions are a rule in the observed laws. These provisions usually refer to defining the personal scope of the law, the right to self-identification, the principle of equality and non-discrimination, and equivalent. The core of the laws make substantive provisions on national minority rights (use of language, with more or less detailed norms on official use of language, on the right to personal name, and on the topographic signs; education in and of minority language; preservation of the minority culture; and the right to media in minority language). With regards to participation in public affairs, many laws contain extensive regulations on consultative mechanisms established to articulate the participation of national minorities on issues of their special interest. Some laws contain detailed provisions on financing. There are also norms on implementation and supervision of the law, as well as the legal protection if the rights have been violated. The laws usually conclude with final provisions, regulating some procedural issues, such as the entry into the force.

3.3 Legal status of the law (hierarchy of norms)

One of the central procedural questions relates to the legal nature of the law on national minority rights. The dilemma is whether it should be enacted as an ordinary law or as a law with a stronger legal force than ordinary legislation (as a constitutional, organic, cardinal or similar law). There is a strong argumentation in favor of passing the law on national minority rights as a law of higher rank. It brings stability, since a qualified majority is needed for the adoption and amendment of such a law. The request for qualified majority also decreases political influence on the enacting process. It calls for a wider consensus, since votes of opposition

are usually needed for a law to be adopted or amended. The higher rank of the law on national minority rights is also of great importance in the case of norm collision with sectoral laws. Depending on its character, the law on national minority rights can have constitutional status, or it can be legally positioned between the constitution and ordinary laws. In both cases, the higher hierarchical status of the law on national minority rights secures its predominance over the ordinary legislation. Hence, in the case of the norm collision, a norm of the law on national minority rights must be implemented.

Another concept is that the law on national minority rights is adopted as an ordinary law. The positive aspect of this concept is that it is more flexible and easily adaptable to the changing social environment. The regular amending procedure enables to "fine-tune" the law in accordance with the follow-up of its implementation. The implementation of the law can indicate its weak points, which can be adjusted with a normative intervention through amending the law. On the other hand, the status of the law on national minority rights as ordinary law, puts it in the same hierarchical level as other such laws. As a consequence, in the case of collision of norms, the law on national minority rights has no primacy, instead the general rules of legal interpretation are implemented. The interpretation can lead to the result that the norm of a sectoral law is to be implemented over the norm of the law on national minority rights. Thus, under certain circumstances, it is possible to derogate the law on national minority rights with the norms in sectoral laws.

There is also a midway solution between these two concepts, in which some norms of the law are of higher legal rank and some are of ordinary legal rank. The issues which the legislator has identified as essential for the protection of national minorities enjoy a special status, whereas the issues of lower importance have the status of ordinary norms.

In Europe, there is no uniform solution with regards to the legal status of the law on national minority rights. For example, the Croatian law is an organic law;[58] in the Austrian law several norms have constitutional rank,[59] and other norms are of the ordinary rank; in the Hungarian law the vast majority of the norms have the status of a "cardinal law";[60] the law in Moldova is adopted as an organic law,[61] and the law in Kosovo is one of the "laws of vital interest", preceding the norms in other laws and regulations.[62] In other countries, the laws on national minority rights have the status of an ordinary law, because in their legal systems there is no further specification among legislation and no intermediate level between the constitution and the laws.

In its opinion on the Hungarian law on nationalities, the Venice Commission has expressed its general positive attitude towards the concept of regulating national minority rights with the act of higher legal

rank. As it stated, "there are good reasons to guarantee the rights of minorities in the Constitution itself and/or in a cardinal law, as these rights ought to be protected on a stable and secure basis and should not depend on the will of a majority in the existing parliament at a given time."[63] Yet in the Hungarian case, the Venice Commission expressed its doubts towards a solution in which almost all norms of the law have been granted the status of "cardinal norms", i.e. norms which require a two-thirds majority to be amended. In this respect, the Venice Commission raised the question over "whether there is a too widespread recourse to cardinal provisions, with the ensuing risk for possible future reforms to be stuck in long-lasting political conflicts and undue pressure and costs for society."[64]

In its first opinion on the Croatian law on national minority rights, the Venice Commission has dealt with the issue of hierarchy of norms, in the context of the status of the Croatian law as an organic law. The Venice Commission referred to the decision of the Croatian Constitutional Court, which found the law on national minority rights to be an organic law, as such a law which is below the Constitution, but above other laws. This was important for the Venice Commission to examine the relationship between the law on national minority rights and specific implementing laws, bearing in mind that most of the rights guaranteed in the former are exercised in accordance with the latter. In this respect, the Venice Commission expressed its understanding, that because of the higher rank of the law on national minority rights, this law takes precedence over implementing laws and that the Croatian Constitutional Court, being entrusted to review legality in general, is able to review the compatibility of implementing laws with this law.[65]

The concerns of the Venice Commission did not relate to the legal status of the law on national minority rights per se, but to the legal status of implementing laws which may relativize the higher legal rank of the former. There is confusion surrounding Article 83 of the Croatian Constitution, which provides that the laws regulating the rights of national minorities shall be adopted by a two thirds majority of the votes of all representatives. It was questionable if the norm is to be narrowly interpreted, so that it only refers to laws exclusively regulating national minority rights, or widely, as to apply to every regulation whatsoever which affects national minority rights. As the Venice Commission has stated, such a wider interpretation "would not only make the adoption of implementing laws extremely cumbersome but might also compromise the constitutional review process, as implementing laws would have the same legal force as the new organic Law."[66]

The Venice Commission has expressed these concerns again in its second opinion on the Croatian law on national minority rights, in relation to the references in the law to 'special laws' which will

regulate certain rights and freedoms guaranteed in the law on national minority rights. In this respect the Venice Commission has stressed that "the status of these 'special laws' and their hierarchy in relation to the proposed Constitutional Law is of importance, *inter alia* in relation to the question of whether the Constitutional Court has jurisdiction to review their conformity with not only the Constitution but also this Constitutional Law."[67]

In its third opinion on the Croatian law on national minority rights, the Venice Commission again provided a reminder that the numerous (unspecified) references in the law to special laws and regulations, raise the question of the hierarchy between the Constitutional Law and these laws and regulations.[68] It concluded that, "as to the formal status of the present Constitutional Law, it does not seem to have been satisfactorily clarified."[69]

As the opinions on laws in Croatia and Hungary show, the Venice Commission generally supports the concept of regulating national minority rights with a law of higher legal rank than ordinary legislation, as this can bring more stability and stronger legal certainty. Yet, there are some traps in which this concept can fall. The first one is the trap of rigidity. If the law is too complicate to amend, it bears the risk for national minorities to get locked into situations that are insensitive to social changes. The second trap is the one of legal confusion, which can occur if the hierarchy of norms is not clearly defined in the legal system. In this respect, it is of great importance to strictly clarify the status of the law on national minority rights and its hierarchical position in relation to sectoral laws.

3.4 Inclusive procedures

As noted above, the principle of democracy presupposes that laws are enacted in a transparent, accountable, inclusive, and participatory manner. This general principle applies to the enactment of the law on national minority rights too. However, in this context, the general democratic principle reaches further since it calls for the participation of national minorities in the enacting process. In Europe, the standard has been established in Article 15 FCNM that national minorities have to participate in affairs which affect their status. Thus, no law on national minority rights should be enacted without their participation in the process. As the Venice Commission has put it, "the effective consultation of national minorities is a key principle in the adoption and implementation of the legislation pertaining to minority protection."[70]

The participation of national minorities in the enacting process can take diverse forms, both formal and informal. The formal forms of participation refer to various institutionalized forms of minority participation/consultation in drafting and enacting the law. For example, the national minority consultative body may be

empowered to propose drafting the law or its amendments, or the competent state authority may be obliged to ask the minority body for opinion on the drafted text. Furthermore, national minorities can participate in public hearings to the draft law organized in parliamentary committees. Finally, formal channels of minority participation provide MPs which represent the interests of national minorities. Informal ways of minority participation refer to various modes of lobbying, public debates and campaigns through which national minorities can influence drafting and enacting process.

Participation of national minorities in the enacting process is usually indirect, through representatives in the national minority civic organizations, minority institutions and institutionalized consultative mechanisms (if existing), and representatives in parliament that belong to national minorities. In most European states, the procedures in parliament rest on the principle of civic representation and the general principle of the majority vote. Yet, also in such circumstances it is welcome to open parliamentary debates (both in the committees and in the parliamentary plenary session) for MPs belonging to national minorities and/or representing their interests.[71] However, in a few European states, the adoption of laws on national minority rights is bound to the so-called "double majority". This means that for the adoption of the law, the regular parliamentary majority is not sufficient and the majority of representatives belonging to national minorities is needed. Such solution can be found in the constitutions of Kosovo and Macedonia, respectively.[72]

Although the participation of national minorities in the enacting process is essential, this does not mean that the law on national minority rights is just a concern for minorities. The enacting process should be also in that respect inclusive, in that it promotes a democratic dialogue between majority and minority (minorities), so that in a result both perceive ownership over the law. The law on national minority rights should be a joint project and neither the act of the (national) majority just accommodating the minority, nor the act of (national) minority defining its free zone of a parallel society. This fully corresponds with the desirable concept of integration which involves both majority and minority. As the ACFC has put it, "integration requires both the majority and the minorities to mutually adapt and change through an ongoing negotiation and accommodation process."[73]

3.5 Processes (Dynamics)

Once the law on national minority rights is adopted, it does not mean that the issue is set *ad acta* for good. The implementation of the law can be indicative of its quality and applicability and can thus provoke the need to amend it. In addition to the direct amendments of the law, it can also be amended through constitutional review[74] or indirectly through the adoption or

amendment of the sectoral norms it refers to. Most of the laws observed in this study have been amended over time. For example, Austria has directly amended its law of 1976 two times (in 2011 and 2013), and indirectly (through the decisions of the Constitutional Court or amending other laws) four times (1988, 2002, 2008, and 2009), plus the issue of amending the law is still vigorously debated there.[75] In Bosnia and Hercegovina, amending of the law is on the agenda.[76] In Croatia, the law adopted in 2002 has been amended in 2010,[77] but it also went through some changes due to several decisions of the Croatian Constitutional Court.[78] The Hungarian Act on the Rights of Nationalities, adopted in 2011 replaced the Act on National and Ethnic Minorities of 1993, as part of the process of implementation of the new constitution of Hungary.[79] In Kosovo, the law adopted in 2008 has been amended in 2011.[80] In Lithuania there has been an interesting development, since it used to have the law on national minority rights which was annulled in 2010.[81] According to the Lithuanian State Report on the FCNM of 2016, the draft law on national minority rights has passed two out of three stages of the adoption of legislation by the Seimas, whereas the final stage (the adoption) still remains.[82] In Montenegro, the law adopted in 2006 has been amended in 2007, 2011, and 2017.[83] The case of Serbia is interesting, because after the dissolution of the federation in 2006, the federal law on national minority rights adopted in 2002 just remained to be valid as a Serbian law. However, this legal maneuver has often been criticized because the law is too vague for the new context. In 2009 Serbia adopted the law on national councils of national minorities, but has not used this opportunity to amend the law on national minority rights. Consequently, the issue of the amending of this law is still pending. In Ukraine, there is a need to amend the existing law adopted in 1992, which is considered to be outdated and too vague in its provisions.[84] However, until now the law has not undergone direct amendments, but number of its provisions have been canceled by another law.[85]

Because of the legal certainty, the law on national minority rights should not be amended too often. Yet, flexibility in this respect is welcome, since amending the law can contribute to its better interaction with real life application. Through amending, the law can better correspond to social changes, whilst the shortcomings in its implementation can be addressed to make the law more effective. It is important that the amendments do not affect the achieved standards in minority protection and that the procedures are transparent and inclusive. However, as the experiences in several European states show, amending the law on national minority rights is not always an easy task. Both majority and minority (minorities) are not always ready to amend the law, perceiving every amendment as an (undesirable) possibility to change the established power-relations.

