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State of human rights and democracy in Europe

Opinion¹

Committee on Rules of Procedure and Immunities

Rapporteur: Mr Jonas CEKUOLIS, Lithuania, Alliance of Liberals and Democrats for Europe

A. Committee conclusions

In connection with the Assembly's debate on the state of human rights and democracy the Committee on Rules of Procedure and Immunities wishes to draw the attention to two particular aspects: the representation of minorities and the rights of the opposition. Both issues have been the subject of committee hearings. The committee considers that in Council of Europe member states the political parties have a responsibility to ensure a fair minority representation in elected institutions, taking account of proportionality. There is no one formula to achieve this objective and a range of possible measures is described in this opinion. Ideally, affirmative action in favour of minorities should only be considered if the expected results at political level cannot be attained.

Concerning the rights of opposition in parliament recent constitutions and parliamentary rules of procedure in new democracies grant explicitly rights to the opposition (e.g. for a vice-presidency of the parliament). Another trend is to grant the opposition increasingly rights in connection with the setting-up of inquiry committees, the convocation of special sittings of the parliament and also to bring cases before the constitutional court. In some countries it is also proposed to give these rights to single oppositional parties or political groups particularly when they are faced with widely supported government coalitions. The committee also concludes that oppositional parties and their members cannot only claim for rights and means but should also show responsibility and willingness to use them and make their best efforts to enhance the efficiency of the parliament as a whole and not only to carry out their natural but perhaps insufficient role of criticism. However, also the parliamentary majority has the responsibility to respect the right of the minority to dissent the majority's opinion and to promote alternative policies.

¹ See Doc. 11203 tabled by the Political Affairs Committee and Doc. 11202 tabled by the Committee on Legal Affairs and Human Rights.

B. Explanatory memorandum, by Mr Jonas Cekuolis, Rapporteur

I. Introduction

1. Among the recent activities of the Committee on Rules of Procedure and Immunities two are relevant in connection with the Assembly's debate on the state of human rights and democracy in Europe to be held during the April 2007 part-session. They are:

- provisions concerning the representation of minorities and autonomous territories in national parliaments;
- the preparation of procedural guidelines on the rights and duties of the opposition in a democratic parliament.

2. In its paragraphs 62.3 and 62.4, the report of the Political Affairs Committee on the state of human rights and democracy in Europe (Doc.11203) mentions shortly both the opposition rights and ethnically based representation in parliaments.

3. The present draft opinion will propose elements for a Committee contribution to the debate.

II. Minorities in national parliaments

i. Participation of minorities in public affairs – from measures in the fields of education and employment to participation in decision-making

4. The recent history of Europe has been far from being a model of interethnic harmony and protection of minorities. All too often we have witnessed inter-ethnic hatred and violence. It is therefore not astonishing that the preamble of the Council of Europe Framework Convention for the Protection of the Rights of National Minorities underlines that the protection of minorities is essential to stability, democratic security and peace on the continent.

5. Minority rights are an integral part of fundamental rights and not, as in the remote past, privileges a State has bestowed to groups by its own choice, often under the pressure of a neighbouring kin state (see Cilevics in: Filling the Frame - Five years of monitoring the Framework Convention for the Protection of National Minorities, Council of Europe editions, 2004, p.29).

6. In the past, policies and practices which favour national minorities who have historically experienced disadvantages were mainly proposed in the traditional fields of education and employment. According to a report of the Venice Commission (see Doc. CDL-AD (2005) 009, par.8) the extension of the protection of minorities to their participation in the decision-making is a relatively late development.

7. Many experts consider that effective participation of national minorities in public life, including decision-making on issues directly affecting them:

- is one of the fundamental issues of democracy and a matter of good governance;
- will make it more likely that the rights of the minorities will be respected and interests accommodated.

8. The efforts for promoting political participation of minorities have been supported mainly by the work of International Organisations: OSCE (High Commissioner for National Minorities, Office for Democratic Institutions and Human Rights (ODIHR)), the Council of Europe (Venice Commission, Advisory Committee for the Framework Convention for the Protection of National Minorities, Parliamentary Assembly) and the United Nations. Their work (see the summary in appendix I) has been most helpful to cope with the situation in some newer democracies and post-conflict countries in Europe and to solve problems of so-called divided societies by taking measures in favour of national minorities. Some post-conflict countries in Europe were almost obliged to pass laws giving minorities special rights because of the lack of democratic tradition, undeveloped democratic institutions and to prevent problems with specific minorities.

9. However such measures have often raised questions of their need, practical usefulness, protectionism and implementation. Furthermore, the importance of legal rules should not be overestimated. The Venice Commission for example considers that the participation of minorities in public life through elected representatives results not so much from the application of rules peculiar to minorities as from the implementation of general rules of electoral law, adjusted if need be, to increase the chances of candidates from minorities (see Venice Commission, CDL-INF(2000) 004, conclusions). Furthermore, some experts (see e.g. the study by Professor Neidhart for the Committee (AS/Pro (2006)20)) consider that legal provisions need to be followed in step with change of political and social consciousness of relations between majority and minorities and with the development of a political culture. This will create the conditions for political affirmation of minorities and general inter-ethnic dialogue and tolerance.

ii. Modalities for ensuring representation of minorities and minorities' interests in Parliaments

a. General

10. On 29 September 2006 the Committee on Rules of Procedure and immunities organised a hearing on "The representation of autonomous regions and minorities in national parliaments". The reference to autonomous regions had been added, as some COE member States do not have national minorities but autonomous regions.

