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## MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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DEMOCRACY, POLITICAL PARTICIPATION, AND NATIONAL MINORITIES: A LEGAL ANALYSIS OF THE RIGHT TO POLITICAL PARTICIPATION OF INDIVIDUALS BELONGING TO NATIONAL MINORITIES

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**Abstract for Master's Thesis**

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Title of the Thesis: DEMOCRACY, PUBLIC PARTICIPATION, AND NATIONAL MINORITIES: A LEGAL ANALYSIS OF THE RIGHT TO POLITICAL PARTICIPATION OF NATIONAL MINORITIES
<p><b>Abstract:</b></p> <p>Political participation lies at the heart of democracy. It is also a guaranteed right in international human rights law. The fundamental importance of the right of individuals to participate in the political life of their state is based on the axiomatic presumption that it gives agency to individuals to influence public decisions which can significantly affect their lives.</p> <p>Individuals who belong to national minority groups are in a different position regarding the exercise of the right to political participation. Such difference is important for two main reasons. Firstly, the marginal position or numerical weakness of national minorities makes it essential to consider the role of structural impediments on the way of exercising their right to political participation. Secondly, the preservation of cultural identity intensifies the importance of the access of national minority groups to forums of public decision-making to be able to protect their cultural interests when public decisions affect them.</p> <p>The present thesis examines where international human rights law stands regarding political participation of national minorities. The research with a legal approach explores different aspects of the right to political participation of national minorities with a focus on the Council of Europe instruments. In this regard, the right to political participation of national minorities can be studied based on three essential criteria developed by the European Court of Human Rights. Those are first, indirect discrimination, second, the idea of the effectiveness of the exercise of rights, and third, the principle of pluralist democracy.</p> <p>Although states do not have a legal obligation to adopt a more favourable approach to political participation of national minorities, based on the criteria mentioned above the research reveals that the core content of the right to political participation of national minorities is that national minorities should be represented and heard when public decisions in some way affect them.</p>

Keywords: Right to political participation, national minorities, decision-making, democracy, cultural, Human Rights Committee, FCNM, ECHR.	
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The state does not oppose the freedom of people to express their particular cultural attachments, but nor does it nurture such expression [...]

Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights

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## **List of Acronyms**

ACFC	Advisory Committee of the Framework Convention for the Protection of National Minorities
CSCE	Conference on Security and Cooperation in Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
GC	General Comment
HCNM	OSCE High Commissioner on National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
OSCE	Organisation for Security and Cooperation in Europe
ICJ	International Court of Justice
P1.3	Article 3 of Protocol No. 1 of the ECHR
PCIJ	Permeant Court of International Justice
UN	United Nations





## 1. Introduction

### 1.1. Background

Article 21 of the Universal Declaration of Human Rights states that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”<sup>1</sup> Further, it states that “the will of the people shall be the basis of the authority of government.”<sup>2</sup> Some years later than the proclamation of UDHR in 1948, the final text of the European Convention on Human Rights concluded in Rome embraces the notion of democracy in its preamble, which highlights the importance of democracy concerning the protection of human rights and fundamental freedoms as enshrined in the Convention. The preamble of the Convention states, “[...] fundamental freedoms which are the foundation of justice and peace in the world [...] are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.”<sup>3</sup>

What comes to mind from the provisions mentioned above of the machinery of human rights is that the idea of political participation is a safeguard to ensure that a government has legitimacy and subsequently respects and protects the human rights of individuals. The authority exercised by the government is derived from the political will of people through their chosen representatives. However, the fact that diverse groups live in society might lead to a situation that a group which constitutes the majority take hold of the fate of public decision-making. In such a situation under the principle of majoritarian decision-making, the chance of influence of national minority groups who are marginal due to the difference in lifestyle and numerical inferiority will become reduced. In a situation like this, minority groups will lose their capability to follow their interests and affect decisions within the legally recognised political institutions. Furthermore, the lack of participation in the course of decision-making can have significant negative impacts on the cultural right of minority groups as a guaranteed right within the framework of international human rights law. In other words, the lack of public participation by members of national minority groups can foster the ground for assimilation and elimination of ethnic, cultural differences. Therefore, the protection of lifestyle and other culture-related aspects of national minority communities require

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<sup>1</sup> Universal Declaration of Human Rights, 1948, Article 21.1

<sup>2</sup> Ibid

<sup>3</sup> ECHR, entered into force 3 September 1953, preamble.

a degree of political control over the matters which affects their cultural identity and their special lifestyle.

In this regard, a genuine democracy endorses the protection of minorities through their participation in the decision-making institutions of the state. In this respect, the requirement of the will of the people,<sup>4</sup> as the legitimising force of democratic governance, necessitates the political participation of every citizen to reflect his will. Presumably, the will of the people cannot be limited exclusively to a group which constitutes the majority. The concept of pluralism as an essential component of genuine democratic governance requires that diverse group identities, such as cultural identities of national minorities, be included in political institutions of the state. Therefore, the reflection of the will of people as the essential objective for democratic governance should allow for the reflection of the will of numerically weak groups that constitute national minority groups to include their perspectives in the course of national decision-making.

In light of the importance of public participation of national minorities in the public affairs, the main research question of this inquiry is: What is the content of the right to public participation for national minorities in the context of international law? Therefore, the thesis will examine the content of the relevant international law norms on the human right to political participation of individuals belonging to national minorities and its significance for the preservation of minorities' cultural identity.

## **1.2. Research Methodology and Research Sources**

The method used in this research project is the legal dogmatic method. The thesis attempts to reflect on minorities' political participation within the limits of legal provisions and overarching principles of international law to find relevant standards of international law and evaluate their applicability to the main research problem. The research will be primarily based on *lex lata* for examining the content of legal rules pertaining to the research problem. In this regard, the primary sources used in this inquiry are primary sources of international law, including international conventions, international custom, general principles of international law, and judicial decisions.<sup>5</sup>

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<sup>4</sup> ICCPR, entered into force 23 March 1976, Article 25.b; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 18 May 1954, 1954, Article 3.

<sup>5</sup> For enumeration of the sources of international law see Statute of the International Court of Justice, 1946, Article 38.

The research will examine the standards developed within the UN system and the regional system of the Council of Europe (hereinafter CoE). There are three main reasons behind the idea of choosing the European regional system in this thesis. Firstly, the European Court of Human Rights provides us with extensive case law related to political participation, democracy, and pluralism, which let us conduct a legal analysis on firm ground. Secondly, within the European context, a minority-specific approach emerged by the development of Framework Convention for the Protection of National Minorities (hereinafter FCNM) that is an unprecedented achievement internationally, because it is a legally-binding convention equipped with a monitoring body mandated to issue country-specific opinions and thematic commentaries. Last but not least, the colourful ethnic composition of Europe, especially in the Eastern and Southeastern part of the continent, makes it a proper context for the study of matters related to minority rights.<sup>6</sup>

### **1.3. The Use of Hard and Soft Law Sources**

Except for the FCNM adopted by the CoE, there is a lack of legally-binding instruments which specifically deal with the rights of minorities in a specific manner. There are, however, other instruments which deal specifically with minority rights but are soft law sources of international law with no legally-binding effect.

The body of general hard law sources of international law contains scattered legal rules, which can serve the protection of individuals who affiliate themselves with minority groups. The hard law sources, including conventions, case law, and authoritative interpretations provide us with a handful of useful provisions for the protection of minority rights and their right to political participation.

The soft law sources such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities concluded by the UN General Assembly and the Lund Recommendations on the Effective Participation of National Minorities in Public Life adopted by the OSCE High Commissioner on National Minorities, draw upon the existing international law

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<sup>6</sup> Schneckener, Ulrich, Senghaas, Dieter, "In Quest of Peaceful Coexistence – Strategies in Regulating Ethnic Conflicts". *Radical Ethnic Movements in Contemporary Europe*, edited by Daftary, Farimah, and Troebst, Stefan, New York: Berghahn Books, 2003, p. 166; see also Dunay, Pal, "Nationalism and Ethnic Conflicts in Eastern Europe: Imposed, Induced or (Simply) Reemerged". *Human Rights in Eastern Europe*, edited by Pogany, Istvan, Aldershot: Edward Elgar, 1995, p. 21.

standards.<sup>7</sup> Thus, although soft law sources produce no legal obligation, they may contain more developed interpretations of existing hard law sources. In other words, utilising these sources by the present author is limited to the aim of shedding light on the content of general and universally applicable provisions of human rights treaties regarding minorities. In this respect, the Conference on Security and Cooperation in Europe adopted the Helsinki Final Act in 1975 marked the beginning of a series of international political efforts. The adoption of a series of documents, such as 1989 Concluding Document of the Vienna Meeting and 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, although lacking a legally-binding status, signified the importance of human rights, democracy and protection of minorities especially after the collapse of the Soviet Union.<sup>8</sup> The aforementioned documents not only introduce a new valuable perspective on the issues of minority rights especially after the adoption of the Copenhagen Document but are also relevant sources of soft law in the European context, because the Organization for Security and Cooperation in Europe (OSCE) includes all the 47 member states of the CoE (by April 2019). Also, according to the opinion of the International Court of Justice in *Nicaragua v. the US*, certain commitments contained in OSCE/CSCE documents, such as respect for human rights and protection of minorities, especially those which are coupled with states treaty obligations, can be regarded as an expression of *opinio juris* regarding member states' support of a rule.<sup>9</sup>

#### **1.4. Definitions**

There are two concepts in this inquiry which should be defined due to their central role: public participation and democracy. It should be noted that these proposed definitions are not meant to distinguish between public participation and democracy; they are only meant to frame the definition of these concepts in the context of the present inquiry.

##### **1.4.1. Public Participation**

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<sup>7</sup> CSCE/OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, September 1999, para. 2.

<sup>8</sup> CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, preamble

<sup>9</sup> *Nicaragua v. United States of America*, International Court of Justice (ICJ), judgement of 27 June 1986, paras, 188-189, 264

Participation in literal sense means taking part, involvement, contribution, or engagement in a project. Public as an adjective means something that is shared, collective, and open to all and is non-exclusive. A simple definition that captures the spirit of the term in the context of this inquiry is the definition introduced by the International Association for Public Participation which defines public participation as, “the belief that those who are affected by a decision have a right to be involved in the decision-making process.”<sup>10</sup>

Public participation of minorities encompasses different areas ranging from casting a vote in periodic elections or standing as a political candidate in parliamentary elections to the employment of persons with minority background in the public sector, such as police forces or the judicial system. Although public participation is not exclusively pertained to participation in the decision-making bodies of the state in the context of this paper public participation means the participation of minorities in national or local decision-making processes through exercising political rights. Therefore, the term public participation will be used as an equivalent of political participation. The present author will utilise both public participation and political participation interchangeably to avoid repetition.

#### **1.4.2. Democracy**

Perhaps the most well-known definition of democracy is the definition given by Abraham Lincoln, who defines democracy as, “Of the people, by the people, for the people.” This definition is, however, a limited definition that does not capture the kind of meaning of democracy in the context of international human rights law as a guaranteed right with specific characteristics.

There are different models of democracy in the world. Nonetheless, the fundamental feature of democratic governance is that the source of authority is the will of the people and that everyone is considered equal for exercising the right to political participation. Democracy, as a form of governance, in the context of international law, can be best defined by listing its fundamental characteristics. In this respect, the former UN Commission on Human Rights provides a list of characteristics of a democratic government as follows:

Respect for all human rights and fundamental freedoms, inter alia, freedom of association and of peaceful assembly, freedom of expression and opinion, and the right to take part in the conduct of public affairs,

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<sup>10</sup> “IAP2 Core Values.” *International Association for Public Participation*, [www.iap2.org/page/corevalues](http://www.iap2.org/page/corevalues), Accessed 14 September 2018.

directly or through freely chosen representatives, and to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability [...].<sup>11</sup>

Three essential elements of democracy can be inferred from this definition. First, respect for all human rights, second, respect for the right to participation in the political life of the state and third, respect for pluralism.<sup>12</sup> Therefore, democracy in this thesis means a kind of government which, *inter alia*, its source of authority is derived from the will of people, respects pluralism in the sense of enabling different voices other than that of the majority population to be heard, and protects human rights of everyone.<sup>13</sup>

### **1.5. A Theoretical Analysis of Public Participation**

After the thirty year war in Europe and the conclusion of the Treaty of Westphalia in the 17<sup>th</sup> century, the concepts of state sovereignty and nation-state came into being in their modern sense. The questions related to who the sovereign is and what qualities does the sovereign have in relation to its subjects became more prominent in the works of the Enlightenment philosophers in the 17<sup>th</sup> and 18<sup>th</sup> centuries. In this respect, because states in the modern sense are built in relation to the concept of the nation,<sup>14</sup> it is essential to examine how sovereignty as the cornerstone of the modern state can be translated in the background of democratic governance. In fact, outlining the most important ideas pertaining to political participation is beneficial for a robust understanding of the right to political participation as a guaranteed right in international human rights law.