IV. SUBSTANTIVE ISSUES

With regards to substantive provisions, it is noticeable that the laws mainly regulate the issues addressed in the FCNM. Yet, although some laws are drafted on the blueprint of the FCNM, they are not (or should not be) a simple copy of the FCNM. As a matter of fact, as the Venice Commission states in one of its opinions, adopting a framework law, with vague and non-self-executing provisions, "might not be the most appropriate means to implement the obligations stemming from the Framework Convention."[86] The main substantive issues the laws regulate are the personal scope of the law application, equality and non-discrimination, special rights for the protection of national identity, and participation of national minorities in public life (in general but also through specific consultative mechanisms). Yet the focus of the laws varies, indicating that not all issues are perceived to be of the same importance in different countries. According to the last compilation of the Venice Commission's opinions and reports concerning the protection of national minorities,[87] there are several thematic aspects which have recurred in its work. These are: definition of "minority", lists of protected minorities, recognition of minorities, membership of a minority, rights exercised in community with others, non-discrimination principle, linguistic rights, freedom of peaceful assembly, freedom of conscience and religious organizations, right to local or autonomous representation, relations with administrative authorities and participation in public affairs, and electoral matters. Some of these aspects do not address laws on national minority rights. For instance, the discussions of the freedom of conscience and religious organizations draw on the Venice Commission's opinions on legislations regarding such issues, while its discussions of electoral matters draw on its opinions on domestic electoral codes as well as laws on national minority rights.

4.1 Conceptual questions

One of the central and most controversial issues refers to the personal scope of application of the law on national minority rights. In this respect, several significant questions arise: the "labeling" of persons who enjoy the protection of the law, setting criteria for defining groups and their members to whom the law applies, and the problem of recognition as a precondition of enjoyment of rights. In addition, it is questionable to define the outreach of the principle of the self-identification. Finally, there is no full consensus over whether the subject of minority rights is exclusively an individual belonging to national minority or also national minority as a group.

Although at the international level the term "national minority" is firmly established, it is not universally applied in all domestic legislation. The term "national

minority" is used in the laws of Albania, Bosnia and Herzegovina, Croatia, the Czech Republic, Moldova, Poland,[88] Serbia, Sweden, and Ukraine. On the other hand, alternative terminology can be found in the laws of Austria ("ethnic groups"), Hungary ("nationalities"), Italy ("historic linguistic minorities"), Kosovo ("communities"), Latvia ("nationalities and ethnic groups"), Macedonia ("communities"), and Montenegro ("minority peoples and other minority national communities"). The question of terminology is relevant for symbolic reasons, but it can also be of legal relevance. In some states the term "national minority" has been abandoned being perceived as pejorative, implicating the "minor" status of national groups other than the majority group and the status of second class citizens for persons belonging to these groups. This symbolism of terminology has been strongly debated in Kosovo, Macedonia, and Montenegro, with respect to strong opposition of some groups to be labelled (and treated) as a minority (Serbs in Kosovo and in Montenegro, and Albanians in Macedonia). In Serbia, there is also a tendency to abandon the term "national minority" and to switch to the term "national communities". The latter term strongly intrudes the jargon, being perceived as more "politically correct". The terminology issue has even been the subject of constitutional review before the Serbian Constitutional Court. Namely, in scope of the constitutional review of the Statute of the Autonomy Province of Vojvodina, the Constitutional Court found that the term "national communities" used in the statute is unconstitutional. The argumentation was based on the fact that the Serbian constitution exclusively uses the term "national minority".[89] In complying with the decision of the Constitutional Court, and adjusting the statute to the decision of the constitutional court, the Assembly of Vojvodina, however, did not reject the term "national communities", but opted to use both terms (it is stated "national minorities-national communities").[90]

The terminology is not a pure linguistic question, but it can have conceptual implications too. The term "communities" can indicate a modification of the concept of civic democracy towards a consociational democracy. This has, for instance, been the case in Kosovo and Macedonia. This conceptual aspect of the terminology has, among others, provoked the Serbian Constitutional Court to reject the term "national communities" in the context of the present constitutional framework based on civic sovereignty.

With regards to using the term "national minority", the Venice Commission has acknowledged that "it is today generally used as a reference term to designate minorities within the state", but that "there is no a specific requirement dictated by the international law for it to be used by a State in guaranteeing rights concerning persons belonging to minorities at a domestic level."

[91] In this context, the Venice Commission has expressed its view that "the term chosen by a given state should reflect on the one hand the wishes of persons concerned, and on the other hand the specific understanding of such terminology in the particular circumstances of the state in question."[92] On other occasions, the Venice Commission pointed out the need to differentiate the terms "national minorities" and "indigenous peoples". The latter term can only be used with reference to "the original inhabitants of the land on which they have lived from time immemorial or at least from before the arrival of later settlers."[93] The term must be narrowly applied and cannot also cover national groups who have immigrated into the state territory in more recent times.[94]

One of the central and highly controversial conceptual issues in laws on national minority rights is the definition of national minority. Since at the international level there is no such definition, states have a margin of appreciation in defining the term in their domestic legislation. The definitions vary, yet there are some commonalities and, to some extent, established standards. The general commonality is that of defining national minority through the prism of the so-called 'objective criteria'. The core of these objective criteria relates to identity characteristics which differentiate a national minority from the majority population. The range of the objective criteria listed in domestic legislation varies from country to country, covering as a minimum, language and traditions, plus stretching to culture, religion, and national or ethnic origin.[95] In this respect the definitions set out in domestic legislation are not controversial.

What became to be one of the most problematic objective criteria set out in almost every domestic legislation is the criterion of citizenship. In the vast majority of the states, the requirement of citizenship forms part of a definition of national minority: Albania (Article 3.1) Austria (Article 1.2), Bosnia and Herzegovina (Article 3.1), Croatia (Article 5), the Czech Republic (Article 2.1) Moldova (Article 1.1), Montenegro (Article 2), Poland (Article 2), Serbia (Article 2), and Ukraine (Article 2). Exceptions can be found in the laws of Hungary and Kosovo (with no reference whatsoever) and Latvia (with the reference not to the citizenship, but to the residence). Yet, the fact that the definition does not contain a reference to the citizenship does not per se broaden the personal application of the law to the non-citizens. The Venice Commission has observed this in relation to the Hungarian law, which despite the citizenship-neutral definition, nevertheless restricts minority rights to citizens.[96] In general, the Venice Commission has repeatedly expressed its standpoint, that "citizenship should (…) not be regarded as an element of the definition of the term 'minority'."[97] It has been argued that the practice to include citizenship among the objective criteria of the definition corresponds with the traditional position in

international law, which however has changed over time. At the international level, "a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past."[98] However, the Venice Commission does not fully discard the relevance of citizenship for minority protection. It rather calls for a nuanced approach, under which non-citizens are not fully excluded from the minority protection, but also do not enjoy all minority rights. According to the Venice Commission, a differentiation should be made between rights to education, use of language or preservation of culture and similar, which can be open to non-citizens too, with political rights or access to civil service, having the possibility to be reserved to citizens only. As a result, the general approach in minority protection should be inclusive, whereas specific minority rights can be reserved to citizens, but only to the extent necessary.[99] The ACFC holds a similar position, finding that "it should be considered for each right separately whether there are legitimate grounds to differentiate its application based on citizenship."[100]

Another problematic element in the legal definition of national minority refers to traditional linkage between the minority group and (the territory of) the state. Generally, this criterion is not problematic, since reference to traditional settlement can also be found in the FCNM. Yet, only three norms in the FCNM (Articles 10.2, 11.3 and 14.2) refer to the criterion of traditional residence. Thus, the ACFC calls for a flexible approach, especially with regards to the rights other than the use of language before administrative authorities, the display of signs, and the education of and in minority language. According to the ACFC, "the length of residency in the country is not to be considered a determining factor for the applicability of the Framework Convention as *a whole*."[101] It also recalls that "the length of residency within the state is irrelevant in terms of the applicability of minority rights arising under Article 27 of the International Covenant on Civil and Political Rights (ICCPR)."[102] Nevertheless, states are more prone to restrict national minority rights to "traditional" national minorities and thus to exclude immigrants from the minority protection.[103] The issue causes problems when it comes to define when a group is to be perceived as traditional. Some countries link this criterion to the requirement for a group to have been living in the country for a certain period of time. For example, in the Hungarian law and the Polish law the time requirement is set as 100 years.[104] In its opinion on the Hungarian law, the Venice Commission has affirmed that "the requirement of having traditional, firm, long-standing and lasting ties with the territory of the state is present" in many states.[105] However, the Venice Commission finds the criterion of 100 years to be very restrictive and that the criterion of three generations has been found to be more suitable when defining the condition of traditional ties with the state.[106]

An interesting issue in defining national minority is its numerical inferiority. In a number of laws on national minority rights, the definition of national minority refers to a group which is numerically smaller. Generally, this is not problematic, but nevertheless some questions may arise. First, numerical inferiority does not necessary mean that a group is in a subordinated position. Or, as the Venice Commission put it, groups inferior in number to the rest or to other groups of the population can find themselves, de jure or de facto, in a dominant or co-dominant position.[107] These are in much stronger position than national minorities, because "the latter in fact enjoy(s) certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions."[108] Hence, if none of the co-dominant groups may be outnumbered within the institutions of the state, then these need no protection under the minority rights regime.[109] Yet, this general principle is not absolute. To some extent, the minority protection could be applied to co-dominant groups too, in cases where these are in a factual minority position. For example, in case of Bosnia and Herzegovina the ACFC has encouraged "the authorities to consider, in close consultation with those concerned, extending the application of the Framework Convention to persons belonging to constituent peoples in a minority situation."[110] The Venice Commission has also acknowledged the position of the ACFC that "a majority at a national level can constitute a minority on a regional level, if the regional authorities dispose of powers that are relevant to the rights guaranteed in the Framework Convention."[111] Following this rationale, the Venice Commission has recommended to pay special attention to the position of the persons belonging to nationwide majority in regions where a minority has a dominant position.[112] In this respect, it is possible for persons belonging to national majority to enjoy minority protection in areas where they constitute a minority. Such a guarantee can be found in the Kosovo law on communities, which states in Article 1.4 that members of the community in the majority in Kosovo as a whole, who are not in the majority in a given municipality, shall also be entitled to enjoy the rights listed in this law.

In relation to the issue of numerical inferiority of national minorities, the question of representativeness of the group can arise. For example, the definition in Article 2.1 of the Serbian law on national minority rights presupposes that a group is "sufficiently representative". The rationale of such an approach is that the number of persons belonging to a national minority should be sufficient for minority protection to be reasonable and effective. However, some caution in applying this criterion is needed, since numerically inferior minorities can be in much greater need for protection than the numerically larger ones. In this respect, the

Venice Commission has expressed its position that "the qualification as a minority should not depend on the numerical strength of the group."[113] Thus, "even tiny groups are to be considered covered by the instruments protecting minorities", provided that they meet set general criteria.[114]

In addition to the objective criteria, a subjective criterion is also essential for defining a national minority. This subjective element refers to the desire to preserve the specific elements of identity. In different formulations, the subjective criterion can be found in the laws on national minority rights in: Albania, Croatia, the Czech Republic, Hungary, Moldova, Montenegro, Poland, Serbia, and Ukraine. No such reference is made in the laws of Austria, Bosnia and Herzegovina, and Kosovo. The subjective criterion is essential since it confirms the principle of self-identification. The status of national minority cannot be misused to segregate a group, but it should rest on free choice. Persons do not belong to national minority simply because they share (or are perceived to share) some objective criteria defining their national identity, but decisively because of their own affiliation with the group and the sense of belonging.