11. Minority participation in the parliamentary process may be promoted by several means which are related to the electoral process (including reserved seats in parliament), to political parties and to arrangements within parliaments. They will be summarized below.

b. Electoral process

12. One of the principal means used to develop participation of minorities in the decision-making is the electoral process. According to the Venice Commission (Doc. CDL-AD (2005) 9 par.16) action is taken mainly in the following areas:

- the electoral system in general (proportional or mixed system)
- the voting right (dual voting and special voters list)
- the numerical threshold
- the electoral districts (their size and form)
- reserved seats for minority representatives in parliament
- representation (over-representation)
- use of the national minorities language in the electoral process.

13. However, as already indicated, special measures for national minorities in the electoral process are often subject to criticism. They are sometimes said to lead to the discrimination of the majority. Therefore, the above-mentioned report of the Venice Commission underlines the need for action to be proportional to the real needs of the minority group in question and directed to providing means for achieving equal opportunities. Such action should be seen as a mechanism which does not establish privileges for minorities but effective rights that members of the majority already enjoy.

Electoral system, voters' lists, voting, threshold, size of electoral districts

14. In Slovenia members of the Italian and Hungarian ethnic minority have dual voting rights. They may vote for deputies from the Italian and Hungarian ethnic minorities and at the same time for ordinary candidates.

15. The number, size and form of electoral districts may be designed with the purpose to enhance the minorities' participation in the decision-making processes. This is for example the case in "the former Yugoslav Republic of Macedonia".

16. Some COE member States grant exemptions to threshold requirements so as to not affect the chances of national minorities to be represented in parliament. In Germany political parties representing minorities are not obliged to reach the threshold level of 5% for Bundestag elections.

However, this does not help them to obtain a seat at federal level as the minorities are not sufficiently important. In Poland the lists of election committees created by electors associated as registered organisations of national minorities are exempt from the threshold requirement.

Measures at the level of political parties

17. The creation of minority parties with a serious prospect of getting seats in parliament has produced important results in particular in Romania, Slovakia and in “the former Yugoslav Republic of Macedonia”.

18. Sometimes alliances are concluded between minority parties and/or major parties to ensure representation in parliament of the former. Another possibility (and probably the most convenient) is the inscription of candidates belonging to minorities on the list of major political parties which are likely to be represented in parliament. However, this is sometimes not easy as doubts are expressed if minority candidates have the necessary experience and chances to be elected. Voters not belonging to minorities may tend not to vote in favour of minority candidates. Because of this situation some minority activists are not in favour of engaging in a mainstream political party.

19. A recent example for strategic considerations of minorities regarding political parties was the campaigning for the Serbian parliamentary elections held in January 2007. The South East European Times of 27.11.2006 reported *inter alia* that the Sandzak Democratic Party in Serbia was in talks with other minority parties on the formation of a “List for Tolerance” which could campaign together with one of the major parties in Serbia, probably the Democratic Party. The Democratic Union of Croats in Vojvodina which could not gather the 10 000 signatures needed under the law on elections, wished to enter into a coalition with a major party, possibly the Democratic Party. The Democratic Union of Vojvodina Hungarians wished to bring all ethnic Hungarian parties together with a joint list. However this was not easy as one of these had already opted for an independent campaign.

20. Action in parliament of elected representatives of minorities will be facilitated if they can form a political group or join another political group. The Rules of Procedure of the Slovenian Chamber stipulate in Rule 29 that a political group may be formed by three deputies at least and that the two deputies of the Italian and Hungarian national communities together have the status of a political group.

21. The question has been raised if members of parliament representing minority parties (particularly those on reserved seats) have legitimacy to commit themselves in all fields of politics and need not limit themselves to activities linked to national minorities. In Germany the Federal Constitutional Court has in a judgment of 6 February 2005 clearly expressed itself for a broad mandate like for other members of parliament.

Reserved seats in parliament

General

22. The practice of reserving seats in parliament is quite old. In the Parliament of the Union between Scotland and England of 1707, 45 seats were reserved for Scotland. In general this method is used for electing representatives of identifiable minorities or communities. These representatives are often elected in much the same manner as other members of parliament. However, sometimes they are only elected by members of the particular minority or community designated in the electoral law.

23. Different views are expressed concerning today’s usefulness of reserving seats in parliament. Current practice shows that parliaments in very developed old democratic countries do generally not have a guaranteed ethnical representation. But reserving seats for minorities in parliaments can be an excellent means of ensuring a *modus vivendi* in a country with a special situation or marked by ethnical tensions and having problems of stability. It will then be used in connection with politico-constitutional arrangements especially to preserve a balance of power. Furthermore, as already indicated, there might be political pressure in divided societies or after a conflict to introduce reserved seats to ensure parliamentary representation of (small) minorities. But experts also hold that a

preferable strategy is to create an environment in the society which will lead to a representative parliament naturally, rather than through legal obligation.

24. A further question which arises is if guaranteed seats run counter the principle of equal suffrage. In the light of the "case-law" of the Advisory Committee for the COE Framework Convention and of Assembly positions this not the case. However, interestingly, the Constitutional Court of Montenegro has in a judgment of 11 July 2006 found unconstitutional a provision in the law on the Minorities' Rights and Freedoms that guarantees national minorities a certain number of seats in parliament. The grounds were that the Law contravened the principle of equality of all citizens as laid down in the Constitution.