The Enlightenment philosophers, such as Jean-Jaques Rousseau, considered the idea of popular sovereignty as a translation of equal participation in political life by individuals. Rousseau believed that the only legitimate authority is the authority exercised by people and the sources of enacted laws should reflect the collective will of the people. He stated, “[...] sovereignty, being nothing but the exercise of the general will, can never be alienated, and that the sovereign power, which is,

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<sup>11</sup> Commission on Human Rights, Human Rights Resolution 2005/32: Democracy and the Rule of Law, 19 April 2005, E/CN.4/RES/2005/32, para. 1.

<sup>12</sup> Ibid

<sup>13</sup> Ibid. As can be seen, all the mentioned characteristics are interrelated and it is difficult to isolate each one of the essential characteristics of democracy without impairing other characteristics.

<sup>14</sup> Mac Laughlin, Jim. *Reimagining the Nation-State: The Contested Terrains of Nation-Building*, 2001, pp. 10-13.

in fact, a collective being, can be represented only by itself [...]”.<sup>15</sup> Rousseau believed that the declaration of the collective will, “[...] is an act of sovereignty and constitutes law [...]”.<sup>16</sup> In the Rousseauian idea of popular sovereignty, the source of sovereignty resides in individuals who constitute the collective will through which laws are enacted.<sup>17</sup> Therefore, the legislator as the body for enacting laws borrows its legitimacy from individuals’ collective will and, “the people, being subjected to the laws, should be the authors of them [...]”.<sup>18</sup>

Immanuel Kant, the 18<sup>th</sup>-century philosopher in the *Grounding for the Metaphysics of Morals*, contended that the foundation for moral action is autonomy.<sup>19</sup> Kant argued that an action is moral only when a rational being acts in accordance with his autonomous will. Therefore, when a rational being acts due to external coercion, such an act cannot be regarded as a moral act. Consequently, the laws demanding respect cannot be deemed as respecting the autonomous will of a rational being if they fail to respect the autonomous will.

Kant’s argument in his ethical philosophy has essential implications for the idea of political participation of members of national minorities. He believes moral action in society is discernible only when individuals subject to the law are themselves the legislator of that law.<sup>20</sup> He argued:

[...] every rational being as an end in himself (the idea of human dignity), must be able to regard himself with reference to all laws to which he may be subject as being at the same time the legislator of universal law, for just this very fitness [...] the legislation of universal law distinguishes him as an end in himself, as well as every other rational being, as being legislative being.<sup>21</sup>

Therefore, the laws which do not result from participation of individuals in the process of legislation are heteronomous laws meaning that such laws are in the form of external coercion and do not result from the will of autonomous rational beings.<sup>22</sup> In other words, if any law is to be

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<sup>15</sup> Rousseau, Jean-Jacques. *The Social Contract and The First and Second Discourses*, edited by Dunn, Susan, 2002, p. 170.

<sup>16</sup> Ibid, p. 171.

<sup>17</sup> Ibid, pp. 178-180.

<sup>18</sup> Ibid, p. 180. See also Althusius, Johannes. *Politica Methodice Digesta*. Translated by S. Carney, Frederick, 1995, p. 71. Althusius, a 16 and 17<sup>th</sup> century political philosopher also argues that the sovereignty of state is vested in people and the only limit for this sovereignty and enacted laws is divine or natural law (*lex divina et naturalis*). In the secular context of contemporary international law we should understand people sovereignty as against majority despotism and natural law in the sense of human rights rules.

<sup>19</sup> Kant, Immanuel. *Ethical Philosophy*, translated by W. Ellington, James, 1994, pp. 38-39

<sup>20</sup> Ibid, p. 43.

<sup>21</sup> Kant, Immanuel. *Ethical Philosophy*, translated by W. Ellington, James, 1994, p. 43.

<sup>22</sup> Ibid, pp. 42-43, 45.



considered as respecting the principle of autonomy of the will and thus human dignity of persons who are subjected to the law it should meet the requirement that “the will of every rational being is [...] bound to the rule [law] as a condition.”<sup>23</sup> In this regard, Kant seems to believe that the subjects of law should have the chance of being included in the formation of the law; otherwise, the law is a heteronomous law disregarding the autonomy of the will.

Kant, in his essay called *Principles of Politics*, in a similar manner to Jean-Jacques Rousseau, contends that the laws should be enacted only through the participation and consent of the people. He argued, “every legislator [...] shall enact such laws as might have arisen from the united will of a whole people, and it will likewise be binding upon every subject, [...] so that he shall regard the law as if he had consented to it of his own will.”<sup>24</sup>

Jürgen Habermas, the contemporary German philosopher, argues, “Authority exercised by the state cannot dispose over naked repression and it must be anchored in the form of the fair legal order.”<sup>25</sup> This means that state authority should be exercised through law and the legitimacy of law is based on the legitimacy of legislative authorities, i.e., the legitimacy of the law depends on the legitimacy of the sources that enact the law.<sup>26</sup> In this regard, the allocation of rights and duties through a democratic procedure results typically in recognized legal norms.<sup>27</sup> Such legal norms are not coercive, and everyone despite possible disagreements can agree on the fairness of a legal rule enacted through this process.<sup>28</sup> Therefore, in a democratic system of governance sovereignty as the ultimate authority in a state is vested in law,<sup>29</sup> which borrows its legitimacy from people who directly or indirectly through their representatives participate in the process of law-making.

The ability of citizens to participate in decision-making constitutes the core of the legitimacy of a legal rule in a democratic state in which, “only those norms can be valid that meet with the approval

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<sup>23</sup> Kant, Immanuel. *Ethical Philosophy*, translated by W. Ellington, James, 1994, p. 44.

<sup>24</sup> Hayden, Patrick. *The Philosophy of Human Rights*. 2001, p. 116. For this quotation I have relied on a condensed, reprinted part of the Kant’s *Principles of Politics* in the aforementioned source.

<sup>25</sup> Habermas, Jürgen. *The Theory of Communicative Action: Vol. 2, Lifeworld and System: A Critique of Functionalist Reason*. 1989, p. 188.

<sup>26</sup> See Lagerspetz, Erik, "Collective Intentions, Legislative Intents, and Social Choice". *Pluralism and Law*, edited by Soeteman, Arend, 2001, p. 375.

<sup>27</sup> Habermas, Jürgen. *The Theory of Communicative Action: Vol. 2, Lifeworld and System: A Critique of Functionalist Reason*. 1989, p.188.

<sup>28</sup> Habermas, Jürgen. *The Theory of Communicative Action: Vol. 2, Lifeworld and System: A Critique of Functionalist Reason*. 1989, p.188.

<sup>29</sup> See Wade, H. W. R. “The Basis of Legal Sovereignty.” *The Cambridge Law Journal*, vol. 13, issue. 2, November 1955, p. 189.

of all affected in their capacity as participants.”<sup>30</sup> In this regard, although the participatory aspect of the legitimacy of a rule is a necessary condition for democratic governance, it is not a sufficient one in the sense that the consequences of an enacted law should be within certain limits that they are not grossly against the essence of human rights and interests of certain individuals, such as persons belonging to national minorities. In other words, enacted laws should be in everyone’s interests,<sup>31</sup> and if laws aim to be in everyone’s interests, they should be enacted through a procedure which allows for those affected to influence the result of the outcome of the decisions in the legislature, that presumably include national minorities as well.

Habermas, following the same line of thought as Rousseau and Kant, contemplates democratic governance as a form of governance where subjects of the law (individuals) can affect the law-making process.<sup>32</sup> However, such participation should not merely be restrained to those individuals who constitute the majority of the population. As Sanford Levinson argues, almost all nations in the world host in some way national minority groups and it is difficult to argue any state is homogeneous.<sup>33</sup> Thus, in this background, persons who identify themselves as belonging to a national minority community might have different values and interests. Such a difference in cultural identity intensifies the need to participate in political life as national minorities to protect their cultural identity and interests.

Hanna Arendt also examines the importance of political participation for cultural identity in her theory of public space.<sup>34</sup> Arendt interprets political participation as a way to enable those individuals whose identities are different from those of the majority to be seen and heard.<sup>35</sup> Arendt illustrates the importance of public participation by an interesting analogy. She states:

The poor [...] feels himself out of the sight of others, groping in the dark. Mankind takes no notice of him. He rambles and wanders unheeded. In the midst of a crowd, at church, in the market [...]. He is in as much

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<sup>30</sup> Habermas, Jürgen. *Moral Consciousness and Communicative Action*. 1990, p. 66.

<sup>31</sup> Ibid, p. 65.

<sup>32</sup> Habermas, Jürgen. *Moral Consciousness and Communicative Action*. 1990, p. 66. See *Sitaropoulos and Giakoumopoulos v. Greece*, European Court of Human Rights, Judgement of 15 March 2012, application no. 42202/07, para 61.

<sup>33</sup> Levinson, Sanford. "Constitutional Democracy in Crisis?" *YouTube*, uploaded by Harvard Law School, 19 October 2018, [www.youtube.com/watch?v=yiFq2HC2q0E](http://www.youtube.com/watch?v=yiFq2HC2q0E). Speech by Levinson given in a panel hosted by Harvard Law School Library, accessed 05 April 2019

<sup>34</sup> d'Entrèves, Maurizio Passerin. *The Political Philosophy of Hannah Arendt*, 1993, pp. 139-143.

<sup>35</sup> Ibid, pp. 46-47.

obscurity as he would be in a garret or a cellar. He is not disapproved, censured, or reproached; he is only not seen.<sup>36</sup>

Enabling national minorities to have a political voice should be the function of a genuine plural democracy which recognises the right of everyone to have a share of influence in the final result of public decisions.<sup>37</sup> As Hannah Arendt explains, “people who are deprived of human rights are deprived, not of the right to freedom, but of the right to action [...]”<sup>38</sup> Therefore, the inclusion of voices of national minority groups is a fundamental characteristic of a plural democracy. In this regard, political participation as the heart of democratic governance becomes instrumental for preserving minorities identities by which the flow of influence of individuals who identify themselves as belonging to national minorities moves toward the state authority in a way that enables them to protect their identity.<sup>39</sup>

To conclude, one can argue that in a democratic context, states borrow their legitimacy from the inclusion of people. If this inclusion falls short of including political voices of national minority groups, the legitimacy of the state concerning the members of those minority groups will become impaired. It can be inferred from the thoughts of philosophers, such as Kant, Rousseau, Habermas, and Arendt is that the political voices of national minorities should be protected to enable individuals who belong to national minorities to regard themselves, like the majority of the population, both as subjects and creators of the laws.<sup>40</sup>

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<sup>36</sup> Arendt, Hannah. *On Revolution*, 1963, p. 69.

<sup>37</sup> See Arendt, Hanna. *The Human Condition*, 1958, p. 50. See also Arendt, Hannah. *The Origins of Totalitarianism*. 1994, pp. 296-297. Arendt thinks that the exclusion of Jews in Nazi Germany was not based on depriving them of their natural rights, but quite differently, it was based on the distortion of their appearance in public life and their ability for social communication which made the natural rights claims of Jews unfruitful. Similarly, it can be argued that it would not be possible for a national group to enjoy its human rights and freedoms and preserve its identity against assimilation without having a voice in the processes of public decision-making.

<sup>38</sup> Arendt, Hannah. *The Origins of Totalitarianism*. 1994, p. 296.

<sup>39</sup> See Rawls, John. *A Theory of Justice*. 1973, pp. 60-65. The fundamentality of public participation is also reflected in Rawls' theory of justice. Rawls develops his theory of justice by drawing upon two principles that any just society needs to recognise, firstly, all rights and liberties are guaranteed to everyone to the most extensive possible. Secondly, inequalities shall satisfy two conditions: first, the inequalities are attached to positions open to all under the condition of equality of opportunity and second, they are to be to the greatest benefit of the most disadvantaged members of the society. The first principle of Rawls' theory of justice indicates that in an original position individuals come together to agree on a set of goals with the condition that their competence to participate in public affairs to secure their rights and interests is recognised. It is through the recognition of public participation that individuals acquire the ability to protect their interests.

<sup>40</sup> Kant, Immanuel. *Ethical Philosophy*, translated by W. Ellington, James, 1994, p. 43.

## 2. Minority: Definition and Recognition

### 2.1. Objective and Subjective Criteria

The term ‘minority’ has no definition in international law. Even minority-specific instruments, such as FCNM adopted by the CoE, lack a definition of the term minority, and it is left to states to decide who the right-holders of the catalogue of minority rights are. As a result of the wide discretion afforded to states, several member states of FCNM, such as Estonia, Austria, Poland, Luxemburg, and Germany have declared unilaterally their understanding of to whom the term national minority applies.<sup>41</sup> The wide discretion of states in the determination of who belongs to a national minority group is indicative of the disagreement among states in this matter. Nonetheless, one of the widely cited definitions of the term ‘minority’ among legal scholars is the definition proposed by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the term minority. Capotorti defines minorities as:

[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>42</sup>

It should be born in mind that Capotorti definition is a proposed definition and lacks any legal status. The lack of consensus on the definition of minority, however, runs the danger of undermining the protection of minorities. In the context of the present thesis, although not all minority groups can be competent for the exercise of public participation based on their minority status, it seems that states are not entirely free in refraining from affording minority status to minority groups if such minorities exist on their territory.