In addition, or as an alternative to the definition of national minority, some laws contain a list of protected minorities. The combination of a definition with a list can be found in the laws of Albania (Article 3), Bosnia and Herzegovina (Article 3.2), Hungary (Appendix No. 1), Kosovo (Article 1.4), and Poland (Article 2). The laws in Italy (Article 2) and Sweden (Article 2) do not contain any definition of a national minority, but only list the minorities which fall into the personal scope of the law. The position of the Venice Commission towards such lists is generally negative. Under its opinion, inclusion of a list in the law on national minority rights could "cause the exclusion of non-listed minorities from the various entitlements under the law and thus violate the concept of equal protection of national minorities."[115] For the Venice Commission, the exhaustive lists are not acceptable. Lists are tolerable only if formulated as open-ended (using the terms "and others" or "such as") and as such only indicative.[116] Hence, the lists should not hinder groups that are not listed, to get under the personal scope of the application of the law, once they meet the (objective and subjective) criteria set in the definition.[117]

In addition to defining a national minority as a group, two laws contain definitions related to persons belonging to national minorities. Such definitions can be found in the law of the Czech Republic (Article 2.2) and Hungary (Article 1.2). This raises the question, to what extent are the objective and subjective criteria relevant for a person to affiliate with a national minority. The core principle in this regard is the self-identification, i.e. the freedom of every person to choose to be treated as a member of a minority group, or not, as well as to change their national affiliation. In different

formulations, this principle can be found in the laws of Austria (Article 1.3), Bosnia and Herzegovina (Article 4.1), Croatia (Article 4.1), Hungary (Article 11), Kosovo (Article 1.5), Moldova (Article 2), Montenegro (Article 10.1), Poland (Article 4), and Serbia (Article 5). Self-identification is paramount in the discussions of the ACFC and the Venice Commission on membership issues. Basically, it is for the individual to decide how the affiliation to a national minority shall be expressed, as well as freely to change their affiliation to a minority.[118] Furthermore, as stated by the ACFC, "free self-identification implies the right to choose on a situational basis when to self-identify as a person belonging to a national minority and when not to do so."[119] Accordingly, the Venice Commission finds that "'objective' criteria for individual minority affiliation should be excluded."[120] Yet, it does not fully deny the relevance of the objective criteria. In the context of the need to exclude the objective criteria, as cited above, the Venice Commission adds the formulation "whereas the core elements of minority definition should be met."[121] The individual's choice of affiliation cannot fully rest on the subjective feeling, but also must correspond, to a certain extent, with the core elements of minority identity (language, traditions, religion, etc.). Nevertheless, according to the ACFC, these (objective criteria) "must only be reviewed vis-à-vis the individual's subjective choice."[122] The Venice Commission has also acknowledged that "the principle of the individual's free choice as to affiliation to a minority, does not prevent States from requiring the fulfilment of certain criteria when it comes to granting privileges to the persons belonging to that minority."[123] As it highlights, "the personal choice of the individual is a necessary element, but not a sufficient one for entitlement to specific privileges."[124] The ACFC moves in a similar direction, expressing the view that "free self-identification may only be questioned in rare cases, such as when it is not based on good faith."[125] It further condemns "identification with a national minority that is motivated solely by the wish to gain particular advantages or benefits" as being contrary to the principles and purposes of the FCNM.[126]

For individual freedom of self-identification, the freedom of expression of national affiliation and the right to data protection are of particular significance. The freedom of expression of national affiliation has both positive (right to express own affiliation) and negative (right not to express own affiliation) aspects. The significant consequence is that no one can be forced to express own affiliation and, as a manifestation of the freedom of self-identification, cannot be forced to affiliate themselves with a specific national group (whether majority or minority). The freedom of expression of national affiliation is explicitly regulated in the laws of Albania (Article 6.1), Austria (Article 1.3), Croatia (Article 4.1), Hungary (Article 11),[127] Poland (Article 4.2), and Serbia (Article 5.1 and 5.2).

In other laws, this freedom implicitly emanates from the freedom of self-identification. In relation to the freedom of self-identification and freedom of expression of own affiliation, questions regarding collection of data on national affiliation and protection of these data emerge. In many states this is a particularly sensitive issue, bearing in mind the severe misuse of such data in the past. Yet, the collection of data on national affiliation can be of great significance for the development of effective diversity management policies and for the follow-up to the implementation of laws on national minority rights. Thus, the full prohibition of collection of these data is not welcome. Yet, because of sensitivity of the data, special caution and protection is needed. The issue of collection of data on national affiliation can be found in a few laws on national minority rights. The Albanian law provides in Article 7.1 that public authorities at the central and local level can collect data on national affiliation, with the purpose of implementation of national minority rights. In line with Article 6.2 of the same law, no one may be compelled to express their own affiliation with a national minority, ethnic, linguistic or religious background. Yet, the expression of such an affiliation may be needed for the enjoyment of some rights envisaged in the law (Article 6.2). The legal basis for such data collection set out in the Albanian law is rather weak, as it rests on the decision of the Council of Ministers. The Czech law in Article 4.2 regulates that the public administration bodies cannot keep records of members of national minorities. Yet, procuring, processing and using of data on national affiliation is not fully outlawed, but can only be performed in compliance with the provisions of special legal regulations. The data procured can be used only for the purpose for which they have been collected and stored, whilst they must be destroyed after statistical processing. In a somewhat concise manner, Article 13.1 of the Hungarian law on nationalities declares the right of individuals belonging to nationality, to voluntarily and anonymously declare their affiliation with a nationality in the course of official statistical data gathering. The same law regulates in Article 13.2 the possibility to manage special data relating to affiliation with nationality for the purposes of state aid provided, regarding such affiliation and investigation of the utilization of the aid according to the relevant purpose. The procedure of management of the data is regulated with special law. Latvian law on national minority rights contains an interesting norm in this respect, providing for each citizen or permanent resident of Latvia above 16-years-old the right to establish or to restore ethnicity records in personal documents. The Serbian law prohibits in Article 5.2 any registration of persons belonging to national minorities that obliges them to express their national belonging against their will, but contains no further regulation on lawful registration or collection of data on national affiliation. The Venice

Commission has dealt with the issues of freedom of expression of affiliation to national minority and the data protection in the context of popular census, as well as the registration of voters and candidates, respectively. In its opinion on Ukrainian linguistic legislation, the Venice Commission found it essential that questions and forms in census are "drawn up in such a way to allow individuals to express their linguistic, but also ethnic identity freely."[128] It puts special emphasis on adequate questions and flexibility, manifested as "optional questions and an open list of alternative answers with no obligation to affiliate to a set category and including also the possibility for multiple identity affiliations."[129] In this context, the Venice Commission also emphasized the importance of the consulting representatives for the various population groups on the formulation of questions and options for answering them.[130] Finally, it called for the observation of international standards on personal data protection.[131] In its opinion on the Croatian law on national minority rights, the Venice Commission addressed the problem that "any special voting system for members of minorities requires that the voters concerned and the candidates must reveal that they belong to a national minority (for instance at the moment of voting or in the frame of a census)."[132] Assuming that "persons belonging to certain minorities may be reluctant to do so out of fear for discriminatory treatment and other forms of harassment", the Venice Commission emphasized the importance of precautions needed to effectively secure the confidentiality of the information provided.[133] In the Opinion on the Romanian Draft Law on the Statute of National Minorities, the Venice Commission has again pointed out the necessity to secure the confidentiality of personal ethnic data. In this context, it called "either to introduce in the draft law certain guarantees ensuring protection for ethnic data or at least make an explicit cross-reference to such guarantees if they are already entrenched in other legislation."[134]

While the principle of self-identification is primarily linked to individual affiliation, it is also relevant for group (self-) identification. In this respect, the question arises as to who is competent to decide if a group meet the criteria set out in a definition and can be considered as a national minority. Is the self-identification of persons belonging to the group sufficient to consider this group of people as a national minority, or is a form of "external" acknowledgment needed? The international standard, established already in the inter-war period, is that "the existence of a minority was a question of 'fact' and not of 'law'."[135] Thus, "state 'recognition' (is) irrelevant under international law."[136] The Venice Commission reaffirms this principle, by stating that "the existence of a minority is and should be a question of fact and not of law or of government recognition, as governments should not be allowed to exclude minorities or define them away by

non-acknowledgement."[137] The ACFC has also confirmed that "access to minority rights should (…) not depend on formal recognition", which, if exists, can only have "a declaratory and not a constitutive character."[138] Yet, despite the clear international standard, the reality is different. The enjoyment of many minority rights is linked to one or another form of the state's recognition of a group as a national minority. This refers especially to the enjoyment of those rights which correspond to positive obligations of the state (for example, the obligation to provide minority education in public schools, to provide media programs in minority languages in public broadcasting services, to provide positive measures in electoral process, or to include minority representatives in consultative mechanisms). The struggles between groups striving for recognition as a national minority and authorities denying such a recognition, present in many European states, show that the states still consider as their exclusive competence to decide which group is to be treated as a national minority.[139]

The question of the holder of minority rights also belongs to the conceptual issues which need clarification. There is no doubt that minority rights are primarily individual rights, i.e. the holder of the rights is a person belonging to national minority. International principles also show "a clear preference for the protection of the minorities through individual rights."[140] Yet, the group component cannot be ignored with regards to these rights, since the individual persons enjoy specific rights because they belong to a group (national minority). As the Venice Commission has stated, "minorities are not only the sum of a number of individuals but present also a system of relations among them."[141] Two aspects are relevant in this respect. Firstly, the right of individuals to enjoy their individual rights in community with others. In this case, the individuals remain holders of rights, but are entitled to exercise them in a group. The rights to education, to exchange of information, to practicing of a religion, just to name a few, are despite being individual rights, hardly implemented without the possibility of the joint exercise of rights. The second aspect refers to group (collective) rights, i.e. rights which national minority holds as a group. Group rights are not set as the universal international standard, but, equally, are not prohibited. As a consequence, these have been recognized in some domestic legal systems, but not in others. The Venice Commission acknowledges the importance of group rights, stating that "without the concept of collective rights the protection of minorities would be somewhat limited."[142] In this regard, the Venice Commission emphasizes the relevance of group rights to ensure minority participation in public affairs.[143] This is most relevant for (different concepts of) cultural autonomy, since it "goes beyond the mere recognition of rights to persons belonging to national minorities",[144] and rests on the right of a national community

to have decisional powers in matters relevant for preservation and promotion of group identity. While the Venice Commission supports the combination of both individual and group protection of national minorities in domestic legislation, it cautions that there needs to be clear judicial protection.[145]

4.2 Equality and Non-Discrimination

As one of the core principles of modern constitutionalism, the principle of equality also marks the minority protection. It presupposes that persons belonging to national minorities are equal in their rights and duties with persons belonging to national majority. It also presupposes equality between different national minorities and persons belonging to them, as well as the prohibition of any hierarchical ranking with regards to their legal status. The primal manifestation of the equality principle is non-discrimination. It presupposes equal treatment of persons in equal situations and outlaws unjustified differentiation of persons in their rights and obligations, on ground of their affiliation to national minority.[146] In addition, the prohibition of discrimination refers also to the equal treatment of persons finding themselves in different situations. This is especially important for identifying cases of indirect discrimination, i.e. when a nominally neutral norm disproportionally affects persons belonging to national minority. As the Venice Commission has pointed out, "the obligation to use only the majority language in the public sphere, and the fact that education is conducted in that language, may arguably be considered discriminatory, as the measures in question result in similar treatment of persons who are in different situations."[147]

An explicit reference to prohibition of discrimination, though differently formulated, can be found in the laws on national minority rights in Albania (Article 8.1), Bosnia and Herzegovina (Article 4.1), Croatia (Article 2 and Article 4.4), Hungary (Article 7), Kosovo (Article 3.3), Poland (Article 6.1), Serbia (Article 3), and Ukraine (Article 18). Norms in the Czech law (Article 4.1), the Moldovan law (Article 2), and in a different formulation in the Austrian law (Article 1.3), stipulate that affiliation with a national minority may not cause loss or disadvantage for a person, but it is disputable if it provides sufficient protection from discrimination. On the other hand, norms in the Latvian law (Article 1) and the Montenegrin law (Article 4.1) generally refer to the equality of persons belonging to national minorities with other citizens. Reference to prohibition of discrimination in laws on national minorities is welcome, but not essential, provided it is legally established in a constitution or specific anti-discrimination law. Yet, if the norm on prohibition of discrimination is to be found in all these acts, the regulation should be coherent.