25. The number of beneficiaries of reserved seats is clearly and sharply determined in the national legal texts. Moreover, the number of such seats is almost ever proportionally the same or lower than the number of minorities. This is seen as a proof that the original aspiration for such electoral rule is probably political. A problem is that in many countries the limited number of minority seats generally goes to candidates representing the largest minorities.

26. The presence in a medium-size parliament of one two or three members of a given minority will not guarantee as such a substantively better representation of that minority's interests. But this does not mean that such presence in parliament is meaningless. For a minority to occupy a reserved set in parliament:

- shows that the minority is relatively important;
- symbolises the minority as an essential part of a national electorate.

27. A better political representation of minorities has become an important factor in the international reputation of new democracies.

Reserved seats in parliament for ethnical minorities

28. The current situation with regard to reserved seats in the parliaments of COE member States is described in appendix II. They are provided for in the parliaments of Bosnia and Herzegovina, Croatia, Poland, Romania, Slovenia. Under the relevant electoral law reserved seats existed in the Montenegrin parliament until a judgement by the Constitutional Court of 11.7.2006 (see above paragraph 25). The Ahtisaari Plan for Kosovo proposes guaranteed representation of minorities in the Assembly.

Reserved seats in countries with several national communities

29. In countries with two or more national communities their proportional representation in national institutions is fixed in the national constitutions. This is relevant in at least three countries, in Belgium (for the Senate), in Cyprus and in Bosnia and Herzegovina. Also in the former State Union of Serbia and Montenegro the number of seats for respectively Serbia and Montenegro in the Union Parliament was fixed in the Constitutional Charter.

Autonomous regions and islands and their representation in parliaments

30. Sometimes in countries composed of islands or having territories enjoying autonomy, their institutional representation at national level, including national parliaments is foreseen.

31. Member states have opted for different solutions. In Portugal each of the country's two autonomous regions, the archipelagos of the Azores and Madeira, is an electoral constituency. In the 2005 elections Azores electors got five representatives (seats) and Madeira 6 seats in the Assembly of the Republic in Lisbon. According to the Spanish constitution Ceuta and Melilla are represented in the Cortes by one deputy and two senators each. Greenland and the Faroe Islands have each two guaranteed seat in the Danish Parliament. The Aland Islands have one seat in the Finnish parliament.

32. If there are such reserved seats in parliaments there is generally no proportionally higher and better representation of the respective population than in other boundaries.

A particular aspect: representation of minorities in international parliamentary Institutions via delegations of national parliaments

33. The possibility of the Hungarian minority in Romania to enter into the Parliamentary Assembly of the COE via a member in the Romanian delegation is an advantage of a major and well organised national minority. In this way matters affecting this minority may, when appropriate, be introduced in the work of the Parliamentary Assembly.

Over-representation in parliaments

34. In some national parliaments, territories or regions can be over-represented to facilitate the increased representation of minority groups. This is the case in the United Kingdom where Scotland and Wales have more MPs in the House of Commons than they would be entitled to if population size alone were the only criteria.

Measures taken at the level of national parliaments for cooperation with minorities or for taking into account their interests

35. In some parliaments particular arrangements have been made for cooperation with minority representatives and /or special bodies were created to deal with minorities. Furthermore, a double majority for the voting of laws affecting minorities has been introduced in some instances.

Minority committees in parliament

36. Committees especially in charge of minorities were set up mainly in the national parliaments of Slovenia, the Czech Republic, "the former Yugoslav Republic of Macedonia", Poland and Russia. A commission for the national minorities chaired by Italian and Hungarian minority representatives has been formed in the Slovenian National Assembly.

37. According to Article 78.1 of the Constitution of "the former Yugoslav Republic of Macedonia", the National Assembly shall establish a Committee for inter-Community Relations. Article 78.2 stipulates that the committee shall be composed by seven members each from the ranks of the Macedonians and Albanians within the national Assembly and five members from among the Turks, Vlachs, Romanies and two other communities. The five members each shall be from a different Community. If fewer than five communities are represented in the Assembly, the Public Attorney, after consultation with the relevant community leaders shall propose the remaining members from outside the Assembly. The committee considers issues of inter-community relations in the Republic and makes appraisals and proposals for their solution. The Assembly is obliged to take into consideration the appraisals and proposals and to take decisions regarding them. Some interesting remarks on the operation of this committee are to be found in the report on the post-monitoring dialogue with " the Former Yugoslav Republic of Macedonia" (AS/Mon (2007) 12).

Other forms of cooperation with minorities

38. Possibilities for direct regular communication between representatives of national minorities and the relevant parliamentary committees exist for instance in the Armenian Parliament and in the German Bundestag (in the form of a Round Table on minorities with Bundestag members). The committees of the Lithuanian parliament set up working groups for examining draft laws affecting the rights of minorities, in which the Council for National Minorities is represented. The Hungarian and the Slovenian parliament have instituted parliamentary commissioners for national minorities/national communities. In Romania groups of minorities represented in parliament cooperate closely.

Double majority system for adoption of laws affecting minorities

39. In certain parliaments (e.g. in "the former Yugoslav Republic of Macedonia") a double majority system is in force for the adoption of laws affecting minorities (cultural matters, use of languages, education, use of symbols). Such laws must obtain a majority in parliament but also a majority of the total number of representatives claiming to belong to the communities not in the majority of the Macedonian population (e.g. Articles 104, 109, 114, and 131 of the Constitution). This procedure also

applies to election of ombudsman, the members of the Judicial Council and for the change of provisions of the Constitution relating to minorities.