There are several indicators to grip the essence of a definition of minority for the purpose of the right to political participation. Although there is no international consensus on the definition of minority, the existence of minority groups can be determined by using two criteria of subjective and objective criteria. On the one hand, objective criterion refers to the question of the actual

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<sup>41</sup> Thiele, Carmen, "Minorities and Minority Rights in Europe". *Human Rights in Europe: A Fragmented Regime*, edited by Brosig, Malte, 2006, p. 126.

<sup>42</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Religious and Linguistic Minorities, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, 1979, para. 568.

existence of minorities as a distinct, identifiable group with solid cultural or historical roots. On the other hand, subjective criterion refers to self-identification of individuals who identify themselves as belonging to a group which has different cultural characteristics to that of the majority population and wants to be recognised according to such cultural identity by others.

The objective criterion for the recognition of a minority community is a question of fact. According to Max Van Der Stoel, the former CSCE/OSCE Higher Commissioner on National Minorities, “even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one.”<sup>43</sup> In this regard, the Permanent Court of International Justice (PCIJ) in its Greco-Bulgarian Communities advisory opinion held:

[...] the community is not a creation of the local law but has an existence in fact, its dissolution is also a question of fact; this dissolution has not to be pronounced ' by any competent body, as might possibly be the case if the community itself had been constituted and recognized in accordance with some local law.<sup>44</sup>

Similarly, in the Secretary-General Memorandum on the definition and classification of minorities, the term minority is interpreted in the strict sense of the existence of a national community that “differs from the predominant group in the state.”<sup>45</sup> In this respect, the first part of the Capotorti definition which refers to a, “group numerically inferior,” refers to the objective criterion.<sup>46</sup> Thus, there should be a community, and that community should be different from the majority of the population in terms of ethno-racial characteristics. The distinctiveness of characteristics of a community and the desire to preserve those characteristics is also reflected in the PCIJ opinion. The Court stated:

[...] a group of persons living in a given country or locality, having a race, religion, language and tradition of their own and united by this identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, [...] and rendering mutual assistance to each other.<sup>47</sup>

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<sup>43</sup> Von Der Stoel, Max, “*Address given in CSCE Human Dimensions Seminar Case Studies on National Minority Issues: Positive Results*”, 24 May 1993, Warsaw.

<sup>44</sup> Permanent Court of International Justice, Greco-Bulgarian Communities (Advisory Opinion No. 17), Series B, No. 17, 31 July 1930, p. 28.

<sup>45</sup> Definition and Classification of Minorities, UN Doc. E/CN.4/Sub.2/85, 27 December 1949, para37.

<sup>46</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Religious and Linguistic Minorities, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, 1979, para. 568.

<sup>47</sup> Permanent Court of International Justice, Greco-Bulgarian Communities Advisory Opinion, Series B, No. 17, 31 July 1930, p. 33.

Further, the Court states, “The existence of communities is a question of fact; it is not a question of law.”<sup>48</sup> In lights of the PCIJ explanation, both subjective and objective criteria shall be satisfied to determine the existence of a minority community. The existence of a, “sentiment of solidarity,” can be deemed as the subjective criterion, which refers to a sense of self-awareness among individuals who identify themselves as belonging to a minority community.

The subjective criterion, as stated in the ACFC Thematic Commentary No. 4 on the scope of application of the FCNM, refers to self-identification as a decisive point when an individual decides whether to avail him/herself to the protection of the convention or not.<sup>49</sup> The requirement of self-identification “based on good faith and not for gaining an advantage”<sup>50</sup> can be conceived as the subjective criterion by which individuals wish to be recognised as belonging to a national minority.

The UN Human Rights Committee in its GC No. 23 states, “the existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that State party but requires to be established by objective criteria.”<sup>51</sup> In this regard, the response of some states to Capotorti definition of the term minority might be relevant regarding the question to whom the term minority can be attributed. For instance, the Netherlands and Greece emphasised the established and distinctive characteristic of national minorities, because otherwise, “every country would be composed of minorities within the meaning of Article 27.”<sup>52</sup> Therefore, the objective criterion should accompany the subjective criterion for determination of the existence of a minority group.<sup>53</sup> This can be for example the existence of a national minority community concentrated in a territory, which has a traditional lifestyle or a dispersed community that its members utilise a common language or a religion that differs from that of the majority population.

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<sup>48</sup> Permanent Court of International Justice, *Greco-Bulgarian Communities Advisory Opinion*, Series B, No. 17, 31 July 1930, p. 28.

<sup>49</sup> ACFC, *Thematic commentary No. 4: The scope of application of the Framework Convention for the Protection of National Minorities*, adopted 27 May 2016, ACFC/56DOC (2016)001, para. 9.

<sup>50</sup> *Ibid*, para. 10.

<sup>51</sup> UN Human Rights Committee, *General Comment No. 23*, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 5.2.

<sup>52</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Religious and Linguistic Minorities, Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, 1979, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 31.

<sup>53</sup> ACFC, *Thematic commentary No. 4: The scope of application of the Framework Convention for the Protection of National Minorities*, 27 May 2016, ACFC/56DOC (2016)001, para. 11.

In the CoE setting, in *Gorzelik and others v. Poland*, applicants wanted to register an association which aimed to protect the minority identity of the Silesian national minority in Poland. The insufficiency of the subjective criterion to determine the existence of a national minority group is apparent in this case.<sup>54</sup> The domestic authorities in Poland doubt such registration by a minority group which its minority status was disputed. In fact, there were grounds to believe that the concerned group seeks to circumvent legal norms to gain eligibility for special protections afforded to national minority groups under the domestic law, such as exemption from electoral thresholds, and thus secure easy access to the national parliament for themselves.<sup>55</sup> The Court agrees that the term minority is difficult to define and Poland authorities' decision on exclusion of the applicant from falling under the category of minority community was for the protection of legal order and rights of others, which does not constitute a violation under ECHR.

In light of the Greek government reply to Capotorti Report, "a minority actually feels itself to be a separate section of the community or is felt to be and is perhaps treated as such by others should also be taken into consideration for any interpretation of the term minority."<sup>56</sup> Therefore, the objective criterion refers to the actual existence of a collective identity, and the subjective criterion is concerned with the individuals who want to be recognised as belonging to a national minority group. In this regard, neither objective criterion nor subjective criterion can be treated independently to determine the status of a group of individuals as a national minority group.

## **2.2. Nationality Requirement**

The Advisory Committee of FCNM, which monitors the implementation of the Convention, has firmly expressed the view that provisions of FCNM also apply to non-citizens.<sup>57</sup> Nonetheless, participation in the political life of a state is based on the status of citizenship, which entitles only citizens of a state to exercise their right to political participation in an equal manner. In this regard, the nationality requirement does not stand at odds with the protection of the right to political

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<sup>54</sup> *Gorzelik and Others v. Poland*, European Court of Human Rights, Judgement of 17 February 2004, Application No. 44158/98, para. 76.

<sup>55</sup> *Ibid*, paras. 32, 36, 76.

<sup>56</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Religious and Linguistic Minorities, Study on the rights of persons belonging to ethnic, religious and linguistic minorities, 1979, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 36.

<sup>57</sup> Weissbrodt, David. Final Report of the Rights of Non-citizens-Regional Activities. 26 May 2003, UN Doc. E/CN.4/Sub.2/2003/23/Add. 2, para. 41-43.

participation as a human right. Also, Article 25 of ICCPR explicitly mentions the concept of citizen as the right-holders in contrast to other provisions of the Covenant, which apply to every human being.<sup>58</sup> Some scholars have argued that a distinction between aliens and citizens is permitted only where explicitly provided in human rights treaties.<sup>59</sup> Such interpretation confirms explicitly with the text of Article 25 of ICCPR as well as P1.3 of ECHR. Therefore, certain rights, such as the right to political participation of persons belonging to minorities, can be guaranteed only in relation to nationals of a country, and thus aliens can become excluded to exercise public participation as a right on the territory of another state where they are not nationals.

Regarding the right to political participation, it requires that persons belonging to a minority group should be nationals of the state they want to participate in its political affairs. In this regard, nationality as a relationship between state and individuals is a legal relationship. ICJ in *Nottebohm* case defines nationality as, “A legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties”<sup>60</sup> further the Court concludes, “[...] Nationality in this sense is concerned with the determination of rights and duties of nationals.”<sup>61</sup>

Also, the right to public participation of individuals belonging to national minorities cannot be invoked to include transient moods. Indeed, this right seems to exclude new minority groups formed by migration or awakening of historical identities, which existed in the past.<sup>62</sup> The term national minorities for the purpose of exercising the right to public participation should be understood as a distinctive, long-established community in the territory of a state in a non-dominant position whose members wish to preserve their cultural identity<sup>63</sup> and are nationals of the hosting state. This view is also confirmed in the following opinion of the UN Human Rights Committee:

“The obligations deriving from article 2.1 are also relevant [for the protection of all minorities who are on the territory of a state], since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, *except*

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<sup>58</sup> ICCPR, entered into force 23 March 1976, Article 25.

<sup>59</sup> Ramcharan, G. Bertrand. "Equality and Non-Discrimination." *The International Bill of Rights: The Covenant on Civil and Political Rights*, edited by Henkin, Louis 1981. p. 263.

<sup>60</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice (ICJ), 6 April 1955, P. 23.

<sup>61</sup> *Ibid*

<sup>62</sup> Thornberry, Patrick, *International Law and the Rights of Minorities*, 1991, p. 168.

<sup>63</sup> *Ibid*, p. 170.



*rights which are expressly made to apply to citizens, for example, political rights under article 25 [emphasis added]. A State party may not, therefore, restrict the rights under article 27 to its citizens alone”.*<sup>64</sup>

One can safely argue that the protection of minorities in the sense of the right to political participation is an apparatus in international law which does not encompass the protection of persons who belong to non-national minority groups. In this regard, Patrick Thornberry argues, “Many states are unwilling to accept voluntary immigrants taking the state’s nationality as being minorities; *a fortiori*, they are even less well disposed to accept the notion that foreigners are the recipients of minority rights.”<sup>65</sup> The *Travaux Préparatoires* of ICCPR also indicates that during the drafting process of the text of Article 27 of ICCPR states distinguished between aliens or non-national minorities whose members might even be the citizens of the host country. In this regard, the right to political participation of individuals belonging to national minorities encompasses only national minority communities that are long-established on the territory of a state and have a distinct cultural character different to that of the majority population.<sup>66</sup>

Therefore, when national minorities meet the requirements of membership in the bigger unit of the state through citizenship status, their right to political participation as individuals belonging to a national minority community can be guaranteed under international human rights law to enable them to influence the outcome of the political decision-making to protect their interests.<sup>67</sup>

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<sup>64</sup> UN Human Rights Committee, General Comment 23, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 5.1.

<sup>65</sup> Thornberry, Patrick, *International Law and the Rights of Minorities*, 1991, p. 171.

<sup>66</sup> General Assembly, 16<sup>th</sup> Session Official Records, 14 November 1961, UN Doc. A/C.3/SR.1104, paras. 7, 17.

<sup>67</sup> *Timishev v. Russia*, European Court of Human Rights, Judgement of 13 March 2006, Applications Nos. 55762/00 and 55974/00, para 58; ; *D.H. and Others v. the Czech Republic*, European Court of Human Rights, Judgement of 13 November 2007, Application No. 57325/00, para. 176; *Young, James and Webster v. the United Kingdom*, European Court of Human Rights, Judgement of 13 August 1981, Application No. 7601/76; 7806/77, para. 63; *Izzettin Dogan and others v. Turkey*, European Court of Human Rights, Judgement of 26 April 2016, Application No. 62649/10, paras. 103, 108-109.

### **3. Democratic Governance and Minorities' Political Participation**

#### **3.1. The Role of National Minorities in Political Life**

Power accompanies the ability to control people and events affecting them.<sup>68</sup> As was examined in chapter 1, power or authority in a democratic setting resides in people. It is in this context that the participation of national minorities becomes essential because if access to the means of collective decision-making becomes impeded for national minorities, they will lose their ability to decide upon the matters which are essential to their cultural identity.

Democracy at its heart has the core idea that the legitimacy of the authority is derived from the consent and participation of individuals who are citizens of a state (the idea of democratic franchise). In other words, legislative mechanisms and enacted laws, which affect the lives of individuals, cannot be considered legitimate if individuals have not consented those enacted laws through either direct consent or the consent of their representatives. Therefore, the idea of participation of all the segments of society in the decision-making process and the mechanisms that allow for the effective participation of diverse groups constitute the core of democratic governance.

In this regard, democratic governance and minorities' participation in political and public decision-making acquires its importance for several reasons. Firstly, political participation as a right is enshrined in the ratified international and regional human rights treatise as a guaranteed right. Its meaningful application regarding minorities needs special considerations, and it should be understood beyond the mere formal recognition of this right by giving due attention to the specific needs of national minorities.

Secondly, historical marginalisation of national minorities has led to structural exclusion and thus the violation of human rights of individuals belonging to national minority groups in various ways. Participation of national minorities in political life and public institutions can be a response to more extensive problems, such as discrimination and marginalisation of minority groups. It is because political participation can empower individuals belonging to minorities to deal with their concerns by means of the authority granted to them to have a share in the working of political institutions.