Prohibition of discrimination is essential, but sometimes not sufficient to

achieve equality among persons belonging to different national groups. For achievement of the so-called substantive equality, implementation of affirmative measures may be needed. The concept of affirmative measures is often subjected to criticism, with the basic argumentation that it perverts the equality principle in treating people in a similar situation in different ways. Thus, according to the critics, affirmative measures are to be considered as discriminatory. Yet, affirmative measures have been widely acknowledged as a lawful instrument to achieve substantive equality. Indicative in this respect is Article 4, subparagraphs 2 and 3, of the FCNM, referring to "adequate measures" for promotion of "full and effective equality" between persons belonging to national minority and those belonging to the majority, which are not to be considered as an act of discrimination. The Venice Commission has also acknowledged the importance of affirmative measures "for the establishment of *de facto* not only *de jure* equality."[148] However, bearing in mind that affirmative measures confer "special benefits upon individuals by virtue of their membership in a certain minority group"[149], they must be strictly scrutinized in order not to pervert to discrimination. According to the Venice Commission, the principle of proportionality shall serve as "a guiding principle for the legislature and the administration in determining necessary positive measures."[150] Affirmative measures are legitimate only if, and to the extent necessary, in order to bring about substantive equality.[151] As a result, these measures "must be seen as a mechanism which does not establish privileges for the minorities but effective rights that members of the minority already enjoy."[152] However, rights provided for persons belonging to national minorities, such as the right to use their own language in communication with the authorities or the right to education in their own language, are not to be considered as affirmative measures, but as so-called "accommodating rights", which aim at enabling the enjoyment of equal rights for persons in different situations. On the other hand, measures such as specific financial support, quotas for civil services, or for enrolment into schools or universities, and certain advantages under electoral rules, are clear examples of affirmative measures.

A clear reference to affirmative measures has been made in the laws on national minority rights in Albania (Article 8.2), Kosovo (Article 3.4), Poland (Article 6.2), and Serbia (Article 4). The lack of such norm in other laws does not implicate that in other legal systems affirmative measures are outlawed. Their legal basis can be set out in the constitution[153] or in the special anti-discrimination legislation.[154] Yet, the reference in the law on national minority rights is welcome.

4.3 Language and Education as the Basis for the Protection of National Identity

The core of the substantive part of laws on national minority rights, refer to rights aimed at the protection of the national identity of national minorities and persons belonging to them. These rights typically relate to use of a minority language, education in and of a minority language, media in a minority language, preservation and promotion of minority cultures and traditions, and freedom of religion. Most of these issues are not exhaustively regulated in the law on national minority rights, usually sectoral laws are also applicable. In this respect, it is of crucial importance that the essence of minority rights is regulated in the law on national minority rights and that these rights are not derogated with the norms in sectoral laws.

The range of issues regulated in laws on national minority rights varies across the countries, but it is evident that language rights and education attract the most attention. The ACFC has devoted two thematic commentaries to language and education, respectively. The Compilation of the Venice Commission is also indicative, which in this regard refers mainly to language, as well as to education in a smaller extent. The regulations on the use of language and education vary in scope and character in the laws on national minority rights. Some laws contain detailed norms on usage of minority languages[155] and/or education in these languages,[156] whereas some laws contain simple references to sectoral laws.[157] In addition, some laws guarantee rights to language and education, whereas other contain vaguer programmatic proclamations.[158]

With regards to the use of minority language, the most problematic aspect turns out to be using one's own minority language in communication with the authorities. There are several reasons for this. Firstly, at the international level, the right to official use of minority language has not been established. Other than the right to use minority language in private and in public, which could be derived from the (general) right to private life and freedom of expression, the right to use minority language in communication with the authorities has not been established as such in any of the relevant international treaties. In this respect, the international law guarantees reach only to the general right to be heard and/or informed in criminal matters, in the language a person understands. This right is not a minority right, but a classic human right. Paradoxically, usually persons belonging to national minorities are even practically excluded from the enjoyment of this right, bearing in mind that in most cases they understand the official language. Both the FCNM and the European Language Charter set no rights and contain formulations which leave a great margin of appreciation for states when regulating this issue. The FCNM provides some, very vague, guidelines for the use of minority languages

before administrative authorities, whereas with regards to communication with the courts it does not go beyond the guarantees set out in Articles 5 and 6 of the ECHR. The approach in the European Language Charter is even more favorable for participatory states, since it contains a list of measures out of which a state can choose those which it finds most suitable for the domestic context. Although states are obliged to take at least the minimal number of measures set in the Charter, they still enjoy a wide margin of appreciation when it comes to the selection of measures and their implementation in the national order. Furthermore, the focus of the Charter lies on regional and minority languages as such and not on the speakers of these languages. As the Venice Commission has pointed out, "the Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State."[159]

Secondly, reluctance of states to provide for the use of minority languages in communication with the authorities, comes from the strong symbolic value of language. Language is not only perceived as a communication tool important for the functioning of a state, but also as a strong symbol of its identity. Since in most cases the state language is the language of a majority, it is also a symbol of ownership and dominance. Thus, the issue of recognition of minority languages is *par excellence* an issue of power relations between majority and minority (or minorities). Many states hesitate to provide minorities with wide range of linguistic rights, afraid that this could erode the state's cohesion and/or lead to claims for some sort of territorial autonomy or even secession. As a result, in defining their policies of accommodation of minority languages, states always, more or less overt, balance it with the need to protect the state language, i.e. the accommodation reaches just to the extent which a state considers it not enough to compromise the state language. The Venice Commission has also dealt with this relationship between the state language and minority languages and has acknowledged that "the right of majority of the population to speak the official language and the right of persons belonging to minorities to use their minority language are compatible and may co-exist with each other without conflict, provided that a positive approach is taken by both the majority and the minorities towards each other."[160] In that context, it has reaffirmed that it is "crucial to strike a proper balance between the promotion of the state language and the protection of the linguistic rights of persons belonging to national minorities."[161] In this respect, it has again stressed the importance of the principle of proportionality, according to which the measures for the protection and promotion of the state language "should not go beyond what is necessary to achieve the legitimate aim pursued."[162] The ACFC holds the same position and pleads to use "promotive and incentive based measures" which it finds to be "a much more effective

approach towards strengthening knowledge and use of the official language(s) by all members of the population than any form of coercion."[163]

Thirdly, states are cautious with the official use of minority languages because this brings additional burden for administration. In this respect, official use of minority languages is the question of capacity. It requires human and financial resources and often it is time consuming. Bearing in mind that backlogs are generally present in the administrations and judiciary in many European states, it is no wonder that states avoid a wide scope of minority language use in official communication. Yet, this is not an excuse. The answer to the capacity shortage should not be to narrow the rights, but to build up the capacities. Indicative in this respect is the call from the ACFC towards states to "promote the recruitment, promotion and retention in the administration and public services of persons belonging to national minorities and/or speaking the language(s) of national minorities, both at national and local levels."[164] According to the ACFC, "proficiency in the minority language should always be considered an asset and, in areas of traditional settlement, even a requirement in recruitment proceedings for the civil service."[165]

Although states have wide margin of appreciation in regulating the use of minority languages in communication with authorities, some recommendations have nonetheless been developed. The use of minority languages in communication with the authorities should be formulated as a right, corresponding with an obligation on the side of the authority. As such, its implementation should not be based on the good will of civil servants, but ensured with the legal claim. As the ACFC has put it, "the rights of persons belonging to national minorities to use their language should (…) be clearly defined and adequately protected by legislation, and its implementation monitored regularly."[166] The ACFC finds further important to "set up clear and transparent procedures on how and when to institute the use of minority languages, including in written form, to ensure that the right is enjoyed in an equal manner."[167]

Since the right to use a minority language in communication with authorities has a strong territorial dimension, it is essential to define areas in which this right can be used. In general, this can be done in two ways. The first way is to list municipalities in which minority languages can be used in official communication. These lists can be part of the law on national minority rights[168] or specific language laws, in which case the amendment is to some extent complicated as it requires legislative procedure. Alternatively, lists can be provided in acts of government or ministry.[169] This approach is more flexible, but bears the risk of arbitrariness. For this reason, it is essential to formulate a clear guideline in the law with respect to the governmental/administration competence in

conducting lists or registers. An alternative to the lists is to define precise conditions under which a minority language can be used in communication with authorities. Here it is necessary to define areas which are to be considered "inhabited by persons belonging to national minorities traditionally or in substantial numbers" (Article 10. 2 of the FCNM). In this respect, the Venice Commission is quite adamant about vague formulations regarding 'substantial numbers' and 'significant percentages.' It prefers to see these phrases qualified, acknowledging that a precise guideline needs to be given in the law on national minority rights, although the question can be regulated in detail in the relevant secondary regulation.[170] The ACFC acknowledges a margin of discretion states have when defining areas where minorities live in 'substantial numbers', but it also asks states to "provide clear criteria" in this regard.[171] Most commonly, states use demographic thresholds, i.e. a minority language can be used in those areas (municipalities or regions) in which persons belonging to a national minority constitute a certain proportion of the population.[172] Popular census is the main source to determinate this proportion, but as the ACFC has put it on several occasions, the census results do not have to be decisive for the enjoyment of minority rights.[173] Thus, although clarity is needed, flexibility is also welcome. As the ACFC has put it, "where thresholds exist, they must not be applied rigidly and flexibility and caution should be exercised."[174] The thresholds "must not constitute an undue obstacle to the official use of certain minority languages", and measures to lower thresholds are always welcome.[175] As a matter of fact, numerically smaller national minorities may be in greater need for the language protection, than those numerically larger or territorially concentrated. As the ACFC has acknowledged, the official use of less spoken minority languages may be needed to protect them from disappearing from the public sphere.[176]

The demographic threshold can be linked to national affiliation or to use of a minority language as a primary language. This is of special importance in the case of linguistic minorities, or minorities which show greater discrepancy in numbers when it comes to persons belonging to a minority and speakers of the minority language. Yet, the Venice Commission has expressed reservations towards defining the criterion on the basis of "speaking the language". It finds this to "lack(s) clarity and fail(s) to ensure the legal certainty."[177] As "an alternative and for the smaller minorities less detrimental criterion" the Venice Commission proposes "the 'native language', on the condition that the criterion is clearly defined as the 'mother tongue' or the 'first language learnt in early childhood'."[178]

When it comes to education in or of minority languages it is obvious that states are much more eager to regulate the issue in sectoral, educational law, than in the law on

national minority rights. In some states, the latter do not even address the issue of education, in others they simply refer to the education law, and some contain a general regulation that is relevant for minority education. Yet, as the ACFC has acknowledged, "rights to, and in education, need to be institutionalized and safeguarded in clear and coherent legal acts."[179] Legal certainty and clarity are preconditions for the coherent implementation of these rights.[180] According to the Venice Commission, the law on national minority rights should contain clear guidelines with regards to the establishment of minority language schools. In the wording of the Venice Commission, "the law itself would contain precise provisions on the number of requests that are necessary to guarantee an enforceable right to have such schools established and maintained, and on relevant decision-making procedures."[181] The Venice Commission attaches special importance to clear criteria and procedures, which if defined "in line with the applicable standards and taking into account the existing needs" are essential to ensure adequate opportunities for teaching and/or in minority languages.[182]

4.4 Participation in Public Affairs

The right to participate in public affairs results from the general democratic principle and the citizens' right to shape their polity. In general, political rights have traditionally been reserved for citizens, although there are certain developments towards opening some aspects for foreigners. In the EU member states, the standard has been established that resident foreigners can participate in local elections and elections for the European Parliament. Through this channel, the whole concept of political participation has been modified, since the right to participation in elections involves in addition to voting rights, the right to membership in political parties, right to political campaign, and other rights supportive for effective participation in election. Nevertheless, political rights are still dominantly citizens' rights and states are legitimized to reserve these rights for citizens. Participation in national elections is still provided for citizens only, as are many positions in public administration and judiciary. This reservation is also relevant when it comes to the political participation of national minorities. Although the general principle is that citizenship should be irrelevant for enjoyment of minority rights, it is legitimate to restrict the enjoyment of minority rights related to political participation only to persons belonging to national minorities who are citizens. As the Venice Commission has put it, "the restriction of the right to take part in the conduct of public affairs and of access to the public services to citizens does not conflict with international standards provided that it does not prevent non-citizens from holding lower-level posts attached to the civil service."[183] The ACFC acknowledges citizenship as a criterion to participate in

parliamentary elections, but it encourages states to open local elections, governing boards of cultural autonomies, membership in trade unions and other civil society associations, to non-citizens belonging to national minorities.[184]

Being citizens, persons belonging to national minorities have the right to participate in public affairs on equal footing with their fellow-citizens belonging to national majority. As a matter of fact, according to the concept of civic democracy, national affiliation is irrelevant for enjoyment of participatory rights. Thus, the basic principle in ensuring participation of national minorities in public affairs is the principle of non-discrimination. Yet, relying just on the principle of non-discrimination, is not always sufficient to secure adequate participation and affirmative measures can be imposed to address the issue of underrepresentation of national minorities. However, not all states are open for such measures, following the idea that these pervert the concept of individual, civic, representation, and introduce a kind of group representation. While the policy of affirmative measures has been accepted (or tolerated) to the wider extent in electoral matters, it is still more objected to than not when it comes to the participation of national minorities in public administration and judiciary. In addition, different consultative mechanisms and/or concepts of autonomy have been developed to address shortcomings in minority participation.