Observer status in parliament for religious groups

40. A particularity exists in Cyprus, where special religious groups have the right to elect their representatives to the House of Representatives who attend as observers and are consulted on religious and educational matters affecting their group.

Creation of special quasi parliamentary bodies for minorities (Sami parliaments)

41. In Finland, Norway and Sweden special representative bodies have been created for peoples of Sami heritage (Sami parliaments). They act mainly as autonomous institutions of culture (including the Sami language) for the indigenous Sami people. Furthermore, they are advisory bodies to the national parliaments and other state organs. But their opinions are not binding.

iii. Main findings (opinions) of the Advisory Committee for the Framework Convention concerning minority representation in Parliaments and resolutions adopted by the Committee of Ministers on the basis of these opinions

a. Work of the Advisory Committee

42. To fulfil any international obligations regarding participation of national minorities in public life, including electoral arrangements for parliamentary representation (e.g. under the COE Framework Convention) the States concerned enjoy a margin of appreciation (see e.g. opinion of the Advisory Committee on Hungary, 2000, par. 49). There does not exist one single specific mode of performance that must be applied by all states parties to the Framework Convention. Often a range of possibilities is available to them (see Mark Weller in: Five years of Monitoring the Framework Convention, Council of Europe editions, 2004, p.91).

43. The Advisory Committee for the Framework Convention has progressively developed its requests concerning institutional representation of minorities. It has

- first checked if Governments have met the targets they have themselves established (e.g. opinion on Hungary (2000, par.48) and Bosnia and Herzegovina (opinion of 2004, par.102) in their respective Constitutions and if not, recommended their implementation;
- then gone beyond simple implementation of targets and commitments and recommended positive measures in terms of the electoral system to bring minorities in the decision-making process;
- after having noted deficiencies in the current system asked for positive action (e.g. adequate measures to increase representation (opinion on Bulgaria 2004, par.136) or to take inspiration from other countries' practice to solve a particular difficulty (opinion on Hungary 2004, par.111) or underlined the usefulness of specific means (e.g. Councils for minorities in the Czech Republic (2001, par.71) or the Liaison Committee with the German minority in Denmark (2004, par.154);
- tried to make sure that reforms do not lead to a lower level of protection than that already enjoyed (opinion on Lithuania, 2003, and Resolution CMN (2003) 11 of the Committee of Ministers).

44. In several opinions the Advisory Committee has welcomed that seats are reserved in parliament for minorities (e.g. opinion on Finland, 2006, par.159) or explicitly noted that national minorities do not enjoy as such a formal representation in some parliaments (e.g. Czech Republic, 2001, par.71; Denmark, 2004, par.154).

45. The Advisory Committee has also recommended to several countries to improve political participation of Roma (Germany, Slovakia, Slovenia, Spain, and "the former Yugoslav Republic of Macedonia") or travellers (Ireland, Switzerland).

46. In its opinion on Croatia (2001, par.65) the Advisory Committee has made comments concerning the allocation of reserved seats in Parliament. It has proposed that Croatia should seek to improve further its legislation and practice concerning the parliamentary representation of national minorities and eliminate any imbalance and undue limitations that exist in this respect.

47. Moreover, the Advisory Committee has tried to improve the quality of the participation of minorities in political life. It is aware of the fact that all too often the voice of minorities is weak or ignored. They mainly often complain that they hardly have an influence on decision-making (e.g. the Hungarian and Italian minorities in Slovenia). The Advisory Committee has therefore invited, for instance, Slovenia to identify ways that the Italian and Hungarian minorities are able to voice better their expectations concerning legislation concerning them (opinion on Slovenia, 2005, par.168).

b. Work of the Committee of Ministers of the COE

48. Few of the 50 resolutions which the Committee of Ministers has adopted so far on the implementation of the Framework Convention by the contracting parties refer directly to parliaments and political representation of minorities. Resolution CMN (2001)4 considers that more effective efforts are necessary to implement legal norms to ensure the representation of national and ethnic minorities in the Hungarian parliament. The authorities of Bosnia and Herzegovina are invited by Resolution CMN (2005) 3 of the Committee of Ministers to consider developing specific parliamentary mechanisms to better protect the interest of national minorities.

49. Concerning participation in elections the Committee of Ministers has recommended with respect to Cyprus that the impossibility for Turkish Cypriots to cast a vote in elections should be addressed (Resolution CMN (2002)3). Furthermore, the Committee of Ministers has encouraged dialogue between the Committee on Rights and Interests of Communities of the Kosovo Assembly and the relevant Government Ministries (Resolution CMN (2006)9).

50. Some Resolutions of the Committee of Ministers concerning the implementation of the Framework Convention underline major difficulties e.g. in the Kosovo “where inter-ethnic violence has seriously eroded trust between communities” (see Resolution CMN (2006) 9 on Kosovo (Republic of Serbia)). With respect to “the former Yugoslav Republic of Macedonia” the Committee of Ministers has observed that the fostering of mutual understanding and intercultural dialogue remains vital to the future social cohesion in the country. The prevention of interethnic tensions and the elimination of the significant barriers between the different communities need constant attention. The interaction between the different components of society needs to be further encouraged particularly in the sphere of education, where individuals’ knowledge of the languages spoken in their region could be promoted (see Resolution CMN (2005)4).

III. Remarks by the rapporteur

51. Proposing a “one size fits all model” concerning representation of national minorities or of their interests in the parliaments of the 46 COE member States is not possible. It is preferable to give expression to specific values and interests of national minorities in a differentiated manner in accordance with the variety of situations to cope with.