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<sup>68</sup> Weller, Marc. "Democratic Governance and Minority Political Participation: Emerging Legal Standards and Practice." *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, 2010, p. 1Vii.

Finally, from the perspective of national peace and security, an inclusive, plural democracy, which allows national minority groups to take part in public decision makings on an equal footing with the majority population, can be the ultimate solution for the prevention of ethnic conflicts, and threats to both national, and international security. The security dimension of national minorities' political participation will not be covered in the present thesis. Nonetheless, the security dimension of national minorities' issues constitutes a considerable part of the works of the Organization for Security and Co-operation in Europe, which has had a central role in the security paradigm of Europe after the cold war. The participating states in the Conference on the Human Dimension of the CSCE emphasised the importance of respect for the universal human rights of national minorities for the reasons of peace and prevention of conflict. In this regard, the Copenhagen Document reaffirms, "minority rights are part of universally recognised human rights is an essential factor for peace, justice, stability, and democracy in the participating States."<sup>69</sup>

### **3.2. Public Participation: A Substantive, Enabling Right**

The substance of national minorities' rights might involve two kinds of typical solutions. The first category of minority rights are concerned with issues, such as language, culture, education, and access to jobs; these rights can be categorised as object-oriented. The second category is the issue of participation of minorities in the public affairs of their country. This right has a process-oriented nature, which can result in one or more objects of the first category. It should be noted that in order to make such a process of public participation meaningful, it should aim for a result-oriented approach by which the protection of minorities' cultural identity is ensured. This approach considers the right to public participation of national minorities as an enabling right that its objective is the protection of matters of primary importance to national minority groups, such as their cultural identity.<sup>70</sup> In other words, full equality and protection of minorities' identity are the outcomes of effective political participation. In this regard, ACFC Commentary on Article 15 of FCNM regards full equality, protection of minorities' cultural identity and participation of minorities in public life as, "three corners of a triangle," which constitute the foundation of

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<sup>69</sup> CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para 30.

<sup>70</sup> ACFC, *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, 5 May 2008, para. 15.

FCNM.<sup>71</sup> The Advisory Committee of FCNM is of the opinion that whatever the mechanisms of public participation are, they should satisfy two requirements and those are, “[...] real opportunities to influence decision-making and the outcome of which should adequately reflect their needs”.<sup>72</sup> Indeed, political participation of minorities, in addition to providing equal opportunity to become represented in the forums of public decision-making, should result in the protection of national minorities’ cultural identity. Therefore, the right to public participation is a human right in itself, which plays a crucial role in the effective exercise of other human rights, especially the protection of national minorities’ right to culture.<sup>73</sup>

### **3.3. An Analysis of International Standards on Minorities’ Public Participation**

It is important to distinguish between universally applicable human rights and specific minority-related rights, which persons belonging to minorities can enjoy in accordance with their association to a minority group. The former include the universal rights and freedoms that states must respect, protect, and promote concerning all individuals within their jurisdiction in a non-discriminatory manner as stipulated in Article 2 of ICCPR, Article 1 of CERD, Article 14 of ECHR and Article 1 of Protocol No. 12 to ECHR. The grounds of discriminations include any differentiation based on race, colour, sex, language, religion, political opinion, national or social origin, property, birth, association with a national minority or another status. The latter refers to a specific apparatus of international law which applies to persons who identify themselves as belonging to a minority group to protect their cultural identity. As Patrick Thornberry argues, the human rights element of rights and freedoms guaranteed in the treaties are secured to all inhabitants of a state, whereas those rights with minority rights element are related to persons belonging to national minority communities.<sup>74</sup>

Although there is a difference between minority rights of individuals who belong to national minority groups and the general category of human rights, it does not exclude the relation between the generally codified human rights and those provisions with a more minority-centric language

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<sup>71</sup> ACFC, *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, 5 May 2008, para. 13.

<sup>72</sup> *Ibid*, para 71.

<sup>73</sup> UN General Assembly, *Factors that impede equal political participation and steps to overcome those challenges*, A/HRC/27/29, para. 88.

<sup>74</sup> Thornberry, Patrick, *International Law and the Rights of Minorities*, 1991, p. 170.

enshrined in FCNM. We need to draw on both of these categories mainly because the *corpus* of universally applicable human rights are legally-binding and contain treaty obligations which can be of use for legal interpretation to compensate for the weakness and the lack of clarity regarding standards related to the protection of national minorities.

The weakness of international instruments regarding minority rights is in two respects. Firstly, except for the legally-binding FCNM, they either lack a legally-binding status or lack a juridical character to allow individuals to enforce the implementation of related provisions by legal actions before a competent court or tribunal. Even FCNM, as the only legally-binding instrument dedicated to the protection of national minorities, does not foresee any mechanism for individual complaints regarding the violation of the provisions of FCNM. Secondly, the content of minority-related instruments, such as FCNM, “includes no directly applicable rule but disposition programs,” which leaves states with a wide margin of discretion.<sup>75</sup>

Therefore, we need to rely on the generally applicable body of human rights and relevant international law principles to give a concrete interpretation to the question of minorities’ entitlement to participate in the political and public life of their states and consequently identify related shortcomings. In this regard, the International UN system and the regional system of the CoE will be discussed and analysed in terms of the developed standards pertaining to the protection of minority communities and the public participation of persons belonging to national minority communities. Besides, the CSCE/OSCE as a multilateral political organisation will also be discussed because, despite its non-binding character, it can shed light on relevant hard law sources regarding public participation of persons belonging to national minorities.

### **3.3.1. The UN System**

Within the UN human rights protection system, the only document which is specifically concerned with the protection of minority rights is the non-binding 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by General Assembly, which contains provisions that specifically deal with minorities.<sup>76</sup> In this regard, the

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<sup>75</sup> Thiele, Carmen, "Minorities and Minority Rights in Europe". *Human Rights in Europe: A Fragmented Regime*, edited by Brosig, Malte, 2006, p. 125.

<sup>76</sup> See UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992. UN Doc. A/RES/47/135.

UN instruments can be divided in terms of their relevance to the protection of minority rights into two groups.

The first category is the UN Minority Declaration and related Special platforms and mandate holders that exclusively deal with minority rights issues. These are mainly preoccupied with, *inter alia*, the thematic reports, promotion of dialogue among states in matters related to minority groups and the provision of advice on the minority-specific issues, which lack a legally-binding status. In this respect, the Independent Expert on Minority Issues, the Special rapporteur on minority issues and the UN Forum on Minority Issues share the common goal of promotion of the implementation of the UN Minorities Declaration.

The second category is the UN General human rights instruments, including International Covenant on Civil, and Political Rights and the instruments primarily adopted for dealing with other human rights concerns, such as the International Convention for the Elimination of Racial discrimination (ICERD). These instruments are legally-binding and contain provisions on the protection of national minorities, such as Article 5.C of ICERD, which refers to the public participation of persons belonging to national minorities as one of the effective ways for the elimination of racial discrimination.<sup>77</sup>

In addition to Article 5.C of ICERD, which refers to public participation as an instrument for encountering discrimination, Article 25 of ICCPR provides for the right to public participation in a general language as the right of every citizen. The right to political participation is also reflected in Article 21 of the Universal Declaration of Human Rights. The *chapeau* of Article 25 of ICCPR provides for the right to political participation with an explicit reference to Article 2 of the same covenant on the prohibition of discrimination. This explicit reference to Article 2 of ICCPR can reflect the importance of the principle of non-discrimination for the exercise of the right to political participation. Article 25 of ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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<sup>77</sup> ICERD, entered into force 4 January 1969, Article 5.C

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.<sup>78</sup>

Similarly, Article 21.1 of UDHR states, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”<sup>79</sup> Subsequently, Article 21.3 of UDHR holds, “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”<sup>80</sup> The difference of the formulation of Article 21 of UDHR, taking into account its customary status in international law, is that it explicitly refers to public participation of people as the legitimising source of political authority.

Article 25 of ICCPR in conjunction with Article 27 of the same covenant, regarding the rights of persons belonging to minorities to enjoy their culture, profess and practice their religion and language, as well as Article 2.1 and 2.2 on the principle of non-discrimination,<sup>81</sup> constitute the basic rules for the protection of the content of the effective participation of minorities in political life.

In this regard, Article 25 of ICCPR and its interrelatedness with Articles 2 and 27 can guide us to a particular understanding of the content of the universal right to political participation, and its application concerning individuals belonging to national minorities. Martin Scheinin in his individual dissenting opinion, in the communication brought against Namibia before the Human Rights Committee, argues that the Committee failed to interpret article 25 in the context of minorities’ enjoyment of the right to participation in public affairs. He states:

There are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in

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<sup>78</sup> ICCPR, entered into force 23 March 1976, Article 25.

<sup>79</sup> Universal Declaration of Human Rights, 1948, Article 21.

<sup>80</sup> Ibid

<sup>81</sup> ICCPR, entered into force 23 March 1976, Article 2.

general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.<sup>82</sup>

Scheinin's argument is in conformity with the authoritative interpretation of the UN Human Rights Committee in GC No. 23 and GC No. 25, which follows the same line of thought about minorities' public participation. The Committee states in General Comment No. 23:

With regard to the exercise of the cultural rights protected under article 27 [...] the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>83</sup>

The UN Human Rights Committee in General Comment No. 25 is more concerned with facilitating the access of minorities to participatory mechanisms by promoting electoral facilities that can be used by all minority groups.<sup>84</sup> In this regard, states should take positive measures to remove the obstacles for the effective participation of individuals who belong to national minorities. For example, states should use minority languages on voting ballots and provide education and information necessary for voting in the areas where minorities live. It is only through such positive measures that the very essence of the exercise of the right to political participation which is the, "reflection of everyone's will," can be realised in relation to national minorities. Thus, special measures to facilitate the political participation of national minorities seem to be a necessity for the political participation of national minorities without which the essence of the general right to political participation, which is the reflection of the will of everyone, might be impaired. Besides, one can argue that these measures are not to be understood as a more favourable treatment of members of minority groups. Indeed, such measures do not add to the substance of the general right to public participation, rather, these measures are to be seen as means to remove the obstacles that individuals belonging to national minorities, unlike the majority population, encounter for the exercise of their right to political rights.

The prohibition of discrimination has major implications in relation to the political participation of national minorities. The prohibition of discrimination, based on the listed grounds in Article 2

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<sup>82</sup> *Diergaardt et al. v. Namibia*, UN Human Rights Committee, views adopted 25 July 2000, UN Doc. CCPR/C/69/D/760/1996, appendix

<sup>83</sup> UN Human Rights Committee, General Comment No. 23, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para 7.

<sup>84</sup> See UN Human Rights Committee, General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7. 12 July 1996, para. 12.



of ICCPR, is a principle in international law. Besides, the prohibition of discrimination based on the ground of race enjoys a heightened status in international law and is considered as an obligation *erga omnes* in the *Barcelona Traction* case.<sup>85</sup> The principle of non-discrimination as ICJ contemplated in the *Barcelona Traction* case considers the prohibition of racial discrimination among the customary principles of human rights, which protect the very core of human dignity.<sup>86</sup> However, the Court only considers racial discrimination as obligation *erga omnes* that its infringement is an action amounting to a violation of the dignity of the human being.<sup>87</sup>

Although ICJ in the *Barcelona Traction* case considers racial discrimination as one of the peremptory norms, it is difficult to argue that the concept of race does not include ethnicity. In this respect, Article 1.1 of ICERD defines racial discrimination as, “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”<sup>88</sup> In addition, the *travaux préparatoires*<sup>89</sup> of ICCPR also considers the term ‘ethnic’ as including both racial and cultural characteristics pertaining to minority groups.<sup>90</sup> It suggests that ethnicity and race are synonyms, and drawing a rigid distinction between them might lead to absurd consequences, such as leaving communities with different cultural characteristics unprotected.<sup>91</sup> The view of the United Kingdom in the fifty-eighth meeting of the sub-commission on prevention of discrimination and protection of minorities was that, “the word ethnic seemed to be more appropriate, as it referred to the entire biological, cultural and historical heritage of an individual or a group whereas racial referred only to the physical aspects of such a heritage.”<sup>92</sup> The chairman of the meeting also supported this view.<sup>93</sup> Regarding the general right to political participation, differential treatments leading to the exclusion of national minorities from participation in public decision-making institutions can be deemed to fall under the category of racial discrimination.

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<sup>85</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, 5 February 1970, p. 32.

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

<sup>88</sup> ICERD, entered into force 4 January 1969, Article 1.1.

<sup>89</sup> See Vienna Convention on the Law of Treaties, 27 January 1980, Article 31 and Article 32. According to Article 32 preparatory work of a treaty is a recognized means for interpretation of treaties.

<sup>90</sup> UN Economic and Social Council, Summary of the 48<sup>th</sup> Meeting, 16 January 1950, UN Doc. E/CN.4/Sub.2/SR.48, paras.11-12, 16 & 21.