When it comes to minority participation in public affairs through parliamentary representation, it is notable that laws on national minority rights are rather silent on the issue, leaving it to be regulated in sectoral (electoral) laws. Under the opinion of the Venice Commission, however, it is questionable if the right to parliamentary representation, being "one of the most important rights in democratic society", is "not too important to leave its elaboration to other legislation."[185] In several laws on national minority rights, regulations on the participation of national minorities in (national and/or local) parliaments can be found. The norms in some of these laws are general in formulations, such as Article 9 (c) of the Albanian law, Articles 19 and 20 in the law of Bosnia and Herzegovina, Article 23 in the Moldovan law, or Article 22a in the Montenegrin law. In different formulations, they acknowledge the representation of national minorities in parliaments, but refer to electoral laws. Croatian law contains greatly detailed regulation, referring to reserved seats in the national parliament for persons belonging to national minorities (Article 19) and representation of persons belonging to national minorities in local and regional parliaments (Articles 20 and 21). The Kosovo law refers in Article 11 to several issues relevant for the participation of national minorities in parliaments, but without the direct reference to affirmative measures in the electoral process. Yet, the law provides for the office of Deputy

Chairperson of Municipal Assembly for Communities (Article 11.2), explicitly acknowledges the right of persons belonging to national minorities to form political parties (Article 11.3), and encourages other political parties to "open themselves to the diversity of Kosovo society" (Article 11.4).

The right to participate in the political processes has received extensive attention from the ACFC and the Venice Commission. Firstly, they have criticized the banning of political parties based on national and ethnic grounds. According to the ACFC, prohibition of political parties on an ethnic or religious basis can lead to undue limitations of freedom of association stipulated in Article 7 of the FCNM.[186] For the Venice Commission such a prohibition is "potentially overbroad and inconsistent with freedom of association."[187] For a political party to be banned an individual approach together with the proportionality test have to be applied. Hence, "it should be established that the activities or aims of the political party constitute a real threat to the state and its institutions."[188] A general presumption that all parties of national minorities bear this threat is not only undemocratic, but it also undermines the mutual trust between the majority and minority (minorities), plus burdens a constructive dialogue in a pluralistic society. The ACFC and the Venice Commission have also dealt with the issue of registration of political parties. Requirements for registration of political parties should, according to the ACFC, "be designed so that they do not limit, unreasonably or in a disproportionate manner, the possibilities for persons belonging to national minorities to form such organizations and thereby restrict their opportunities to participate in political life and the decision-making process."[189] The Venice Commission is of the opinion that states should "remain neutral when dealing with the establishment and registration procedures and (to) refrain from any measures that could privilege some political forces over others."[190] In particular, the (excessive) requirements based on territorial representation and on minimum membership are undesirable, bearing in mind their potential of limiting persons belonging to national minorities to organize in political parties.[191]

When it comes to the representation of national minorities in parliament, the Venice Commission has generally welcomed (affirmative) measures such as "reserved seats, lower electoral thresholds, special parliamentary committees, adapted constituency boundaries, voting rights for non-citizens, and constitutionally guaranteed representation of minorities in parliament."[192] The Venice Commission has also acknowledged the more favorable impact of proportional electoral systems on representation of minorities. As it has stated, "the more proportional an electoral system, the more it allows minorities, even dispersed ones, to be represented in the elected body."[193] Furthermore, it emphasized that "electoral thresholds should not affect the

chances of national minorities to be represented", and that "electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes."[194] The ACFC has also indicated that threshold requirement, as potentially having a negative impact on participation of national minorities in an electoral process, "needs to be duly taken into account."[195] The ACFC welcomes exemptions from threshold requirements as useful to enhance national minority participation in elected bodies.[196] Both the Venice Commission and the ACFC have dealt with reserved seats as one way of accommodating national minorities. The Venice Commission found that these "do not in principle run counter to equal suffrage,"[197] but nevertheless it acknowledged that "the notion of setting aside seats reserved for minorities is debatable".[198] In the view of the Venice Commission, reserved seats are suitable as a transitional mechanism, which may latter be replaced by ordinary representation.[199] Reserved seats are also seen to be problematic because of the difficulties to decide "which minorities should be entitled to have such seats and who legitimately represents the respective minority in national or local parliaments."[200] With regards to reserved seats, the Venice Commission has also cautioned states to be careful if they apply double voting, which only conforms to the principle of 'one man one vote', if each voter has the same number of votes.[201] The ACFC acknowledges reserved seats (for one national minority or as shared seats for various national minorities) as "one of the ways in which the representation of persons belonging to national minorities can be ensured in elected bodies."[202] The concept of shared seats can be appropriate for the representation of numerically small minorities, whereas it is essential to "agree on a common strategy and shared goals to be reached through the representation."[203] The ACFC recommends a rotation of the representatives of the different national minorities as a tool to create the sense of a shared seat.[204] The system of reserved seats can enhance national minority representation in parliament only if minority representatives have full parliamentary status, i.e. they have speaking and voting rights and are not limited to mere observers.[205] Yet, even then, the concept of reserved seats "does not automatically provide persons belonging to national minorities with a genuine and substantial influence in decision-making."[206]

In addition to the issue of representation of national minorities in parliaments, some laws on national minority rights contain regulations on minority participation in the executive branch (governmental bodies and public administration) and the judiciary. The norm in the law of Bosnia and Herzegovina (Article 20.2) simply refers to a special law and other regulations, which shall regulate the manner of minority representation in

these two branches of government. In the Croatian law, Article 22 is relevant in this respect, according to which, proportional representation of persons belonging to national minorities must be ensured in the executive bodies of the local self-government units, state administration and judiciary, and local administration. It also provides for favorable treatment of candidates belonging to national minorities when it comes to assigning positions in administration and judiciary. The Hungarian law refers in Article 6.2, to the employment of persons familiar with the mother tongue of the nationality which reaches 20% of the local population, when it comes to filling the positions of local civil servants and public sector employees, as well as the positions of notary public and court bailiff in the locality. According to Article 11.1 of the Kosovo law, effective participation of national minorities in decision-making at all levels of government is assured through representation in the Government, the Judiciary and other bodies of Kosovo. For strengthening the participation of national minorities in the executive branch at the local level, the law establishes the Deputy Mayor for Communities (Article 11.2). The Moldovan law sets in Article 24, the right for persons belonging to national minorities to "approximately proportional representation in the institutions of the executive branch and those of the judicial branch of all levels, in the army, in the law enforcement agencies." The Macedonian law sets in Article 4, the principle of adequate and equitable representation of persons belonging to national minorities (those making less than 20% of the general population), when it comes to "employment in the organs of state governance and other public institutions at all levels". In Montenegro, Article 25.1 sets the right for national minorities to proportional representation in public services, bodies of state government, and local administration. The competence to take care over such representation lies on human resources institutions, which should cooperate with national minority councils. In Serbia, Article 21 links employment in public services, including the police, to three criteria: the national composition of the population, adequate representation, and the knowledge of the languages spoken in the territory of the authority or service.

For the ACFC representation and participation of persons belonging to national minorities in public administration, in the judiciary, and in the executive, is an important channel for minority participation in public affairs. The ACFC recommends "to provide a legal basis for promoting the recruitment of persons belonging to national minorities in public administration."[207] Legal guaranties should be coupled with adequate implementation measures. When it comes to the judiciary and the administration of justice, the ACFC also acknowledges the importance to promote participation of persons belonging to national minorities, assuming that the independence and the

effective functioning of the judiciary are guaranteed.[208] The need for a diverse administration and judiciary does not, however, imply reaching a rigid, mathematical equality in the representation of various groups. An unnecessary multiplication of posts as a technique to achieve minority representation is not welcome.[209]

The minority right to participation in public affairs always provokes the question of whether this includes some autonomy arrangements for national minorities. States are generally reluctant to provide some sort for autonomy for national minorities, primarily anxious that it eventually would lead to secession. The right to autonomy, whether territorial or cultural, cannot be derived from the wording of the FCNM.[210] The Venice Commission is also very clear that special autonomy status is not a norm that can be claimed under the current *acquis*.[211] It has stated in no uncertain terms that its "work and a study of national systems for protecting minorities do not reveal the existence of any common practice in the matter of territorial autonomy, even in general terms."[212] In the same discussion, the Venice Commission also establishes that the right of self-determination, which some constitutions guarantee, is in fact internal because it excludes secession.[213] In this respect, at the dawn of the 21st century, multi-level governance is a more suitable tool for solving the conflicts, than division into a number of separate states.[214] Under this general framework, the Venice Commission encourages states to offer minorities "the possibility to appropriate local or autonomous administrations or at least the minimum requirements of a special status" according to certain specific criteria.[215] These criteria encompass consultation on introducing legislative or administrative measures, involvement in the preparation, evaluation and implementation of development plans and programs, and effective participation in decision-making process and elected bodies (all with reference to issues which directly affect national minorities).[216] The ACFC has found that territorial autonomy arrangements "can foster a more effective participation of persons belonging to national minorities in various areas of life."[217] Yet, the ACFC is cautious in its formulations, as not to recommend territorial autonomy arrangements for fostering participation of national minorities. Moreover, it refers to territorial arrangements that already exist as a result of specific historical, political and other circumstances.[218]

The vast majority of laws on national minority rights establish an institutional arrangement to enable minority participation in decision-making on issues of special relevance for the protection of minority identity. In some states, a special advisory (consultative) body is attached to a governmental institution, whereas in others it is established as an institutionally autonomous body (or set of bodies). In the

first case, most commonly a body is attached to the executive branch of government. In Albania, the National Minorities Committee is established as a central institution under the Prime Minister (Article 18.1). In Austria, ethnic group advisory boards have been installed to provide advice to the Federal Government and the Federal Ministers (Article 3.1), and, on request, also to the Provincial Governments (Article 3.2). In the Czech Republic, the government establishes the Council for National Minorities as its consultative and initiative body (Article 6.3). In Kosovo, the Community Consultative Council is established under the auspices of the President of the Republic (Article 12.1). In Moldova, the Coordination Council functions as advising body under the Department for Interethnic Relations (Article 25.2). In Poland, the Joint Commission (of government and national and ethnic minorities) is appointed as the Prime Minister's consultative body (Article 23.1). Bosnia and Herzegovina stands as an exception, since the Council of National Minorities there has been established as a special advisory body of the Parliamentary Assembly (Article 21). In addition, the law stipulates that parliaments of the entities shall also establish such a council as their advisory bodies (Article 23). In Croatia, Estonia, Hungary, Montenegro, and Serbia there are no institutional attachments, and minority (representative and/or consultative) bodies operate as separate institutions. In Croatia, National Minority Councils or National Minorities' Representatives can be established at the municipal and county levels, in areas inhabited in some proportion by persons belonging to national minorities (Articles 23 and 24). In addition, according to Article 35 of the Croatian law on national minority rights, the National Minorities' Committee has been established at the central level. In Estonia, the National Minorities Cultural Autonomy Act provides for persons belonging to a national minority the right to establish cultural autonomy bodies (Article 2.1), with the cultural council of national minority as the main directing body (Article 11.1). The latter can establish a county or town cultural council of national minority, or appoint local cultural councilors (Article 11.2). In Hungary, national minorities may set up Nationality Self-Governments at local, regional, and the national level (Article 50). In Montenegro, each national minority can establish one Minority Council (Article 33.1 and 33.2). Similarly, in Serbia, national minorities are represented by National Councils of National Minorities (Article 19.1).[219] When it comes to the personal composition of the above listed institutions, in some states both governmental representatives and representatives of national minorities are present, whilst in others it is solely a national minority representative body. The first concept can be found in the Czech Republic (Article 6.4), Kosovo (Article 12.6), and Poland (Article 24.1). In Albania (Article 20.1), Austria (Article 4.2),[220] Bosnia and Herzegovina