52. There are cases like Kosovo, Bosnia and Herzegovina, where the Parliamentary Assembly, the Advisory Committee for the Framework Convention and the Committee of Ministers of the COE have acknowledged the weight of the past, the risk of tensions etc. In further member States the political culture (often still to be created), different traditions in one and the same country, the existence of two or more communities of almost the same size and the need to ensure proportionality or parity among them may create special situations requiring special solutions. Furthermore, flexibility is required for adopting variable approaches to situations which are similar but different in some countries.

53. In the COE member States the political parties have a responsibility to ensure a fair minority representation in elected institutions, taking into account of proportionality. There is no one formula to achieve this objective and a range of possible measures has been described above (see paragraphs 18 to 22). Ideally, affirmative action in favour of minorities should only be considered if the expected results at political party level cannot be attained.

54. The rapporteur does in particular not favour guaranteed representation of ethnic minorities in parliaments. He considers that this is a very particular formula and he would rather encourage minorities to participate actively in general political parties. Also the report by Mr Gross on the state of democracy in Europe underlines that one standard of a strong democracy is the absence of ethnical-based representation in parliament (Doc.11 203, par.62.4). The only exception should be to allow the lowering of numbers /percentage for parties to entering parliament. The afore-mentioned report by Mr Gross proposes a level of no higher than 3 % as a standard for a “stable” democracy. Furthermore, certain measures could usefully be taken within parliaments to facilitate dealing with important minorities matters and favouring their consultation of the minorities concerned (see above paragraphs 36, 38). It is also necessary to avoid in all circumstances that electoral boundaries are designated to deliberately exclude or under-represent a national minority.

55. The rapporteur has also reservations with respect to the appropriateness of minority parties. They are outside the classical political system. In any case deputies of minority parties should obey to the same rules as the all other deputies.

56. It could be useful to prepare cooperation programmes of the Parliamentary Assembly with interested parliaments on how representatives of the minorities should participate in national political parties in the decision-making process in general.

57. Moreover it might finally also be noted that whereas the OSCE/ODIHR regularly takes into account for its reports on the observation of parliamentary elections in Europe questions of minorities, this is generally not the case for the Parliamentary Assembly's corresponding reports.

58. Finally, the rapporteur should like to recall that in its Resolution 1527 (2006), paragraph 7, the Assembly has considered that the ultimate objective of policies towards minorities is the cohesion of society and inter-ethnic coexistence based on respect for diversity and a system of rights, obligations and responsibilities negotiated in a rational and constructive spirit by those directly concerned.

IV. Rights of the opposition in parliament

i. The relevance of the right to form an opposition in the plans for the building of a united Europe

59. For the founding fathers of the COE the role of the opposition was of fundamental importance for a functioning democracy. At the Congress of The Hague (May 1948) which gave the decisive political impetus for the creation of the COE Sir Anthony Eden, who later became Foreign Minister and Prime Minister of the UK, claimed for laying down standards to which a state must obey if it is to deserve the name of democracy. According to Eden a state should in no circumstances be entitled to be called democracy unless it does in fact and in law guarantee to its citizens liberty of thought, assembly and expression as well as the right to form a political opposition. Furthermore, it was proposed in The Hague that European Convention on Human Rights (ECHR) should contain a political clause worded as follows: "Every state party to the ECHR undertakes faithfully to respect the fundamental principles of political democracy and in particular (...) to take no action which will interfere with the right of political criticism and the right to organize a political opposition."

60. Astonishingly, both proposals were only partly followed up. The ECHR contains in its first additional protocol, Article 3, the following text with a quite limited scope: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

61. Although the idea of a declaration on the criteria of a genuine democracy has been pursued in the COE for many years, no such text was finally adopted by the Committee of Ministers. However, the Assembly has prepared several reports on that issue.

62. Unfortunately, the fundamental European texts of the EU and also those of the OSCE do not mention the opposition or political parties. The only exception is the Copenhagen document of the OSCE which refers to political parties in its paragraph 5.4.

ii. The COE contribution to the work of parliamentary opposition

63. The European Court of Human Rights has in many cases dealt with questions concerning parliamentary privilege (immunity) e.g. judgments of 17.12.2002 (A. v. the UK) and of 30.01.2003 (Cordova v. Italy), elections and electoral laws, e.g. judgment of 05.04.2007 (Kavakci, Silay and Ilıcak v. Turkey) and other matters involving legal issues concerning parliaments or parliamentarians e.g. judgment of 27.09.2001 (Demicoli v. Malta), decision of 24.01.2006 (Marchiani v. France). Also the European Commission for Democracy through Law of the COE has increased its activities on legal issues involving parliaments, including the rights of the opposition. In March 2007 it adopted a preliminary opinion on the Ukrainian draft law on the parliamentary opposition (Doc. CDL-AD (2007) 015).

64. The elaboration of a law on the opposition (e.g. Portugal and Ukraine) is quite exceptional. Some of the essential findings of the opinion of the Venice commission are

- the opposition is an inherent component of any democratic political system and its undisturbed functioning is of vital importance;
- the legal status of the opposition varies greatly from country to country; the concrete solutions concerning the status of the opposition are determined by the constitutional framework, the electoral system and historical, political, social and cultural factors;
- even if it is difficult to identify common European standards there is at least a general requirement to provide the parliamentary opposition with fair procedural means and guarantees;
- the introduction of an "Opposition Day", during which the opposition is entitled to set the agenda, enables the opposition to have an increased influence on parliamentary work.