<sup>91</sup> Economic and Social Council. Report of the Third Session of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, 9-27 January, UN Doc. E/CN.4/Sub.2/119, para. 31.

<sup>92</sup> Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Summary of the 48<sup>th</sup> Meeting, 16 January 1950, UN Doc. E/CN.4/Sub.2/SR.48, para. 12.

<sup>93</sup> *Ibid*, para. 16.

In addition to the centrality of the prohibition of discrimination based on race and ethnicity in international law. Political participation is also an effective instrument for eliminating discrimination against ethnic identities because it affords those communities the ability to influence public decisions which might affect them. The ICERD is more explicit about political participation in light of the principle of non-discrimination. Article 5(c) of CERD requires states to undertake measures to tackle discrimination along the lines of ethnicity, age, gender, etc. and reaffirms that one of the means to do so is to ensure political rights, such as participation in elections based on internationally recognised electoral principles of equal and universal suffrage.<sup>94</sup>

One of the contributions of ICERD to the principle of non-discrimination is that it requires states to take measures in forms of positive discrimination to empower disadvantaged individuals belonging to minority groups. Article 1(4) of CERD states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination [...].<sup>95</sup>

Over-emphasis on formal equal treatment can lead to *de facto* inequality through negligence to remove structural obstacles for facilitating the right to political participation of members of a national minority group. Here, non-discrimination as an overarching principle of international law can serve as an important legal principle for the interpretation of the right to political participation of persons belonging to a national minority. It is in this regard that the Sub-Commission on Prevention of Discrimination and Protection of Minorities in a report adopted in 1947 states:

Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which [...] distinguish them from the majority of the population.<sup>96</sup>

### **3.3.2. The Council of Europe**

The main instrument for the protection of human rights within the CoE is the European Convention on Human Rights (hereinafter ECHR). It did not contain any provision on the universal right to

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<sup>94</sup>ICERD, entered into force 4 January 1969, Article 5.C

<sup>95</sup> Ibid, Article 1.4.

<sup>96</sup> UN Commission on Human Rights, The Main Types and Causes of Discrimination, 7 June 1949, UN Doc. E/CN.4/SUB.2/40/REV.1, p. 2.

participation in the public affairs in the first place until the Protocol No. 1 was added to the convention. Article 3 of Protocol No. 1 to the ECHR provides for the right to political participation through participation in elections. Article 3 of Protocol No.1 (hereinafter P1.3) states, “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.”<sup>97</sup>

The formulation of the right to political participation, as reflected in P1.3 of the ECHR, is different from the formulation of the similar right in ICCPR in several ways. Firstly, although participation through voting is an essential component of genuine democracy, political participation is not limited to voting. In other words, the wording of P1.3 does not contain any explicit reference to political participation through representation or the right to directly participate in the political life of a state by standing as candidates in elections. Nonetheless, this became further elaborated by the European Court of Human Rights (ECtHR) which does not consider political participation limited to the act of voting and extends it to encompass representative means of participation by, “standing for election.”<sup>98</sup>

Secondly, the text of P1.3 only refers to the election to choose members of the legislature, and it excludes other organs of state, such as the administrative bodies. It is evident that this Article does not entitle individuals to the right to participate in public affairs beyond the legislative bodies, such as administration body of the state if the constitution of the respective country does not provide for it.

The Convention as a whole lacks reference to the term minority except in Articles 14 of ECHR as well as Article 1 of Protocol No.12 to ECHR. These articles prohibit any differential treatment for the purpose of the enjoyment of the rights guaranteed in ECHR based on, *inter alia*, belonging to a national minority group.<sup>99</sup> However, the Convention lacks explicit reference to minority groups beyond the prohibition of discrimination. Such absence of reference to minority groups is especially crucial regarding guaranteeing the right to freedom of culture of persons belonging to

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<sup>97</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 18 May 1954, 1954, Article 3.

<sup>98</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 51.

<sup>99</sup> ECHR, entered into force 3 September 1953, Article 14; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 01 April 2005, Article 1.

minorities, which could be taken into account for the interpretation of the right to political participation of persons belonging to national minorities. However, democracy which political participation can be presumed to be its beating heart has a principal status in ECHR as the preamble of the Convention states:

Reaffirming [...] belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.<sup>100</sup>

The rulings of ECtHR subsequently elaborated the idea of effective political democracy. As reflected in the preamble of the Convention, the Court reiterates that the protection of human rights and effective political democracy go hand in hand. The Court considers P1.3 of ECHR as, “[a] principle that is characteristic of an effective political democracy” and of, “prime importance in the Convention system.”<sup>101</sup> In this respect, democratic governance is an underlying principle for the effective implementation of the Convention, and this has consistently been referred to in the Strasbourg Court rulings.<sup>102</sup> Therefore, democracy can have the status of a general principle of the regional international law in the CoE because the right to political participation, as the cornerstone of democracy, is considered by the Court as a fundamental feature of the European public order, and the only political model compatible with ECHR.<sup>103</sup>

In this regard, because the specific situation and concerns of persons belonging to national minority groups differ from those of the majority, an inclusive democratic system which allows for the plurality of political interests should facilitate the access of national minorities to means of political participation. This can be done if individuals belonging to national minorities can vote for their representatives or stand as a candidate of their community in a non-discriminatory fashion. The ECtHR highlights the value of pluralism as an integral element of the kind of democracy that is compatible with the Convention. In other words, the Strasbourg Court acknowledges that

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<sup>100</sup> ECHR, entered into force 3 September 1953, Preamble

<sup>101</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 47; *mutatis mutandis, Davydov and others v. Russia*, European Court of Human Rights, Judgement of 30 May 2017, Application No. 75947/11, Para. 271

<sup>102</sup> *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, Judgement of 30 January 1998, Application No. 133/1996/752/951, para 45.

<sup>103</sup> *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, Judgement of 30 January 1998, Application No. 133/1996/752/951, para 45. For an analysis on the formation of international law principles see Brownlie, Ian. *Principles of Public International Law*. 2003, p. 37

pluralism, as the integral value of political democracy, is not compatible with the exclusion of national minorities in relation to their right to political participation.<sup>104</sup> For instance, in *Sedjic and Finci*, the Court finds a violation of P1.3 in conjunction with article 14 of ECHR. The Court holds that the differential treatment regarding the ineligibility of the representatives of other national communities to stand in elections of the House of People and the Presidency of Bosnia and Herzegovina was not compatible with the requirements of a pluralist democracy that is built on the value of diversity and the principle of non-discrimination.<sup>105</sup>

The materials of legal assessment for the Strasbourg Court in cases related to the political participation of minorities are the general right to political participation as enshrined in P1.3 and the principle of non-discrimination as enshrined in Article 14 of ECHR and Article 1 of Protocol No. 12<sup>106</sup> to ECHR. Also, the principle of democratic governance in a plural manner, as stated in the preamble of ECHR, has become a consistent theme for the Court in deciding the cases before it. The provisions mentioned above constitute the foundation for the protection of the right to political participation of individuals belonging to national minorities, which can be legally enforced by individuals before the Court when CoE member states fail to meet their obligation.

The Court, however, has been more conservative with matters related to the mechanisms and procedures of political participation, which might structurally limit or even undermine the ability of national minorities to exercise their right to public participation. For example, In *Yumak and Sadak* case, the Court adopted a limited, conservative approach regarding the issue of minimum electoral thresholds<sup>107</sup> (this will be discussed in more detail later in chapter 6). Nonetheless, the Court in other contexts adopts views which seem to be promising for an analysis of the right to political participation of national minorities. Concerning the issue of *de facto* discrimination, the Court considers equality of the treatment of two persons or groups of individuals while their situations are considerably different is discriminatory. In light of the Court jurisprudence, the issue of

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<sup>104</sup> *Timishev v. Russia*, European Court of Human Rights, Judgement of 13 December 2005, Applications Nos. 55762/00 and 55974/00, para. 58; *D.H. and Others v. the Czech Republic*, European Court of Human Rights, Judgement of 13 November 2007, Application No. 57325/00, para. 176.

<sup>105</sup> *Sedjic and Finci v. Bosnia and Herzegovina*, European Court of Human Rights, Judgement of 22 December 2009, Applications Nos. 27996/06 and 34836/06, paras. 44-45.

<sup>106</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 01 April 2005, Article 1. ETS No. 177.

<sup>107</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, paras. 110-125.

indirect discrimination has been addressed in the *Thlimmenos* case, and in the *D.H. and others* case in which the Court acknowledges that equal treatment of individuals whose situation considerably differs from that of others might result in indirect discrimination.<sup>108</sup> However, ECtHR fails to adopt the same approach to the issue of minorities' representation in Turkey in *Yumak and Sadak*.

It is essential to consider that imposing a one-size-fits-all approach to the political participation of minorities by the Court will not be a fruitful approach. However, the importance of political participation of minorities for the preservation of minorities' cultural identities seems to be more compatible with the spirit of ECHR. In this regard, the principles of democracy and respect for pluralism in lights of the principle of non-discrimination should be a guide for the assessment of the mechanisms designed for political participation in order to adequately protect the content of P1.3 for individuals belonging to national minorities. This kind of assessment seems to be absent in the Court's judgement in *Yumak and Sadak*.

The FCNM is another legally-binding treaty within the regional system of the CoE that deals specifically with issues concerning national minorities. Both the preamble of FCNM and explanatory report to FCNM clarify that the Convention was the CoE attempt to transform the political obligations of CSCE/OSCE documents regarding minorities into legally-binding standards.<sup>109</sup> The Convention has a monitoring body (ACFC) which together with the Committee of Ministers of the CoE are responsible for the monitoring of the implementation of the Convention provisions through country-specific reports, and along with thematic reports on particular, concurrent areas of concern to minorities.<sup>110</sup> There is no complaint mechanism to allow individuals or groups to lodge a complaint against member states. Also, ACFC works in cooperation with the Committee of Ministers, which is a political organ to monitor the implementation of the

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<sup>108</sup> *Thlimmenos v. Greece*, European Court of Human Rights, Judgement of 6 April 2000, Application No. 34369/97, para. 38; *D.H. and Others v. the Czech Republic*, European Court of Human Rights, Judgement of 13 November 2007, Application No. 57325/00, para. 176

<sup>109</sup> Thiele, Carmen, "Minorities and Minority Rights in Europe". *Human Rights in Europe: A Fragmented Regime*, edited by Brosig, Malte, 2006, p. 136. See FCNM, 1998, preamble. See also CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1995, para. 10.

<sup>110</sup> FCNM, 1998, Articles 24 and 26.

Convention provisions.<sup>111</sup> Even though a political organ monitors the Convention (the Committee of Ministers), the Convention has a legally-binding character.<sup>112</sup>

Article 15 of FCNM, explicitly refers to the right to public participation of national minorities, including participation in the political life of the hosting state. The importance of public participation within in FCNM is supported by the adoption of a Commentary on Article 15 by the Advisory Committee, which is exclusively concerned with the Effective Participation of Persons Belonging to National Minorities. In this regard, the Advisory Committee assigns a central role to article 15 of FCNM and considers it as, “an indicator of the level of democracy and pluralism of society.”<sup>113</sup>

There is no doubt that according to the principle of equality and non-discrimination the right to political participation can be well guaranteed for everyone without any distinction based on, *inter alia*, affiliation with a national minority group.<sup>114</sup> This represents the normative equality between citizens concerning political participation, which is based on the traditional principle of one-person, one-vote. Also, democracy and pluralism as the only political ideas which are compatible with ECHR require that although the majority has a significant influence on democratic systems, it does not mean that the voice of national minorities due to their numerical weakness can be disregarded. Furthermore, the fundamental right of persons belonging to minorities to freely enjoy and practice their culture intensifies the protection of national minorities’ participation in the political life to be able to have an influence on matters, which directly or indirectly, affect their cultural identity.<sup>115</sup> In this regard, the Advisory Committee considers Articles 4, 5, and 15 of FCNM as the backbones of the catalogue of minorities’ rights which lay the foundations of FCNM. These articles respectively deal with the right to equality, the responsibility of states to promote conditions for the development of minorities’ identity, and the right to participation in public life.<sup>116</sup>

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<sup>111</sup> FCNM, 1998, Article 26.

<sup>112</sup> Brownlie, Ian. *Principles of Public International Law*. edited by Crawford, James, Eighth edition. Oxford: Oxford University Press, 2012, p. 648.

<sup>113</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para 5.

<sup>114</sup> See *Chapeau* of Article 25 of ICCPR as well as Article 14 of ECHR, Article 1 of Protocol No.12 to ECHR.

<sup>115</sup> See UN Human Rights Committee, General Comment No. 23, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7.

<sup>116</sup> FCNM, entered into force 1 February 1998, Articles 4, 5, and 15.

ACFC considers the right to effective participation as a right that enables minorities to preserve their identity as enshrined in Article 5 of FCNM. Besides, it allows individuals who belong to national minority groups to enjoy full equality as enshrined in Art 4 of FCNM. Thus, two principal aims of the Convention can become realised through the right to political participation of national minorities without which neither full equality nor the preservation of the cultural identity of national minorities' can be achieved.<sup>117</sup> Therefore, political participation of national minorities as a right entitles individuals belonging to national minorities to political participation in a non-discriminatory manner along the line of their cultural identity. It requires not only recognition and non-interference with the exercise of the right to political participation but also affirmative measures to enable national minorities to have an influence on matters which are of cultural importance to them.