(Article 21), Croatia (Articles 23 and 36), Estonia (Article 2.1), Hungary (Article 50), Moldova (no reference in the law), Montenegro (Article 33.1), and Serbia (Article 19.1), members in the bodies are solely persons belonging to a national minority or minorities (depending if every national minority has its own body, or there is one body representing all national minorities). In some states, members of the body are appointed, whilst in others they are elected. The first solution can be found in Albania (appointment by the Prime Minister, Article 20.2), Austria (appointment by the Federal Government, Article 4.1), Bosnia and Herzegovina (appointment by the Parliamentary Assembly), the Czech Republic (depending on members, appointment either by the Government or by the President of the Council), Kosovo (appointment by the President, Article 12.8), and Poland (appointment by the Prime Minister, on the motion of the competent minister, Article 24.2). In Estonia (Article 12), Hungary (Article 56), and Serbia (Article 19.1), members of the body are elected by persons belonging to the national minority the body represents. The same applies to the election of members of national minority councils and national minorities' representatives in Croatia (Article 24.5), but members of the National Minorities' Committee are appointed by the state government (Article 36.1). In Montenegro, some members of minority councils are *ex officio* members, as persons belonging to national minority on certain positions in the legislative and executive branch of government at national and local level (Article 33.5), whilst the rest of the members are elected by persons belonging to a respective national minority (Article 33.7).

When it comes to the competences of these bodies, some laws on national minority rights are silent on the issue (Austria and Moldova), some are in general terms (Bosnia and Herzegovina, Article 22), and some are more (or less) precise in regulation (Albania, Article 19; Croatia, Articles 31-32, Article 35; the Czech Republic, Article 6.5; Estonia, Article 5; Hungary, extensive regulation throughout the law, but in particular Articles 79-86; Kosovo, Article 12.1; Montenegro, Article 35; Poland, Article 23.2; and Serbia, Article 19 (7-11) and the special law). In general, the impact of these bodies on decision-making varies in different national arrangements, which range from unbinding and consultative forms (such as proposing initiatives or giving opinions), through more binding procedural competences in decision-making (such as giving consent to decisions or making formal requests), to some forms of minority self-governance.

For the proper functioning of minority consultative/representative bodies, the issue of financing is of significant importance. Laws on national minority rights of Croatia (Articles 28-29), Estonia (Article 27), Hungary (Articles 124-137), Kosovo (Article 12.11 and 12.13), Montenegro (Article 33.14), Poland (Article 30.2), and Serbia

(Article 19.5) contain explicit regulations on how these bodies are to be financed.

In analyzing participation of persons belonging to national minorities through consultative mechanisms, the ACFC has stressed the importance of ensuring that "consultative bodies have a clear legal status, that the obligation to consult them is entrenched in law and that their involvement in decision making-process is of regular and permanent nature."[221] The ACFC finds it important that consultative bodies are inclusive and representative. If composed as mixed bodies, the ACFC states that "proportion between minority representatives and officials should not result in the latter dominating the work."[222] It also stresses the necessity of transparent appointment procedures, designed in close consultation with national minorities.[223] The ACFC further encourages states to establish regular consultative mechanisms as a form of an institutionalized dialogue between the governments and minority representatives.[224] These are not only to be established on the national level, as regional and local consultative mechanisms can also be "a useful additional channel" for the minority participation, especially in the context of decentralized decision-making.[225] The ACFC finds it "essential that the legal status, role, duties, membership and institutional position of consultative bodies be clearly defined."[226] It also pleads for consultative bodies to have a legal personality.[227] Finally, "adequate resources should be made available to support the effective functioning of consultative mechanisms."[228]

In assessing how effective participation of national minorities in decision-making through above mentioned consultative bodies is, the ACFC has mainly referred to shortcomings in appointing/election procedures and the insufficient impact on decision-making. In the case of the former, the ACFC has, for example, called on the authorities of Bosna and Herzegovina to "amend the provisions governing the membership of the State Council of National Minorities in order to depoliticize appointments and ensure that the members of the Council are genuinely representative of national minorities."[229] With regards to Croatia, it called for the adoption of "an appropriate legislative framework for the elections of councils and representatives of national minorities in self-government units."[230] The appointment procedure in the Czech Republic should ensure "greater involvement of national minority organizations in the process" and ensure "that appointed representatives enjoy the confidence and support of the national minority they represent."[231] The authorities in Poland have been asked to make the appointment procedure "more participatory, efficient, transparent and swift."[232] When it comes to the capacity of a consultative body to effectively influence decision making, the ACFC has called on the Austrian authorities to strengthen ethnic group advisory bodies so that these "can participate effectively in all

relevant decision-making processes, not limited to allocations for cultural purposes, and have access to senior policy makers, where necessary, in order to engage in a meaningful dialogue on issues of their concern."[233] It has urged the authorities of Bosnia and Herzegovina "to pay increased attention to the proposals put forward by the Councils of National Minorities", whereas "any decisions not to take them up should be justified."[234] In Croatia, consultative bodies should be "equipped with sufficient competencies to effectively influence relevant decision making, not limited to cultural affairs."[235] In case of Kosovo, the ACFC has urged the authorities to ensure that the Consultative Council for Communities is "effectively consulted on all issues of relevance to minority communities, and granted the opportunity to influence decision-making processes on issues that affect them."[236] In its opinion on Moldova, the ACFC notes that "most national minority representatives do not consider the Coordinating Council to be an important tool for ensuring that their views and concerns are effectively taken into account by the various levels of government."[237] Thus, it calls on the authorities "to ensure that national minority representatives are effectively consulted at central and local levels on all issues that concern them, not only those related to culture, and that their views are seriously taken into account during relevant decision-making processes."[238] With regards to Montenegro, the ACFC has urged the authorities to review legal provisions in order to address the problems with the politicization of minority councils and a factual lack of decision-making powers.[239] The authorities in Poland should ensure that ministerial decisions take opinions and recommendations of the Joint Commission fully into account.[240]

V. CONCLUSION

States have a wide margin of appreciation when developing a domestic legal framework on national minority rights, provided that this complies with the (vague) standards set out in the FCNM. In Europe, there is no unified model of a law on national minority rights, but some standards (good practices) have been developed, mainly due to the work of the Venice Commission and the ACFC. States can freely decide whether to adopt a comprehensive law on national minority rights or not, but the first option provides better guaranties of a coherent legal framework on national minority rights. For this to occur, it is important to clarify the relationship of the law on national minority rights with sectoral laws, with regards to both the hierarchy and the content of norms. The essence of national minority rights should be regulated in the law on national minority rights, without the possibility to be derogated with sectoral norms. The process of enacting the law on national minority rights should be inclusive, providing for both the national majority and national minorities to be

effectively involved and to have (joint) ownership over the process and the law. Although frequent amending of the law is not welcome, as it jeopardizes legal certainty, the approach should not be too rigid. If properly conducted, amendments can improve the implementation of the law and thus the quality of minority protection. Substantive provisions of the law should be clearly formulated, establishing national minority rights. Although vague proclamations are sometimes needed, the law should not pervert into a programmatic document. It should entitle persons belonging to national minorities, or in some cases national minorities as groups, with enforceable rights. Hence, education in/of minority language, use of minority language in communication with public authorities, participation of national minorities in public affairs, (just to name a few), should not depend on the good will of the authorities, but should rest on the rights proclaimed in the law. In this respect one should not neglect the importance of developed (institutional) mechanisms for the implementation of rights and their protection in case of a violation. Even a well formulated law on national minority rights cannot bring desired effects if there is not the sufficient capacity for its implementation and protection.

Notes

[1] "Ligj nr. 96/2017 'Për mbrojtjen e pakicave kombëtare në Republikën e Shqipërisë'", Fletorja Zyrtare e Republikës së Shqipërisë, No. 196/2017. In Albanian available at http://www.qbz.gov.al/botime/fletore_zyrtare/2017/PDF-2017/196-2017.pdf (retrieved on 3.12.2017)
[2] "Bundesgesetz über die Rechtsstellung der Volksgruppen in Österreich", BGBl. No. 396/1976, with several amendments, latest amended in 2013 (BGBL. 84/2013). In English available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1976_396/ERV_1976_396.pdf (retrieved on 25.10.2017)
[3] "Zakon o zaštiti prava pripadnika nacionalnih manjina", Sl. glasnik BiH No. 12/2003. In English available at https://advokat-prnjavorac.com/legislation/LAW_ON%20RIGHTS_OF%20NATIONAL_%20MINORITIES_BOSNIA.pdf (retrieved on 25.10.2017)
[4] "Ustavni zakon o pravima nacionalnih manjina", NN 155/02, 47/10, 80/10, 93/11. In English available at http://www.sabor.hr/the-constitutional-act-on-the-rights-of-national-m (retrieved on 25.10.2017)
[5] "Zákon o právech příslušníků národnostních menšin a o změně některých zákonů", 273/2001, amendments 320/2002 Sb. and 250/2016 Sb. In English available at http://www.legislationline.org/documents/action/popup/id/5851 (retrieved on 25.10.2017)
[6] "2011. évi CLXXIX. törvény a nemzetiségek jogairól", Magyar Közlöny 154/2011. In English avaialble at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF%282012%29014-e (retrieved on 25.10.2017)
7 "Legge n. 482/1999, 'Norme in materia di tutela delle minoranze linguistiche storiche'", Gazzetta Ufficiale n. 297/1999. In Italian available at http://www.camera.it/parlam/leggi/99482l.htm (retrieved on 25.10.2017)
8 "Ligji Nr. 03/L-047 për mbrojtjen dhe promovimin e të drejtave të komuniteteve dhe pjesëterëve të tyre në Republikën e Kosovës", Gazeta zyrtare nr. 28/2008. In English available at http://www.assembly-kosova.org/common/docs/ligjet/2008_03-L047_en.pdf (retrieved on 25.10.2017)
9 "Latvijas Republikas Likums Par Latvijas nacionālo un etnisko grupu brīvu attīstību un tiesībām uz kultūras autonomiju", Ziņotājs 21/22, 6.6.1991. In English available at http://www.minelres.lv/NationalLegislation/Latvia/Latvia_CultAut_English.htm (retrieved on 25.10.2017)
10 "Lege Nr. 382 cu privire la drepturile persoanelor aparţinînd minorităţilor naţionale şi la statutul juridic al organizaţiilor lor", Monitorul Oficial Nr. 107/2001. In English available at http://ecmi-epp.org/wp-content/uploads/2015/03/Moldova_LEGE_-Nr382_RUS.pdf (retrieved on 25.10.2017)
11 "Zakon o manjinskim pravima i slobodama", Sl. list CG 031/06, 051/06, 038/07, 002/11, 008/11, 031/17. Consolidated text in Montenegrin available at http://www.mmp.gov.me/biblioteka/zakoni (retrieved on 25.10.2017)
12 "Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym", Dz. U. 2005 nr. 17 poz. 141. In English available at http://ksng.gugik.gov.pl/english/files/act_on_national_minorities.pdf (retrieved on 25.10.2017)
13 "Zakon o zaštiti prava i sloboda nacionalnih manjina", Sl. list SRJ 11/2002, Sl. list SCG 1/2003, Sl. glasnik RS 72/2009, 97/2013. In English available at http://www.refworld.org/pdfid/43e756834.pdf (retrieved on 25.10.2017)
14 "Lag om nationella minoriteter och minoritetsspråk", SFS nr. 2009:724. In English available at https://rm.coe.int/168008bb67 (pp. 63-67) (retrieved on 25.10.2017)
15 "Закон України про національні меншини в Україні", ВВР 36/1992, 23/2013, 5/2014. In English available at http://www.minelres.lv/NationalLegislation/Ukraine/Ukraine_Minorities_English.htm (retrieved on 25.10.2017)
[16]"Vähemusrahvuse kultuuriautonoomia seadus", RT I 1993 71, 1001, RT I 2002, 53, 336, RT I 2002, 62, 376. In English available at https://www.riigiteataja.ee/en/eli/519112013004/consolide (retrieved on 25.10.2017)
[17] "Keeleseadus", RT I, 18.03.2011, 1 (with further amendments). In English available at https://www.riigiteataja.ee/en/eli/506112013016/ (retrieved on 25.10.2017)
[18] "Kohanimeseadus", RT I 2003, 73, 485 (with further amendments). In English available at https://www.riigiteataja.ee/en/eli/529052014008/consolide (retrieved on 25.10.2017)
[19] For example, the Act on the Sami Parliament (Laki saamelaiskäräjistä, 974/1995), the Sami Language Act (Samisk språklag, 1086/2003) or the Act on the Swedish Assembly in Finland (Lag om Svenska Finlands folkting, 1331/2003).
[20] "Закон за унапредување и заштита на правата на припадниците на заедниците кои се помалку од 20% од населението во Република Македонија", Сл. весник РМ 92/2008.
[21] "Zakon o samoupravnih narodnih skupnostih", Uradni list RS 65/94.