65. As a contribution to cooperation programmes with certain new democracies in Eastern Europe, the Committee on Rules and Procedures and Immunities has organized a hearing on the role of opposition in a democratic parliament in Stockholm on 10 December 2004. Conclusions of the hearing were prepared (AS/Pro (2006) 33) and as a follow-up a report is under preparation on procedural guidelines on the rights and duties of the opposition in a democratic parliament (AS/Pro (2006) 3). The hearing underlined *inter alia* that the main function of the opposition in a working democracy is to offer a reliable alternative to the ruling party (parties); in the more advanced democracies the politics of the opposition correspond sometimes to a logic of conflict and sometimes to a logic of cooperation, of influencing the policy-making process

66. Parliamentary opposition issues regularly play a role in the Assembly's monitoring procedures. Several passages of the report on the post-monitoring dialogue with "the Former Yugoslav Republic of Macedonia" (Doc. AS/Mon (2007) 12) deal with the parliamentary opposition in that country, e.g. the insufficient co-operation between the government and the opposition (par.13), the need for new rules of procedure, including rights of the opposition (par.21). Resolutions 1358 (2004) and 1398 (2004) on the functioning of the democratic institutions in Azerbaijan refer to the threats against and the ill-treatment of the opposition in that country. Resolution 1505 (2006) concerning the challenge of credentials of the parliamentary delegation of Azerbaijan refers to the boycott of elections in that country by some opposition parties. In par.18 (ii) of Resolution 1456 (2005) on the functioning of democratic institutions in Azerbaijan the Assembly proposes training seminars for parliamentarians, including the rights of the opposition. Assembly Resolution 1361 (2004) on honouring of obligations and commitments by Armenia proposes to involve the opposition in the discussions about the future democratic institutions in Armenia. In Resolution 1374 (2004) on the same issue the Assembly calls upon the Armenian authorities and the opposition to abstain from every action which may lead to further violence. Resolution 1465 (2005) on the functioning of the democratic institutions in Moldova encourages the Moldovan leadership to accompany all declarations in favour of democratic values and standards with real dialogue and transparency in relation with the opposition. In its Resolution 1280 (2002) on the same subject the Assembly underlines that the opposition has rights that must be honoured. It encourages a revision of the parliamentary rules of procedure in order to widen the opposition rights. In Resolution 1303 (2002) on the functioning of the democratic institutions in Moldova the Assembly invites the Moldovan authorities to involve the opposition in the discussions on the law on the national public broadcasting company and in the parliamentary activities concerning any forthcoming constitutional reform.

iii. Some new developments

67. Areas where further progress could be made are to grant the opposition the chairmanship of parliamentary committees which are competent for the monitoring of the government's action. Furthermore it is proposed (e.g. in Germany) to replace existing relatively high quorums (25%, 33%), for the exercise of important opposition prerogatives (request for setting-up of inquiry committees, convocation of special sittings of the parliament, etc.) by guaranteeing these rights to individual opposition parties.

68. Increasingly, constitutions and parliamentary rules of procedure of new democracies explicitly grant opposition rights (e.g. for a vice-presidency of the parliament).

69. Further information and comparative details on opposition rights in parliaments will be given in the report by Mr Van Overmeire on the rights and duties of the opposition in a democratic parliament.

C. Proposed amendments on behalf of the Committee

Amendment No. 1

In the draft resolution (part II – The state of democracy in Europe), after paragraph 73, to insert a new paragraph worded as follows:

“The Assembly also recalls that since the beginning of European integration the right to form a political opposition has been considered to be an essential element of genuine democracy. It notes that the opposition in parliament is increasingly granted rights in connection with the setting-up of inquiry committees, the convocation of special sittings of parliament and the possibility to bring cases before the Constitutional Court. In some countries it is also proposed to give these rights to single opposition parties or political groups. Opposition parties and their members cannot only claim for rights and means but should also show responsibility and willingness to use them and make their best efforts to enhance the efficiency of the parliament as a whole. They should not only carry out their natural, but perhaps insufficient, role of criticism. However, the parliamentary majority also has the responsibility to respect the right of the minority to disagree with the majority’s opinion and to promote alternative policies. “

Amendment No. 2

In the draft resolution (part II – The state of democracy in Europe), after paragraph 76, to insert a new paragraph worded as follows:

“In the Council of Europe member states the political parties have a responsibility to ensure a fair minority representation in elected institutions, taking into account proportionality. There is no one formula to achieve this objective and a range of possible measures is available.”

APPENDIX I

INTERNATIONAL TEXTS ON EFFECTIVE PARTICIPATION OF MINORITIES IN PUBLIC LIFE
AND WORK OF THE VENICE COMMISSION AND THE PARLIAMENTARY ASSEMBLY

i. International texts

1. A number of provisions in Treaties or other texts adopted at the level of International Organisations explicitly deal with participation in public life. These are mainly the Framework Convention for the Protection of National Minorities of the COE, the CSCE/OSCE Copenhagen document of 29 June 1990, the so-called Lund recommendations of 1999, article 27 of the (UN) International Covenant on Civil and Political Rights as determined by the UN Human Rights Committee's General Comment No.23.

2. Article 15 of the COE's Framework Convention is worded as follows: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."