### **3.3.3. Public Participation of National Minorities through the Lens of CSCE/OSCE**

The Conference on Security and Cooperation in Europe (CSCE) was founded in 1973 as a multilateral forum for states negotiations. After the 1994 Budapest Summit, the Conference continued its work under the new name of the Organization for Security and Cooperation in Europe (OSCE). The primary concern of CSCE was the establishment of a channel for talks and cooperation between former East-West blocks during the Cold War. There were fundamental changes in the working of CSCE/OSCE in terms of increasing emphasis on human rights and minority issues, during the conferences held in the late 80s and the early 90s. The first references to the protection of national minorities were made in principle VII of the 1975 Helsinki Final Act which states:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, and protect their legitimate interests in this sphere.<sup>118</sup>

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<sup>117</sup> ACFC, *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, 5 May 2008, para. 15.

<sup>118</sup> CSCE/OSCE, Helsinki Final Act, 1975, p. 6.



In this regard, the concept of the human dimension introduced in the concluding document of the 1989 Vienna meeting in which member states made non-legal commitments concerning the protection of human rights and national minorities.<sup>119</sup>

One of the most critical documents of CSCE/OSCE which dedicates considerable attention to the protection of minorities, including the right to public participation, is the 1990 Copenhagen Document on the human dimension.<sup>120</sup> The Copenhagen Document later became the primary source of inspiration for the UN Minority Declaration and FCNM, which both contain provisions on the political participation of individuals who belong to national minorities.<sup>121</sup>

In the 1992 Helsinki summit participating states reaffirmed their determination to implement their commitments in the Vienna Concluding Document and the Copenhagen Document relating to the rights of persons belonging to national minorities. In this regard, the 1992 Helsinki Document reiterates the importance of the right of persons belonging to national minorities, “to participate fully, in accordance with the democratic decision-making procedures of each State, in the political [...] decision-making and consultative at the national, regional and local level, *inter alia*, through political parties and associations”.<sup>122</sup> In this context, the CSCE/OSCE highlights the importance of strengthening the viability of democratic governments for realising objectives, such as conflict prevention and the creation of confidence between people and the governments. Also, the member states emphasised the vital role of plural democracy, which allows national minorities to participate in the national decision-making processes.<sup>123</sup>

Following the emphasis that the Vienna Concluding Document and the Copenhagen Document put on minorities issues, in the 1992 Helsinki summit, member states established the Office of the High Commissioner on National Minorities (HCNM). The primary role of the Office is to provide early warning about tensions involving national minority issues.<sup>124</sup> Thus, the Office designed as, “an instrument of conflict prevention at the earliest possible stage.”<sup>125</sup> After the establishment of HCNM, the Office took substantial steps toward the development, better clarification, and better

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<sup>119</sup> CSCE/OSCE, Concluding Document of the Vienna Meeting, 1989, § 18-19

<sup>120</sup> CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, para. 35.

<sup>121</sup> Pentasuglia, Gaetano. *Minorities in International Law*, 2002, P. 142.

<sup>122</sup> CSCE/OSCE, Helsinki Document, 1992, para. 24

<sup>123</sup> CSCE/OSCE, Helsinki Document, 1992, para. 23

<sup>124</sup> *Ibid*, Section II, para. 2-3.

<sup>125</sup> *Ibid*

implementation of international law standards regarding minority rights in different areas, including the right of minorities to participate in public and political decision-making. These attempts were in the form of thematic recommendations regarding recurrent issues in member states that the High Commissioner had faced in his work. The most important recommendations are the Lund Recommendations, the Oslo Recommendations, and the Hague Recommendations which are concerned with the effective participation of national minorities in public life, the linguistic rights and the education rights of persons belonging to national minorities, respectively.

The bodies of CSCE/OSCE as well as the recommendations and reports issued under the mandate of HCNM have no legally-binding effect and consequently, no capability for standard making. However, the human dimension of CSCE/OSCE, as reflected in the Vienna Concluding Document and preamble of 1990 Copenhagen Document, emphasises human rights, protection of minorities, and democracy as the principles of the new order of Europe after the collapse of the Soviet Union.<sup>126</sup> In this regard, the Copenhagen Document reminds member states of their obligations under international human rights treaties, which they are bound to respect and protect.<sup>127</sup> The same approach reflected in the thematic recommendations, introduced by the OSCE High Commissioner on National Minorities. In this regard, the Lund Recommendations contain a set of guidelines which are either compiled from the already existing international standards with further specifications or contain proposals that have been identified as a response to a general pattern of deficit in CSCE/OSCE member states.<sup>128</sup> The Lund Recommendations aim to facilitate the protection of minorities' participation in the conduct of public affairs and for that purpose draw upon already existing standards in international law.<sup>129</sup>

Even though the documents adopted by the CSCE/OSCE are not legally-binding, the workings of OSCE organs and the HCNM have had a decisive influence on the development of minority protection in European regional system.<sup>130</sup> As was mentioned earlier, the CSCE/OSCE has contributed to further elaboration of legal standards concerning the protection of national

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<sup>126</sup> CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, preamble

<sup>127</sup> CSCE/OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, para. 38.

<sup>128</sup> Pentasuglia, Gaetano. *Minorities in International Law*, 2002, p. 139.

<sup>129</sup> Drzewicki, Krzysztof. "OSCE Lund Recommendations in the Practice of the High Commissioner on National Minorities." *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, pp. 265-267

<sup>130</sup> Pentasuglia, Gaetano. *Minorities in International Law*, 2002, p. 139.

minorities, especially in co-operation with the CoE and the adoption of FCNM in 1995.<sup>131</sup> Such influence is significant considering the precedent efforts of some CoE member states, such as Austria in 1993, which tried to add a protocol to ECHR concerning the rights of individuals belonging to minorities but failed to succeed.<sup>132</sup>

In 1991 member states agreed under the Moscow Document that the principle of non-intervention is not applicable in cases related to the human dimension.<sup>133</sup> Consequently, the issues related to minorities and human rights become issues of international concern which state sovereignty is non-applicable and can lead to reporting measures under the Moscow mechanism regarding violations in member states. This mechanism can be requested by any of OSCE member states even if the host state denies as long as five other states support the initiative to establish a country mission consisting of rapporteurs.<sup>134</sup> In this regard, although the commitments, made within the CSCE/OSCE framework, lack a legally-binding status, they are politically binding and have contributed to the international norm-setting, especially in the context of the CoE.<sup>135</sup>

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<sup>131</sup> Narten, Jens. "The Human Dimension: The OSCE's Approach to Human Rights". *Human Rights in Europe: A Fragmented Regime?*, edited by Brosigm Malte, 2006, p. 109.

<sup>132</sup> Thiele, Carmen, "Minorities and Minority Rights in Europe". *Human Rights in Europe: A Fragmented Regime*, edited by Brosig, Malte, 2006, p. 124.

<sup>133</sup> CSCE/OSCE, Document of the Moscow Meeting on the Conference on the Human Dimension of the CSCE, 1991, para. 9-11.

<sup>134</sup> Ibid

<sup>135</sup> Pentikainen, Merja, and Scheinin, Martin. "A Comparative Study of the Monitoring Mechanisms and the Important Institutional Frameworks for Human Rights Protection within the Council of Europe, the CSCE and the European Community." *Monitoring Human Rights in Europe-Comparing International Procedures and Mechanisms*, edited by Bloed, Arie, *et all*, 1993, p. 117.

## 4. Mechanisms for Political Participation of National Minorities

### 4.1. Effective and Plural Participation

There is not any provision in hard law sources of international law in favour of any special mechanism to facilitate political participation of national minorities. Nonetheless, the provisions of Article 25 of ICCPR and the communications before the UN Human Rights Committee of ICCPR, as well as P1.3 and the case law of ECtHR, emphasise the centrality of electoral processes in democratic states. The principal expectation from electoral systems is that they should be capable of reflecting the opinion of people in the choice of their representatives.<sup>136</sup>

The minimum legal standards as guaranteed in P1.3 of ECHR and Article 25 of ICCPR are that every citizen in a non-discriminatory fashion can participate in the conduct of the state and the mechanism of elections should be capable of reflecting the opinions of people. Therefore, apart from the duty of states to hold free and periodic elections, individuals' right to political participation should be guaranteed in the form of the right to free elections.<sup>137</sup> The Strasbourg Court, in light of the minimum legal guarantee of P1.3 of ECHR, holds that states cannot thwart, "the free expression of opinion of the people in the choice of the legislature."<sup>138</sup> In fact, even if states apply measures under their margin of discretion, these measures cannot aim at restricting the application of P1.3 for members of national minority groups.<sup>139</sup>

Also, FCNM, which exclusively deals with minority rights, holds the same general approach regarding political participation of members of national minority groups. ACFC adopts the view that any standard making regarding political participation of minorities should be cautious to domestic complexities of each state and avoid a one-size-fits-all approach.<sup>140</sup> Therefore, appropriation of mechanisms for political participation of minorities should be done in a case by case and need-based manner. As Asbjørn Eide, the author of the commentary to the UN Minorities Declaration, states, "it is essential that the state consult the minorities on what would constitute

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<sup>136</sup> *Chiiko Bwalya v. Zambia* (Communication No. 314/1988), UN Human Rights Committee, views adopted 14 July 1993, U.N. Doc. CCPR/C/48/D/314/1988, Para. 6.6. See *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, para. 50.

<sup>137</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 51.

<sup>138</sup> *Ibid*, para. 52

<sup>139</sup> *Ibid*, *Gitonas and others v. Greece*, European Court of Human Rights, Judgement of 1 July 1997, Application Nos. 18747/91; 19376/92 ; 19379/92, para. 44.

<sup>140</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 148.

appropriate measures, different minorities might have different needs that must be taken into account.”<sup>141</sup> It is in this regard that due attention should be given to mechanisms of political participation, to examine whether they are capable of protecting the exercise of the right to political participation for national minorities. In other words, structural problems can place a *de facto* restriction on the meaningful realisation of the right to political participation as a guaranteed right. In this respect, the failure of states to take positive measures impedes individuals to have an influence on public decision-making to preserve their culture and protect their interests.<sup>142</sup> It is stated in the Explanatory report on FCNM that state parties have, “a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.”<sup>143</sup> Thus, the focus has been on the compliance with general and fundamental international law standards regarding internal processes of decision-making, which directly or indirectly, affects national minorities in a case by case manner.<sup>144</sup>

Generally speaking, states should meet the minimum legal requirements, as stated in article 25 of ICCPR and P1.3 of ECHR regarding holding free elections. However, the distinct situation of minorities concerning the exercise of the right to public participation and the importance of this right for the preservation of minority culture should be taken into account in order to give the right to public participation an effective content for members of minority groups. In this regard, three characteristics can be identified in the case law before the Strasbourg Court, which are important in relation to the right to political participation of national minorities.

First, one of the well-established legal principles, which can help to protect better the right to public participation of persons belonging to minorities, is the prohibition of indirect discrimination. Indirect discrimination refers to discriminatory results which are caused by equality of treatment. In other words, mere equality of treatment can lead to discrimination when two persons or groups of individuals have significantly different situations. The Court, in the *Thlimmenos* case, finds a violation of the content of Article 14, when a neutral law can have a

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<sup>141</sup> Sub-commission on the Promotion and Protection of Human Rights. Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 2 April 2001 E/CN.4/Sub2/AC.5/2001/2, para 30.

<sup>142</sup> Ibid, paras. 30-31; Compare with ICERD, entered into force 4 January 1969, Article 1.1

<sup>143</sup> CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1995, para 11.

<sup>144</sup> Steven, Wheatley. "Minorities, Political Participation, and Democratic Governance under the European Convention on Human Rights". *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, p. 211.

detrimental impact on the rights of some individuals. Indirect discrimination and the removal of structural disadvantages faced by national minorities can be a basis for the justification of the need for special measures to facilitate political participation of individuals belonging to minorities. In this regard, minorities' political participation in the context of pluralistic democracy overlaps with the duty of states to protect the cultural identity of minorities through promoting, "[the] opportunity for contribution from those who are affected by public decision-making."<sup>145</sup>

Second, the idea of democratic pluralism developed in the Strasbourg Court case law has implications for to the general duty of states to be inclusive concerning, *inter alia*, the participation of national minorities in the political life of the state. In this regard, the importance of pluralism as the hallmark of democracy has been emphasised persistently by the Strasbourg Court.<sup>146</sup>

Third, the idea of the effectiveness of rights means that the exercise of individual human rights should find a concrete meaning in real life. Regarding the exercise of the right by individuals who belong to national minorities, states should adopt measures to actualize the reflection of the political voices of national minorities. In this respect, the Strasbourg Court in the *Soering* case reiterates the need for effective and meaningful enjoyment of the rights guaranteed in the Convention. The Court in its reasoning, which is in conformity with the provisions of Article 31.1 of the Vienna Convention on the Law of Treaties,<sup>147</sup> states that the Convention provisions should be interpreted and applied in a manner to make its safeguards practical and effective, rather than illusory and theoretical.<sup>148</sup> The effective implementation of the rights of individuals who belong to minorities is a guiding principle, which might require different affirmative measures based on the specific circumstances of minorities in each state. They might range from lowering the minimum thresholds in proportional electoral systems to facilitate the representation of national minorities to guarantying seats designated to minority representatives in the national parliaments.