[22] "Zakon o posebnih pravicah italijanske in madžarske narodne skupnosti na področju vzgoje in izobraževanja", Uradni list RS 35/01.
[23] "Zakon o romski skupnosti v Republiki Sloveniji", Uradni list RS 33/07.
[24] "Gesetz zur Ausgestaltung der Rechte der Sorben/Wenden im Land Brandenburg", GVBI. I/94, [Nr.21]; "Gesetz über die Rechte der Sorben im Freistaat Sachsen", SächsGVBl. 7/1999.
[25] "Zákon o používaní jazykov národnostných menšín", Zákon č. 184/1999 Z. z.
[26] "Wet van 2 oktober 2013, houdende regels met betrekking tot het gebruik van de Friese taal in het bestuurlijk verkeer en in het rechtsverkeer (Wet gebruik Friese taal)", Staatsblad van het Koninkrijk der Nederlanden Nr. 382/2013.
[27] "Gesetz zur Förderung des Friesischen im öffentlichen Raum (Friesisch-Gesetz)", GVOBl. 481/2004.
[28] *See* the third Lithuanian State Report on the FCNM, ACFC/SR/III(2011)005 rev, p. 62. Available at https://rm.coe.int/168008b7cd (retrieved on 25.10.2017)
[29] *See* the fourth Opinion of the ACFC on Armenia, ACFC/OP/IV(2016)006, p. 2. Available at https://rm.coe.int/16806f7f70 (retrieved on 25.10.2017)
[30] *See* the fourth Romanian State Report on the FCNM, ACFC/SR/IV(2016)002, p. 11. Available at https://rm.coe.int/1680595fbf (retreived on 25.10.2017)
[31] "Minderheiten-Schulgesetz für Kärnten", BGBl. Nr. 101/1959 (with further amendments); "Minderheiten-Schulgesetz für das Burgenland", BGBl. Nr. 641/1994 (with further amendments).
[32] "Legge 23 febbraio 2001, n. 38, 'Norme a tutela della minoranza linguistica slovena della regione Friuli-Venezia Giulia'", Gazzetta Ufficiale n. 56/2001.
[33] "Zakon o nacionalnim savetima nacionalnih manjina", Sl. glasnik RS 72/2009, 20/2014 and 55/2014.
[34] In particular: the Albanian state report of 2016, the ACFC opinion on Armenia of 2016, the Austrian state report with the ACFC opinion both of 2016, the ACFC opinion on Azerbaijan of 2012, the State report of Bosnia and Herzegovina of 2016, the Croatian state report of 2014 with the ACFC opinion of 2015, the Hungarian state report of 2015 with the ACFC opinion of 2016, the Italian state report of 2014 with the ACFC opinion of 2015, the Lithuanian state report of 2016 and the earlier ACFC opinion of 2014, the Romanian state report of 2016 and the ACFC opinions of 2005 and 2012, the ACFC opinion on Serbia of 2013, and the ACFC opinion on Ukraine of 2013. All these state reports and the respective opinions of the ACFC are available online via https://www.coe.int/en/web/minorities/country-specific-monitoring (retrieved on 25.10.2017)
[35] "Thematic Commentaries of the ACFC", https://www.coe.int/en/web/minorities/thematic-commentaries (retrieved on 25.10.2017)
[36] "Commentary on Education under the Framework Convention for the Protection of National Minorities", ACFC/25DOC(2006)002. Available at https://rm.coe.int/16800bb694 (retrieved on 25.10.2017)
[37] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001. Available at https://rm.coe.int/16800bc7e8 (retrieved on 25.10.2017)
[38] "Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention", ACFC/44DOC(2012)001 rev. Available at https://rm.coe.int/16800c108d (retrieved on 25.10.2017)
[39] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001. Available at https://rm.coe.int/16806a4811 (retrieved on 25.10.2017)
[40] "Compilation of Venice Commission Opinions and Reports Concerning the Protection of National Minorities", CDL(2011)018. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)018-e (retrieved on 25.10.2017)
[41] *See* "Opinion on the Draft Law on Rights of National Minorities of Bosnia and Herzegovina", CDL-INF (2001) 12. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)012-e (retrieved on 25.10.2017).
[42] *See* "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-AD (2003) 9, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)009-e; "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-AD (2002) 30, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)030-e; "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-INF (2001) 14, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)014-e; (retrieved on 25.10.2017).

[43] *See* "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)011-e (retrieved on 25.10.2017)
[44] *See* "Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania", CDL-AD (2003) 13. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)013-e (retrieved on 25.10.2017).
[45] See "Opinion on the Draft Law on Amendments of the Law on Minority Rights and Freedoms of Montenegro", CDL-AD(2015)033, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)033-e; "Opinion on the Revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro", CDL-AD(2004)026, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)026-e (retrieved on 25.10.2017).
[46] *See* "Opinion on the Draft Law on the Statute of National Minorities Living in Romania", CDL-AD(2005)026, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)026-e (retrieved on 25.10.2017).
[47] *See* "Opinion on the latest version of the Draft Law Amending the Law on National Minorities in Ukraine", CDL-AD(2004)022, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)022-e (retrieved on 25.10.2017).
[48] CDL-AD(2008)013; available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)013-e (retrieved on 25.10.2017)
[49] CDL-AD(2007)001; available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)001-e (retrieved on 25.10.2017)
[50] CDL-AD(2005)009; available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)009-e (retrieved on 25.10.2017)
[51] CDL-INF (2001) 19; available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)019-e (retrieved on 25.10.2017)
[52] *See* Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, p. 13. Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e (retrieved on 26.10.2017)
[53] *See*, for example, formulations in the law in Bosnia and Herzegovina, the Czech Republic, Latvia, Serbia, or Sweden.
[54] *See*, for example, formulations in the law in Bosnia and Herzegovina or Serbia.
[55] Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 7 (point 27). Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)011-e (retrieved on 26.10.2017)
[56] *Ibid.*
[57] *Ibid.*
[58] Although the law is labeled as a constitutional law, in its legal nature it is not a constitutional law, but an organic law. *See* Article 15.2 and Article 83.1 of the Croatian Constitution. "Ustav Republike Hrvatske", NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.
[59] Articles 12 (1-3), 13 (1), and 22a, as well as Annexes 1 and 2.
[60] *See* Article 158 of the Hungarian Law on Nationalities.
[61] *See* the preamble of the Moldovan law on national minority rights.
[62] *See* Art. 81 of the Kosovo Constitution and Article 15.2. of the Law on the communities.
[63] Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 6 (point 24). Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)011-e (retrieved on 27.10.2017)
[64] *Ibid.*, p. 6, point 25.
[65] Venice Commission, "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-INF (2001) 14, p. 4. Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)014-e (retrieved on 27.10.2017)
[66] *Ibid.*, p. 5.
[67] Venice Commission, "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-AD (2002) 30, p. 5 (point 22). Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)030-e (retrieved on 27.10.2017)
[68] Venice Commission, "Opinion on the Constitutional Law on the Rights of National Minorities in Croatia", CDL-AD (2003) 9, p. 3 (point 8). Available at

http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)009-e (retrieved on 27.10.2017)

[69] *Ibid.*, point 10.

[70] Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 4 (point 10). Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)011-e (retrieved on 28.10.2017)

[71] MPs belonging to national minorities can be elected on general lists (as candidates of mainstream parties) or specific minority lists (as candidates of national minority parties) for which usually affirmative measures apply (reserved seats of lower thresholds). In this regard two issues may arise: the issue of representativeness and of the impact. When it comes to representativeness, more often than not, the MPs elected on specific minority lists are considered more genuine representatives of national minority interests than those elected via the mainstream parties. Even the ACFC is of the opinion, that "inclusion of minority representatives in mainstream political parties does not (…) necessarily mean the effective representation of the interests of minorities." ("Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001, p. 24, point 78). Usually, the argument is in the case of the former the party/political identity prevails over the minority identity. Yet, this has not always to be the case, to some extent it conflicts with the principle of self-identification and it wrongly implies the monopoly over minority issues (and interests) for minority representatives. Thus, no difference should be made among MPs belonging to national minorities if this contributes to open parliamentary debate and better visibility of national minorities in the enacting process. The issue of impact becomes relevant in the context when representatives of national minorities in parliament do not have a full parliamentary status. In such cases, they can observe the parliamentary work and possibly participate in the debates, but without a right to vote. Thus, they are not MPs in a full sense. Nevertheless, purely because of such a weaker status it would be reasonable to provide these representatives with stronger voice in the parliamentary debates (both in the committees and in the plenary) on draft laws concerning national minorities, bearing in mind their lack of the voting right in parliament.

[72] *See* Article 81 and Amendment 2 of the Constitution of Kosovo and Amendment X (2) of the Constitution of Macedonia.

[73] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 18, point 44. For a detailed elaboration on integration of diverse societies see: OSCE HCNM, "The Ljubljana Guidelines on Integration of Diverse Societies", 2012. Available at http://www.osce.org/hcnm/ljubljana-guidelines (retrieved on 28.10.2017)

[74] The intervention of constitutional court is limited to the annulment of the unconstitutional norms. It cannot make positive substantive changes, since these are in the exclusive competence of the legislator (parliament). However, the interpretation of the norms of the law by constitutional court can function as an informal amendment of the law.

[75] *See* the fourth Austrian State Report on the FCNM, ACFC/SR/IV(2016)001, p. 10-12, available at https://rm.coe.int/1680650fd1 and the Fourth Opinion of the ACFC on Austria, ACFC/OP/IV(2016)007, p. 3-4, available at https://rm.coe.int/168070f1e3 (retrieved on 28.10.2017).

[76] *See* the Fourth State Report of Bosnia and Herzegovina on the FCNM, ACFC/SR/IV(2016)007, p. 10. Available at https://rm.coe.int/16806d318e (retrieved on 28.10.2017)

[77] "Ustavni zakon o izmjenama i dopunama Ustavnog zakona o pravima nacionalnih manjina", NN 80/2010. For more details about the amendments of 2010 see the Fourth Croatian State Report on the FCNM, ACFC/SR/IV(2014)012, p. 11-13; available at https://rm.coe.int/1680094aa8 (retrieved on 28.10.2017).

[78] Two decisions in 2010, and one decision in 2011.

[79] Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 3.

[80] "Law no. 04/L-020 on Amending and Supplementing of the Law no.03/L-047 on the Protection and Promotion of the Rights of Communities and their Members in Republic of Kosovo", Official Gazette of Kosovo No. 2011/29.

[81] The law of 1991 has been annulled in the general process of annulment of laws which have not been adjust to the new Lithuanian legal order. See the third Lithuanian State Report on the FCNM, ACFC/SR/III(2011)005 rev, p. 62.