3. The explanatory report to the Framework Convention contains the following passage: "In order to create the necessary conditions for such participation by persons belonging to national minorities, Parties could promote - in the framework of their constitutional systems - *inter alia* the following measures: (...) effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels. An Advisory Committee assists the Committee of Ministers which is monitoring the implementation of the Convention.

4. On the occasion of the hearing organised by the Committee on Rules of Procedure and Immunities on 29 September 2006 a very comprehensive compilation by the Advisory Committee for the Framework Convention of its opinions/observations and recommendations on Art.15 of the Convention was distributed. Furthermore the committee secretariat received a compendium with all resolutions adopted by the Committee of Ministers on the implementation of the Framework Convention on a country by country basis.

5. The so-called "Lund recommendations" adopted in September 1999 following an initiative of the OSCE High Commissioner on National Minorities, include the following provision: (see part II, par.6) " States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government , including through special arrangements as necessary. These may include depending upon the circumstances special representation of national minorities for example through a reserved number of seats in one or both chambers of parliament or in parliamentary committees and other forms of guaranteed participation in the legislative process. On the basis of the pertinent Lund recommendations OSCE/ODIHR has prepared guidelines to assist national minority participation in the electoral process (2001). These guidelines contain an addendum III on "Integrating minority issues into ODIHR election observation", together with an annex 1 on "National minority issues and observation techniques".

6. In November 2003 OSCE has adopted an action plan on improving the situation of Roma and Sinti within the OSCE area. Its section VI on enhancing participation in public and political life includes the following paragraph 96: "Encourage the representation of Roma and Sinti people in elected and appointed office at all levels of government."

7. Concerning the United Nations (UNO) the rapporteur should like to limit himself to mentioning that UNO has elaborated a declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities and that since some time a draft UN declaration on the rights of indigenous people is under preparation. Article 2 paragraph 3 of the declaration on minorities reads as follows: "Persons belonging to minorities have the right to participate effectively in decisions on the national (...) level concerning the minority to which they belong (...), in a manner not incompatible with national legislation."

ii. Summary of the Venice Commission's work

8. In January 1993 the Venice Commission discussed a report on the participation of persons belonging to national minorities in the operation of democratic institutions (CDL-MIN (93) 2). It develops interesting general considerations on the relationship between democracy and minorities:

- majoritarian democracy is only concerned with citizens individually in their relationship to the State; its instruments and the "rule of law" can be used for assimilating national minorities and hence imposing uniformity on the national political society; this rules out any distinction based on ethnic criteria;
- the numerical basis for majoritarian democracy has to be adjusted when the latter is applied in a heterogeneous national society;
- to this end a set of institutional mechanisms and arrangements has to be established in deeply divided societies to enable a *modus vivendi*;
- this is based on the principle of the search for a balance between the constituent parts of a national society, in the form of power-sharing;
- voting systems allowing for minority representation have at least to major disadvantages; it is difficult to export them outside the specific situations to which they apply; they all involve a risk of isolating minority groups from national political life;
- territorial autonomy can help national minorities to be taken into account in states which do not recognise the heterogeneity of their national society but which practise governmental and administrative decentralisation.

9. In January 2000 the Venice Commission published a report on electoral law and national minorities (CDL-INF (2000) 4). Its main conclusions are

- the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body; other elements also have a bearing such as the choice of political candidates by the political parties and, obviously, voters' choices which are only partly dependent on the electoral system; the concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society and, above all its numerical size;
- the participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the minorities as from implementation of general rules of electoral law, adjusted if need be, to increase the chances of success of the candidates from such minorities.

10. In July and October 2002 the Venice Commission adopted guidelines and an explanatory report on elections (code of good practice in electoral matters, see CDL-AD (2002)23)). These guidelines also contain a section on minorities.

11. In March 2005 the Venice Commission adopted a report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries (CDL-AD (2005)9). This report analyses the situation in thirteen countries and its main conclusions are:

- parties representing national minorities must be permitted
- special rules guaranteeing national minorities reserved seats or providing exceptions to the normal seat allocation criteria for parties representing national minorities do not in principle run counter to equal suffrage
- electoral thresholds should not affect the chances of national minorities to be represented
- electoral districts (number, size, form, magnitude) may be designed with the purpose to enhance the minorities' representation in the decision-making processes.

12. A report of the Venice Commission on second chambers in Europe – parliamentary complexity or democratic necessity, of November 2006 (CDL (2006) 059 rev) notes that "in considering the composition of second chambers, insufficient attention has been paid to the possibility they offer of representing groups whose presence in the lower house is limited or non-existent." The report then gives examples of seats set aside in certain second chambers for particular categories of the population such as women, visible minorities etc.

13. Finally, in December 2006 the Venice Commission has published a report on non-citizens and minority rights (CDL-ADC (2007) 001).

14. In its many expertises on draft electoral laws the Venice Commission has on several occasions referred to minority representation in parliaments.

iii. The main activities of the Parliamentary Assembly

15. The Assembly has since 1949 tried to promote the inclusion in the European Convention on Human Rights (ECHR) of an article concerning the protection of minority rights. However, this was not accepted by the Committee of Ministers. The Assembly has then dealt with specific minority concerns (such as minority languages, media aspects, freedom of religion and conscience ...) and also with specific minority situations (situation of Jews in the Soviet Union, freedom of religion in Eastern Europe ...).