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<sup>145</sup> See CSCE/OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1 September 1999, p. 6.

<sup>146</sup> *Handyside v. United Kingdom*, European Court of Human Rights, Judgement of 7 December 1976, Application No. 5493/72, para. 49. See *mutatis mutandis Izzettin Dogan and others v. Turkey*, European Court of Human Rights, Judgement of 26 July 2016, Application No. 62649 /10, para. 109

<sup>147</sup> Vienna Convention on the Law of Treaties, 27 January 1980, Article 31.1.

<sup>148</sup> *Soering v. the United Kingdom*, European Court of Human Rights, Judgement of 7 July 1989, Application No. 14038/88, para. 87; see also *Magyar Helsinki Bizottsag v. Hungary*, European Court of Human Rights, Judgement of 8 November 2016, Application No. 18030/11, para. 121.

However, none of the measure mentioned above can automatically lead to the violation of the content of the right to political participation of individuals who belong to national minorities.

The following sections will examine in more detail how a right to political participation of minorities can be effectively guaranteed through electoral systems, which are the most common ways of public participation.

#### **4.2. Accountable Representation**

The right to political participation of national minorities necessitates their inclusion into the decision-making bodies, such as legislative bodies. National Minorities' inclusion means that such inclusion should be through a process of voting and representation by individuals who belong to national minorities.

In this regard, the representatives of a national minority group act on behalf of a minority group and are accountable to those who have elected him (the idea of democratic franchise). Indeed, there should be a link between the representative of a minority group and a minority group. This link is established through individuals who vote for a candidate on a special minority voter register. Therefore, it is by means of such a relationship that a representative can be considered accountable to individuals who belong to a national minority group for the reflection of minorities' demands in decision-making bodies.

Only accountable representation of national minority groups allows for the promotion of minorities' identity in an elected body.<sup>149</sup> In this regard, political participation of national minorities is meaningful only when persons belonging to a minority community can elect their representatives who are accountable for their representation, and their assignment or reassignment depends on the will of national minorities' voters.<sup>150</sup>

ACFC acknowledged the importance of the requirement of accountability in its first opinion on Hungary. ACFC noted the problem of the lack of link or accountability between the representatives of minorities and voters who chose the representatives.<sup>151</sup> Namely, the national laws allowed people who did not belong to minorities to vote for persons that represent minorities. This had led

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<sup>149</sup> Annelies, Verstichel. "Understanding Minority Participation and Representation and the Issue of Citizenship." *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, 2010, pp. 79-80.

<sup>150</sup> Ibid

<sup>151</sup> ACFC, 1<sup>st</sup> opinion on Hungary, 22 September 2000, ACFC/INF/OP/1(2001)4, para. 52.

to a situation that harmed the credibility of the local minority self-government guaranteed by Hungarian law. In the second cycle of reports, the Advisory Committee welcomes the concrete measures taken by the Hungarian authorities to amend the previous deficits in the constitutional law regarding the lack of accountability link between the minority voters and their representatives.<sup>152</sup> After the new constitutional amendments in Hungary, “only persons belonging to minorities will in future be able to elect their self-government [...]”.<sup>153</sup>

It seems that ACFC, apart from the requirement to belong to a minority group, recognises the accountability relationship as an essential requirement for the effective participation of national minorities in decision-making bodies. ACFC held the opinion that the safeguards towards establishing a firm relation of accountability between minority voters and persons who would represent them are of crucial importance not only for the legitimacy of those representatives but also for guaranteeing the right to political participation of minorities, which can meaningfully protect their interests and their cultural identity.<sup>154</sup>

### **4.3. The Ability to Influence**

It should be noted that the objective of the representation of minorities in decision-making bodies is to enable them to influence the results of decision-making, which directly or indirectly, affect them. In this regard, even if national minorities or their representatives are included in the decision-making process and their views are considered and taken into account by majority their ability to influence and to have control over matters directly affecting their cultural life remains an important issue that we need to explore its legal implications. In this regard, the notion of pluralism in the democratic state and its correlation with the principle of subsidiarity become essential when we talk about democratic public participation.

As was previously mentioned, the Strasbourg has consistently held the opinion that pluralism is the, “hallmark of democracy,” and, “there can be no democracy without pluralism.”<sup>155</sup> The idea of pluralism refers to the inclusion of all sectors of society in order to ensure the public will of all or

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<sup>152</sup> ACFC. 2nd opinion on Hungary, 14 December 2005, ACFC/INF/OP/2(2004)003, paras. 24-25.

<sup>153</sup> Ibid, para. 26.

<sup>154</sup> Ibid, para 27.

<sup>155</sup> *Freedom and Democracy Party v. Turkey*, European Court of Human Rights, Judgement of 8 December 1999, Application No. 23885/94, para. 37; *Izzettin Dogan and others v. Turkey*, European Court of Human Rights, Judgement of 26 April 2016, Application no. 62649/10, para. 109.



will of the people is genuinely reflected.<sup>156</sup> Therefore, a democratic state not only reflects the will of the majority but also accommodates the will of a national minority population live within its jurisdiction.<sup>157</sup> In this respect, the principle of subsidiarity goes hand in hand with pluralism, and it means that the concerns of those who are directly affected by the results of a decision should be considered in the process of decision-making.<sup>158</sup>

One can argue that the effective exercise of the right to political participation by individuals who belong to national minorities is dependent on the degree their concerns become considered in national decision-making, which directly affect their identities and interests. In this regard, the respect for minorities' right to freely enjoy their culture by non-interference of governments can only be sufficient if governments take positive measures to place matters which might directly affect national minorities under their scrutiny in national decision-making processes. This approach is also reiterated in the Explanatory Report of FCNM, which highlights the participation of national minorities in decision-making is important, especially when Parties are contemplating legislation or administrative measures likely to affect national minorities directly.<sup>159</sup>

In this regard, when the very cultural identity of national minorities is affected, persons belonging to a national minority group should have the opportunity to affect the public decisions. Therefore, the very core of minorities' right to political participation is to enable them to decide over matters,

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<sup>156</sup> Although decision-making based on the majoritarian consensus is the core of democratic governance, it should be balanced with a political voice reserved for minorities to demand their interests and reflect their perspective on issues which directly affect them. In this regard it is stated in the Lund recommendations: "it is not always sufficient and states should make effort towards decentralization of decision-making processes to assure the maximum level of relevance and accountability of decision-making processes for those affected [...]" (The Explanatory Note to the Lund Recommendations, para. 6.)

<sup>157</sup> The introduction of the Lund Recommendations states that one of the objectives of good governance is "to serve the needs and interests of the whole population, it was presumed that all governments seek to ensure the maximum opportunities for contributions from those affected by public decision-making."(OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, introduction).

<sup>158</sup> Packer, John. "The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life." *Helsinki Monitor*, vol. 11, issue. 4, 2000, p. 39. See also The Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1 September 1999, para. 19. It is stated that there is a general trend among European countries regarding the implementation of the principle of subsidiarity.

<sup>159</sup> CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1999, para. 80. See also ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 80.

which might directly, affect the exercise of the right to cultural identity as guaranteed in Article 27 of ICCPR.

The UN Human Rights Committee deals with the issue of subsidiarity in several communications on the alleged violation of Article 27 of ICCPR in respect of states legislations, which affected the cultural lifestyle of an indigenous people. Bearing in mind that the protection of indigenous people is another institution of international law, it has important implications for national minorities' political participation. The UN Human Rights Committee reiterated the importance of the principle of subsidiarity or making public decisions in close consultation with those who are directly affected. The Committee, in *Länsman*, considered the fact that the affected Sami community in Finland was properly consulted and the views of its representatives were taken into account before launching a quarrying project, which allegedly had disrupted the traditional reindeer-herding activities of Sami people in Finland.<sup>160</sup>

Similarly, the Committee, in *Apirana Mahuika*, considered the process of close communication between the state and minorities more explicitly. The Committee concluded that because state legislation regarding fishing activities of Maori population preceded comprehensive and meaningful negotiations with those affected, there was no violation of the provisions of Article 27 of ICCPR.<sup>161</sup> The Human rights Committee considerations imply that with the inclusion of Sami and Maori people in the process of the decision-making, the concerned states discharged their obligation of allowing affected communities to participate in national decision-making that directly affects them (which is a translation of the principle of subsidiarity). Therefore, the essence of the right to public participation of persons who belong to national minority groups is their ability to influence public decisions, which directly affect them. In this respect, states should give due diligence to ensure that national minority communities can effectively participate in communications and negotiations with the government through their representatives when national decision-making affect them.

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<sup>160</sup> *Länsman et al. v. Finland* (Communication No. 511/1992), UN Human Rights Committee, views adopted 26 October 1994, UN doc. CCPR/C/52/D/511/1992, para. 9.6

<sup>161</sup> *Apirana Mahuika et al. v. New Zealand* (Communication, No. 547/1993), UN Human Rights Committee, views adopted 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, para. 9.4, 9.8.

## 5. The Scope of Public Participation

### 5.1. Political Life: Legislative, Administrative, and Judicial Bodies of Government

The international human rights law instruments do not contain any clear reference to the scope of the right to political participation except for P1.3 of ECHR, which explicitly formulates the right to political participation as a right to vote in the legislature.<sup>162</sup> The formulation of the right to political participation in ICCPR is, however, very general and does not limit participation to any particular sector of the state. Article 25(a) of ICCPR holds that every citizen has the right, “to take part in the conduct of public affairs, directly or through chosen representatives.”<sup>163</sup> Furthermore, in a similar manner to Article 25 of ICCPR regarding the scope of participation, Art 5(c) of ICERD holds that state parties shall guarantee, “the enjoyment of the right to vote in elections and to stand for election ... to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service.”<sup>164</sup> Therefore, in contrast to P1.3 of ECHR, the scope of participation seems to be wider in the perspectives of ICCPR and ICERD, in a sense that the relevant provisions of the two conventions do not refer to a right to participation in a specific body of states, such as the legislative or the administrative.<sup>165</sup>

Generally speaking, the right to public participation through periodical elections should be extended to members of national minorities in terms of their equal right to vote and to stand as candidates on equal terms with the majority population. However, unlike the relevant provisions of ICERD and ICCPR; Art 3 of Protocol No. 1 of the European Convention on Human Rights seems to limit the right to vote and to stand in elections to legislature of member states.

It seems that ECHR has a limited approach to the scope of the right to vote and to stand as a candidate. According to the *Travaux Préparatoires* of ECHR, Article 3 of Protocol No. 1 refers only to, “legislature, or at least of one of its chambers if it has two or more.”<sup>166</sup> However, in the subsequent case law of the Court, it becomes evident that the scope of the participatory right, exercised through the channel of elections, is not limited to the legislature in a strict sense.

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<sup>162</sup> CoE, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 18 May 1954, Article 3.

<sup>163</sup> ICCPR, entered into force 23 March 1976, Article 25.

<sup>164</sup> ICERD, entered into force 4 January 1969, Article 5.C.

<sup>165</sup> See Palermo, Francesco. "At the Heart of Participation and of its Dilemmas: Minorities in the Executive Structure." *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, 2010, pp. 437-444.

<sup>166</sup> Council of Europe, Collected Edition of the *Travaux Préparatoires* of the European Convention On Human Rights, pp. 46, 50, 52.

According to decisions made by the former European Commission, legislative powers are not limited only to the national parliaments.<sup>167</sup> In this regard, the Court distinguished regulative powers (as distinct from law-making) from legislative powers<sup>168</sup> and reiterated the former Commission opinion that the legislative power is not necessarily limited to national parliaments.<sup>169</sup> Therefore, the scope of the right to vote becomes limited to those positions that have law-making powers, and in order to determine what state body exercise the legislative authority, the constitutional structure of the state concerned shall be analysed.<sup>170</sup>

Concerning the judgments of the Strasbourg Court, it seems evident that the Court determines the legislative power of a state organ in the background of the national constitution of the state concerned to determine the scope of the right to free elections. Therefore, the Court reiterates that the provisions of P1.3 of ECHR include presidential elections if the office of the president has the power to legislate or has the power to control the passage of legislation.<sup>171</sup>

The term legislature in P1.3 can be taken as an official position or organ with the ability to make decisions by which the interests of citizens, directly or indirectly, are affected. For instance, the European Court of Human Rights in the *Mathieu-Mohin and Clerfayt* case stated, “the word legislature does not necessarily mean only the national parliament, however; it has to be interpreted in the light of the constitutional structure of the State in question.”<sup>172</sup>

The Court, in the *Matthews* case, extends the ambit of P1. 3 of ECHR to the European Parliament, in addition to the ‘national legislature’ as stated in P1.3. According to the facts of the case, Gibraltar is part of the United Kingdom overseas territory that is not part of the United Kingdom in domestic terms. Based on the United Kingdom’s declaration of 23 October 1953, ECHR became applicable to Gibraltar. Subsequently, the Protocol No. 1 to ECHR became applicable to Gibraltar

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<sup>167</sup> European Court of Human Rights, Guide on Art 3 of Protocol No. 1 – Right to Free Elections, April 2018, para 2. See *Timke v. Germany*, European Commission of Human Rights, Decision of 11 September 1995, Application No. 27311/95.