[82] The fourth Lithuanian State Report on the FCNM, ACFC/SR/IV(2017)004, p. 10. Available at https://rm.coe.int/16806f826c (retrieved on 28.10.2017)

[83] *See* the consolidated text of the law available at http://www.mmp.gov.me/biblioteka/zakoni, retrieved on 28.10.2017.

[84] *See* the third Opinion of the ACFC on Ukraine, ACFC/OP/III(2012)002, p. 12 (point. 35). Available at https://rm.coe.int/168008c6c0 (retrieved on 28.10.2017)

[85] *See* the fourth Ukrainian State Report on the FCNM, ACFC/SR/IV(2016)003, p. 8.

[86] *See* Venice Commission, "Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania", CDL-AD (2003) 13, p. 2 (point 4). Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)013-e (retrieved on 30.10.2017)
[87] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018. Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)018-e (retrieved on 30.10.2017)
[88] In addition to the term "national minority", the Polish law contains the term "ethnic minority" which refers to groups with no identity links with other state. However, the legal status of both is the same.
[89] Decision of the Serbian Constitutional Court of 5.12.2013, IUo-360/2009, Sl. glasnik RS, 61/2014.
[90] *See* Article 6.2 of the Statute of the Autonomous Province of Vojvodina, Sl. list AP Vojvodine, 20/2014.
[91] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 8.
[92] *Ibid.*
[93] *Ibid.*, p. 10.
[94] *Ibid.*
[95] *See* Article 3.1 of the Albanian law, Article 1.2 of the Austrian law, Article 3.1 of the Law of Bosnia and Herzegovina, Article 5 of the Croatian law, Article 2.1 of the Czech law, Article 1.1 of the Hungarian law, Article 1.4 of the Kosovo law, Article 1 of the Moldovan law, Article 2 of the Montenegrin law, Article 2.1 (2) and 2.3(2) of the Polish law, Article 2.1 of the Serbian law.
[96] *See* Article 170.1 of the Law, but also Article XXIX of the Hungarian Constitution. Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 8 (point 35).
[97] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 8.
[98] *Ibid.*, p. 6.
[99] Ibid., p. 7, 8, 9.
[100] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 13, point 30.
[101] *Ibid.*, p. 13, point 31. Emphasis added.
[102] *Ibid.*, p. 13, fn. 50.
[103] A positive exception is the Czech Republic which provided the Vietnamese with the national minority status.
[104] In Article 1.1 of the Hungarian law, the criterion is that a group is resident in Hungary for at least one century; in the Polish law, the criterion is that ancestors have been living on the present territory of the Republic of Poland for at least 100 years, Article 2.1 (5).
[105] Venice Commission, "Opinion on the Act on the Rights of Nationalities of Hungary", CDL-AD(2012)011, p. 8 (point 33).
[106] *Ibid.*
[107] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 6.
[108] *Ibid.*
[109] *Ibid.*
[110] *See* the third opinion of the ACFC on Bosnia and Herzegovina, ACFC/OP/III(2013)003, p. 11 (point 36). Available at https://rm.coe.int/168008c667 (retrieved on 30.10.2017)
[111] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p.13.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*, p. 10.
[116] *Ibid.* p. 9, 10.
[117] *Ibid.*, p. 9.
[118] *Ibid.*, p. 14.
[119] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 7, point 11.

[120] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 14.
[121] *Ibid.*
[122] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 7, point 10.
[123] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 14.
[124] *Ibid.*
[125] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 7, point 10.
[126] *Ibid.*
[127] Article 11.2 of the Hungarian law is interesting in this respect, as while providing the general prohibition of obligation to make declarations on national affiliation, it nevertheless acknowledges that such a declaration is needed for the exercise of certain minority rights.
[128] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p.15.
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid.*, p. 51.
[133] *Ibid.*
[134] *Ibid.*, p. 53.
[135] *Ibid.*, p. 13.
[136] *Ibid.*
[137] *Ibid.*
[138] "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 12, point 28.
[139] Just to mention few illustrative examples: Poles strive for recognition in Austria, Torbeshi in Macedonia, Silesians in Poland, Aromanians in Romania, Ruthenians in Ukraine.
[140] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 18.
[141] *Ibid.*, p. 16.
[142] *Ibid.*
[143] *Ibid.*, p. 18.
[144] *Ibid.*
[145] *Ibid.*
[146] Protected grounds of discrimination related to affiliation to national minority refer to national or ethnic origin, race, skin color, language, religion, and similar.
[147] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 19.
[148] *Ibid.*, p. 21.
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *See* for example Article 8.2 of the Constitution of Montenegro ("Ustav Crne Gore", Sl. list CG, 1/2007, 38/2013).
[154] *See* for example Article 9.2 (2) of the Croatian Anti-Discrimination Law ("Zakon o suzbijanju diskriminacije", NN 85/08, 112/12).
[155] *See* for example Articles 13-22 of the Austrian law, Articles 7-9 of the Italian law, Article 11 of the Montenegrin law, Article 9 (relevant are also Articles 10 and 11) of the Polish law, Article 11 of the Serbian law, Articles 8-16 of the Swedish law.
[156] *See* for example Article 11 of the Croatian law, Articles 22-43 of the Hungarian law, Articles 4-6 of the Italian law, Article 8 of the Kosovo law, Articles 13-19 of the Montenegrin law, Articles 13-15 of the Serbian law.
[157] *See* for example Article 11 of the Czech law, Article 17 of the Polish law, or Article 10.2 of the Latvian law.

[158] Illustrative in this respect is the formulation in Article 6.1 of the Moldovan law that the state should *create conditions* for the realization of the rights of the people belonging to national minorities to education in mother tongue.
[159] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 27.
[160] *Ibid.*, p. 33.
[161] *Ibid.*, p. 32.
[162] *Ibid.*
[163] "Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention", ACFC/44DOC(2012)001 rev, p. 17, point 53.
[164] *Ibid.*, p. 28, point 89.
[165] *Ibid.*
[166] *Ibid.*, p. 8, point 22.
[167] *Ibid.*, p. 18, point 55.
[168] *See* for example Annexes 1 and 2 to the Austrian law, which even have the constitutional status. *See* Article 6 of the Swedish law.
[169] *See* for example Art. 3 of the Italian law, Article 10 of the Polish law, or Article 7 of the Swedish law.
[170] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 29.
[171] "Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention", ACFC/44DOC(2012)001 rev, p. 18, point 55.
[172] *See* for example Article 12.1 of the Law of Bosnia and Herzegovina, Article 12.1 of the Croatian law, Article 6 of the Hungarian law, Article 11.2 of the Montenegrin law, or Article 11.2 of the Serbian law.
[173] *See* for example the third Opinion of the ACFC on Albania, ACFC/OP/III(2011)009, p. 6 (point 17); the fourth Opinion of the ACFC on Croatia, ACFC/OP/IV(2015)005rev, p. 7 (point 16); the fourth Opinion of the ACFC on the Czech Republic, ACFC/OP/IV(2015)004, p. 10 (point 25), the fourth Opinion of the ACFC on Hungary, ACFC/OP/IV(2016)003, p. 12 (point 30), the second Opinion of the ACFC on Montenegro, ACFC/OP/II(2013)002, p. 13 (point 49); the third Opinion of the ACFC on Serbia, ACFC/OP/III(2013)006, p. 14 (point 49). See also "Thematic Commentary No. 4: The Scope of Application of the Framework Convention for the Protection of National Minorities", ACFC/56DOC(2016)001, p. 9, point 18.
[174] "Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention", ACFC/44DOC(2012)001 rev, p. 18, point 57.
[175] *Ibid.*, pp. 18-19, point 57.
[176] *Ibid.*, p. 18, point 56.
[177] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 48.
[178] *Ibid.*
[179] "Commentary on Education under the Framework Convention for the Protection of National Minorities", ACFC/25DOC(2006)002, p. 20.
[180] *Ibid.*
[181] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 34.
[182] *Ibid.*
[183] *Ibid.*, p. 42.
[184] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001, p. 27, point 101.
[185] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 49.
[186] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001, p. 23, point 75.
[187] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 46.
[188] *Ibid.*
[189] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001, p. 23, point 76.

[190] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 47.
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*, p. 49.
[194] *Ibid.*, p. 54.
[195] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC(2008)001, p. 24, point 82.
[196] *Ibid.*
[197] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL(2011)018, p. 54.
[198] *Ibid.*, p. 55.
[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*, pp. 50, 51.
[202] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC (2008)001, p. 26, point 91.
[203] *Ibid.*, point 92.
[204] *Ibid.*
[205] *Ibid.*, point 93.
[206] *Ibid*, point 94.
[207] *Ibid.*, p. 31, point 121.
[208] *Ibid.*, point 122.
[209] *Ibid.*, point 123.
[210] *Ibid.*, p. 33, point 133.
[211] Venice Commission, "Compilation of Venice Commission Opinions and Reports concerning the Protection of National Minorities", CDL (2011)018, p. 37.
[212] *Ibid.*, p. 38.
[213] *Ibid.*, p. 38.
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC (2008)001, p. 33, point. 134.
[218] *Ibid.*
[219] In addition to the national minority councils, the Serbian law on national minority rights provides in Article 18 for the establishment of the Council for National Minorities, as a governmental body.
[220] The Austrian law regulates that only such persons can be appointed members of an ethnic group advisory board, who: are members of a general representative body and have been elected in consideration of their affiliation to the respective ethnic group or are members of such ethnic group; have been nominated by an association representing pursuant to the objective of their by-laws interests of ethnic groups and are representative for the respective group; or have as members of the ethnic group been nominated by a church or a religious denomination. Yet, according to the Opinion of the ACFC, "some 50% of the members are national minority representatives", whereas "the other 50% of members are made up of representatives of the various political parties and by church representatives, without any input from the national minority communities". See: Fourth Opinion on Austria, ACFC/OP/IV (2016)007, p. 29 (point 75). Available at https://rm.coe.int/168070f1e3 (retrieved on 5.11.2017)
[221] "Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs", ACFC/31DOC (2008)001, p. 29, point 107.
[222] *Ibid.*, point 109.
[223] *Ibid.*, point 111.
[224] *Ibid.*, point 113.
[225] *Ibid.*, point 115.
[226] *Ibid.*, point 116.
[227] *Ibid.*
[228] *Ibid.*, point 119.

[229] Third Opinion on Bosnia and Herzegovina, ACFC/OP/III(2013)003, p. 38 (point 161). Available at https://rm.coe.int/168008c667 (retrieved on 5.11.2017)
[230] Fourth Opinion on Croatia, ACFC/OP/IV(2015)005rev, p. 31 (point 87). Available at https://rm.coe.int/16806c268b (retrieved on 5.11.2017)
[231] Fourth Opinion on the Czech Republic, ACFC/OP/IV(2015)004, p. 27 (point 107). Available at https://rm.coe.int/1680684ff9 (retrieved on 5.11.2017)
[232] Third Opinion on Poland, ACFC/OP/III(2013)004, p. 34 (point 184). Available at https://rm.coe.int/168008c6a1 (retrieved on 5.11.2017)
[233] Fourth Opinion on Austria, ACFC/OP/IV(2016)007, p. 31 (point 78). Available at https://rm.coe.int/168070f1e3 (retrieved on 5.11.2017)
[234] Third Opinion on Bosnia and Herzegovina, ACFC/OP/III(2013)003, p. 39 (point 162).
[235] Fourth Opinion on Croatia, ACFC/OP/IV(2015)005rev, p. 31 (point 86).
[236] Third Opinion on Kosovo, ACFC/OP/III(2013)002, p. 46 (point 144). Available at https://rm.coe.int/168008c6c6 (retrieved on 5.11.2017)
[237] Fourth Opinion on the Republic of Moldova, ACFC/OP/IV(2016)004, p. 33 (point 92). Available at https://rm.coe.int/16806f69e0 (retrieved on 5.11.2017)
[238] *Ibid.*, p. 34 (point 94)
[239] Second Opinion on Montenegro, ACFC/OP/II(2013)002, p. 37 (point 197) in relation to p. 36 (p. 193). Available at https://rm.coe.int/168008c1ac (retrieved on 5.11.2017)
[240] Third Opinion on Poland, ACFC/OP/III(2013)004, p. 34 (point 182).

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