16. In the 90s following the changes taking place in Europe, the Assembly addressed the issue of international standard-setting with new impetus. An important initiative was the adoption of its Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the ECHR. It was accompanied by a draft protocol which proposed *inter alia* to give minorities the right to set up their own organisation including political parties. Assembly Recommendation 1492 (2001) on rights of national minorities recognises that the majority has obligations to the minority and, on the other hand, the minority has the responsibility to participate in the political and public life of the country in which it lives and to contribute along with the majority to the democratic cohesion and pluralism of the states to which it has offered its allegiance. In Recommendation 1623 (2003) on the rights of national minorities the Assembly has invited the Parties to the Framework Convention “ to pay particular attention to ensure parliamentary representation of minorities.”

17. A full description of the Assembly’s work concerning minorities until the end of 2002 is to be found in chapter 8 of the book “Minority Rights in Europe, Council of Europe publishing, 2004, by Thornberry and Martin Estebanez.

18. In June 2004 a motion for a resolution was tabled on “Electoral rules and affirmative action for national minorities’ participation to the decision-making process in the European countries”. However, it was not followed up by the preparation of a draft report for the Assembly but led to a study by the Venice Commission of the COE (CDL-AD (2005) 9).

19. The minority rights issue always played an important role in connection with requests for membership and monitoring procedures (see in this connection also the afore-mentioned book by Thornberry/Martin Estebanez, chapter 9). The most recent case is the request for membership of the Republic of Montenegro. The preliminary draft opinion to the Committee of Ministers proposes seven minimal principles to be included in the constitution, which were already accepted by the highest Representatives of Montenegro. They comprise the need to provide at least for the same level of protection of human rights and fundamental freedoms as the one provided for in the Charter on human and minority rights of Serbia and Montenegro, including rights of minorities. In its paragraph 52 the Charter lists minority rights. They include the right of members of national minorities to a certain number of seats in the Assembly of the member state concerned and in the Assembly of the State Union, based on the principle of direct representation in accordance with the laws of the member state.

20. It is also to be noted that in the last months the Assembly adopted texts on the rights of national minorities in Latvia (Recommendation 1772 (2006) and Resolution 1527 (2006)). Its Committee on Legal Affairs and Human Rights is currently considering the situation of national minorities in Vojvodina and of the Romanian minority in Serbia.

iv. Initiatives of the Congress on Local and Regional Authorities of the COE

21. In 1998 the Congress has adopted Recommendation 43 on territorial autonomy and National Minorities.

22. The Congress is currently preparing a Conference on the role of the second Chamber or similar structures representing the regions of the member states, to be held in 2008. It is possible that in connection with this conference the representation of minorities in second Chambers may be raised.

APPENDIX II

GUARANTEED SEATS IN NATIONAL PARLIAMENTS FOR ETHNIC MINORITY REPRESENTATIVES

1. The following information is available:

- **Bosnia and Herzegovina:** the electoral law stipulates that from the 58 delegates to the House of Peoples seven will be elected by others, i.e. neither from Serbs nor from Bosnians' or Croats, in other words guaranteed seats for members of national minorities (see the report of the Venice Commission, Doc. CDL-AD (2005) 9 pp 7/8). The Advisory Committee noted that none of the seven "other" members in the 2004 elections came of the correct category of "others".
- **Croatia:** adoption of the constitutional law on the rights of the minorities has improved the representation of persons belonging to national minorities in parliament, by increasing the number of guaranteed seats and by including also national minorities not mentioned in the constitution in to ensure the scheme for guaranteed representation. Art19 para.2 of that law is worded as follows: "members of national minorities elect no less than five and no more than eight of their representatives in special election constituencies, pursuant to the law by means of which the election of representatives to the Croatian Parliament is being regulated....". Paragraph 3 reads " To the members of national minorities that in the total amount of population of the Republic of Croatia participate with more than 1,5 % one seat is being guaranteed and maximum three representative seats of members of this particular national minority, pursuant to the act...". Paragraph 4 reads "Members of national minorities that in the total amount of population of the Republic of Croatia participate with less than 1,5% have the right to elect four representatives of their members pursuant to the act by means of which the election of representatives to the Croatian Parliament is regulated."
- **Kosovo (Serbia):** the (revised) Ahtisaari plan for the Kosovo status settlement of 7 March 2007 proposes to give members of the communities clear role in the decision-making processes in Kosovo, including guaranteed representation in the Assembly; it remains to be seen if and how the plan will be implemented
- **Montenegro:** according to the Minority Rights Act reserved seats existed until the above-mentioned judgment of the Constitutional Court of 11 July 2006; minority parties comprising between 1 and 5% of population were under the terms of that law allocated one seat in the parliament and parties comprising over 5 % of population would be allocated three seats; it remains to be seen how the Minority Rights Act revised in the light of the judgment of the Constitutional Court will tackle the question of minority representation in parliament
- **Poland:** two seats are reserved in the Sejm for the German minority under the current electoral law.
- **Romania:** right to parliamentary representation is guaranteed in constitution and electoral legislation. Following the last parliamentary elections minorities are represented in both houses of parliament , namely one parliamentary group of the Democratic Union of Hungarians and a parliamentary group of all other minorities comprising members of the 18 other Organisations of Minorities (Czechs and Slovaks have one Joint Organisation).
- **Slovenia:** The Hungarian and Italian minorities enjoy direct representation within the National Assembly (each one seat) and have a right of veto on certain laws.

2. It is to be noted that in **Hungary** the Constitution and the law of 1993 on the rights of national and ethnic minorities provide in general terms for the possibility of minorities to be represented in parliament. However this has not been implemented through the adoption of the relevant legislation.

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