<sup>168</sup> *Mółka v. Poland*, European Court of Human Rights, Decision of 11 April 2006, Application No. 56550/00.

<sup>169</sup> European Court of Human Rights, Guide on Art 3 of Protocol No. 1 – Right to Free Elections, April 2018, para 2.

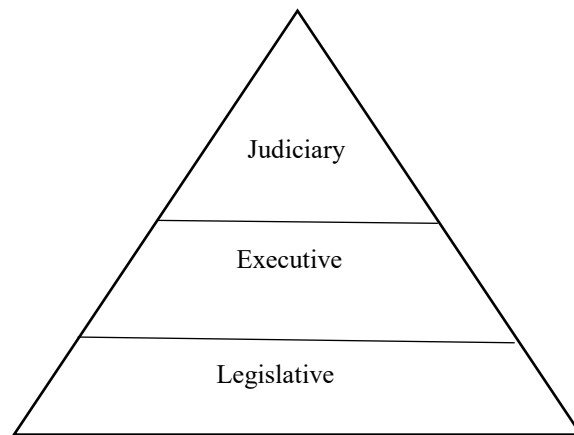
<sup>170</sup> *Ibid*, para 2.

<sup>171</sup> See *Boškoski v. the Former Yugoslav Republic of Macedonia*, Decision of 2 September 2004, Application No. 11676/04; *Brito Da Silva Guerra and Sousa Magno v. Portugal*, European Court of Human Rights, Decision of 17 June 2008, Application Nos. 26712/06, 26720/06.

<sup>172</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application no. 9267/81, para. 53.

after 25 February 1988 UK declaration.<sup>173</sup> Therefore, the United Kingdom has jurisdiction within the meaning of Article 1 of ECHR.<sup>174</sup> In addition, the United Kingdom under article 227 (4) of the Treaty Establishing the European Community has accepted, in many areas, the applicability of the European Commission legislation to Gibraltar.<sup>175</sup> Although the legislature in Gibraltar was the House of Assembly and P1.3 could be applied only in relation to the elections of house of assembly the court held, “[...] there was no basis upon which the Convention could place obligations on Contracting Parties in relation to elections for the parliament of a distinct, supranational organization [...]”.<sup>176</sup> The Court further states, “to accept the Government’s contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 would risk undermining one of the fundamental tools by which, “effective political democracy,” can be maintained.”<sup>177</sup>

One can conclude the hierarchal importance of public participation in the pyramid below, based on the emphasis which the Strasbourg Court puts on the legislative authority, and the inherent importance of legislation in democratic governance in the case law of ECtHR.



*Hierarchy of Participation*

The pyramid is ordered in lights of the criterion of disinterestedness, which means by moving upwards from the bottom the decisions taken in corresponding bodies become less concerned with

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<sup>173</sup> *Matthews vs. the United Kingdom*, European Court of Human Rights, Judgement of 18 February 1999, Application No. 24833/94, para. 19.

<sup>174</sup> *Ibid*, paras. 19, 29-30.

<sup>175</sup> *Treaties Establishing European Communities*, 1987, Article. 227.4.

<sup>176</sup> *Matthews vs. the United Kingdom*, European Court of Human Rights, Judgement of 18 February 1999, Application No. 24833/94, para. 36.

<sup>177</sup> *Ibid*, para. 43.

the interests of citizens in terms of allocation of rights and duties.<sup>178</sup> In other words, the executive and the judicial sectors actualise or protect the already taken decisions by legislative bodies, which are preoccupied with the task of communicating different interests and views to reach a coherent decision for legislation.<sup>179</sup> Therefore, it can be concluded that the scope for political participation is determined by the competency of a state body for law-making.

## **5.2. States' Margin of Discretion *vis-à-vis* the Essence of Public Participation**

Political participation in the sense of participation in elections constitutes the heart of democratic governance. The importance of democratic governance for the protection of human rights is reflected not only in the preamble of ECHR but also in the Strasbourg Court jurisprudence, which considers democracy, “[as] one of the cornerstones of the European Convention system”<sup>180</sup> and a fundamental element of, “the European public order.”<sup>181</sup> Also, democracy cannot be genuine without respecting the value of pluralism.<sup>182</sup> From the democratic point of view, the idea of democratic franchise requires that all nationals who are affected by laws should have the possibility to participate in legislative institutions. Individuals who belong to a national minority group need to participate in law-making processes which might affect the preservation of their cultural identity.

The right of minorities to exercise and preserve their culture, as guaranteed in Article 27 of ICCPR, gives a special characteristic to the right to public participation of minorities. The protection of minorities' culture requires their participation in decision-making institutions of the hosting states in order to be able to influence public decisions which affect their cultural identity. In this context, as Martin Scheinin points out, specific positive measures to facilitate public participation for national minorities might be necessary if any right to participation in public life is to be enjoyed

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<sup>178</sup> For further discussion on minorities' participation in the judiciary see Nobbs, Katherine. "International Benchmarks: A Review of Minority Participation in the Judiciary." *Political Participation of Minorities*, edited by Weller, Marc, Nobbs, Katherine, 2010, pp. 588-608.

<sup>179</sup> For a discussion on the legitimacy of sovereignty see Suksi, Markku. *Traces of Ideal Government: exploring legal-philosophical elements of internal sovereignty*, 1988, pp. 4, 69-72.

<sup>180</sup> *Karacsony and Others v. Hungary*, European Court of Human Rights, Judgement of 17 May 2016, Application Nos. 42461/13 and 44357/13, para. 138

<sup>181</sup> *Ždanoka v. Latvia*, European Court of Human Rights, Judgement of 16 March 2006, Application No. 58278/00, paras. 98, 103.

<sup>182</sup> See *Freedom and Democracy Party v. Turkey*, European Court of Human Rights, 8 December 1999, Application No. 23885/94, para. 37.

by them.<sup>183</sup> In fact, although there cannot be any one-size-fits-all approach regarding mechanisms and positive measures to facilitate the right to public participation of persons belonging to minorities, the essence of the right to public participation should always ensure that they have the possibility to be represented in decision-making, which directly concerns them.

In this regard, the Explanatory Report to FCNM states that Article 15, “leave the States concerned a measure of discretion in the implementation of the objectives, which they have undertaken to achieve, thus enabling them to take particular circumstances into account.”<sup>184</sup> Nonetheless, the Commentary of the Advisory Committee on Article 15 of FCNM highlights the need-based characteristic of the mechanisms adopted to facilitate the right to political participation for minorities. Indeed, ACFC highlights the need for constant reassessment of adopted measures regarding minorities’ participation in an evolutionary fashion to ensure the effective public participation of national minorities is realised.<sup>185</sup> ACFC does not clarify what measures are to be taken by member states, regarding Article 15 of FCNM. However, the Commentary on Article 15 of FCNM implies that state responsibility can be triggered if negligence to take positive measure could impair the exercise of the right to public participation by individuals who belong to national minorities. In this regard, the Advisory Committee notes that “[although] measures taken by state parties may be considered satisfactory in a given stage [...] it does not ensure that they will be sufficient to ensure compliance with the standards of the Framework Convention in the future.”<sup>186</sup> It is evident that ACFC considers the participation of national minorities in political life as an obligation of result, which might require positive measures to be taken by a member state if the meaningful exercise of this right requires.

Similarly, the universal right to political participation, as enshrined in P1.3 of ECHR and Article 25 of ICCPR, leaves states with a wide margin of discretion.<sup>187</sup> The Strasbourg Court has been

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<sup>183</sup> *Diergaardt et al. v. Namibia* (Communication No. 760/1996), UN Human Rights Committee, views adopted 25 July 2000, UN Doc. CCPR/C/69/D/760/1996, Appendix.

<sup>184</sup> CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1998, para. 11.

<sup>185</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, paras. 148-150.

<sup>186</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 149.

<sup>187</sup> See for example *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application no. 9267/81, para. 52; *Crippa et al. v. France* (Communication No. 993/2001, 995/2001), UN Human Rights Committee, Decision of 28 October 2005, UN Doc. CCPR/C/85/D/993-995/2001, para. 4.10.

very conservative about clarifying the content of the right to political participation of individuals belonging to national minorities, which have practically resulted in a dependency on states discretion how to implement their participatory mechanisms.<sup>188</sup> This lack of clarity might run the danger of leaving the right to public participation for individuals belonging to minorities ineffective. The ambiguity of the content of the right to public participation for individuals who belong to national minorities is a gap which can be filled by recourse to existing normative principles of international law to find a more solid ground for the protection of minorities' right to public participation.<sup>189</sup> There are two important points which should be considered in assessing the outlines of national minorities' right to participate in the political life of a state.

Firstly, the very core of the right to political participation, which is the right to vote and the right to stand in elections, cannot be arbitrarily suspended. As reiterated in ECtHR case law, although the right to political participation is not absolute and it might be subject to limitations those limitations should not be discriminatory, either directly or indirectly, in a way that impairs the right to public participation of certain individuals belonging to a minority group.<sup>190</sup> Exclusion of minorities, either explicitly or covertly, is against the principle of universal suffrage as a guaranteed human right.<sup>191</sup> In this respect, within the UN framework, the Human Rights Committee in GC No. 25 states the right to political participation, as guaranteed in the Covenant, "[...] may not be suspended or excluded except on the grounds that are established by law and that are objective and reasonable."<sup>192</sup> It means states have the obligation of non-interference with the exercise of voting rights of persons who belong to national minorities.

Second, in addition to the negative obligations, mere equal treatment can have a counter effect on the exercise of the right to public participation of national minorities. In other words, numerical

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<sup>188</sup> Pentassuglia, Gaetano. "Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities - With Special Reference to the Role of Advisory Committee." *International Journal on Minority and Group Rights*, vol. 6, issue. 4, 1999, p. 418-420.

<sup>189</sup> Oppenheim, Lassa. *Oppenheim's International Law*, vol. 1, Peace: Parts 2 to 4. edited by Watts, Arthur, and Jennings, Robert, 1992. P.40.

<sup>190</sup> *Hirst v. United Kingdom*, European Court of Human Rights, Judgement of 6 October 2005 Application No. 74025/01, para. 60.

<sup>191</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 51. *Hirst v. United Kingdom*, European Court of Human Rights, Judgement of 6 October 2005, Application No. 74025/01, para. 59.

<sup>192</sup> UN Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 4. See *Rebeca Elvira Delgado Burgoa v. Bolivia* (Communication No. 2628/2015), UN Human Rights Committee, views adopted 28 March 2018, UN Doc. CCPR/C/122/D/2628/2015, para. 11.4.



weakness and special needs of minority groups, such as the lack of knowledge of the official language by national minorities' voters (if the only official language is used on voting ballots) can constitute conditions which might expose them to indirect discrimination. In fact, if one compares the situation of national minorities to that of the majority population, whose conditions are substantially different from persons belonging to national minority communities, the lack of intention for discriminating against a national minority group loses its credibility.<sup>193</sup> It is because mere equality of treatment regarding political participation of minorities can lead to their exclusion from political life and thus render their right to political participation ineffective. Therefore, states should take positive measures to facilitate minorities' political participation as an effective right, rather than an illusory right.<sup>194</sup> In this regard, the Strasbourg Court has consistently reiterated the wide margin of discretion regarding the design of electoral systems; however, this wide margin of discretion shall not undermine the effectiveness of the right to political participation for members of national minority groups.<sup>195</sup>

Based on the reasoning of the Strasbourg Court one can argue that states have a wide margin of appreciation to adopt appropriate mechanisms for political participation which is more suitable for their, "historical development and cultural diversity."<sup>196</sup> If such mechanisms fail to be effective regarding meeting the needs of persons who belong to national minorities, states shall take affirmative measures in order to prevent thwarting the effective exercise of the right to participation by minorities. The Court, in the *Hirst v. the United Kingdom* case, concerning the discretion of states in relation to the design of the electoral systems, held, "they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."<sup>197</sup> The logical consequence

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<sup>193</sup> *D.H. and Others v. the Czech Republic*, European Court of Human Rights, Judgement of 13 November 2007, Application No. 57325/00, para. 183-184. *Thlimmenos v. Greece*, European Court of Human Rights, Judgement of 6 April 2000 Application No. 34369/97, para. 44.

<sup>194</sup> *Soering v. the United Kingdom*, European Court of Human Rights, Judgement of 7 July 1989, Application no. 14038/88, para. 87. *Magyar Helsinki Bizottsag v. Hungary*, European Court of Human Rights, Judgement of 8 November 2016, Application no. 18030/11, paras. 121, 155. *Broniowski v. Poland*, European Court of Human Rights, 22 June 2004, Application no. 31443/96, para. 185.

<sup>195</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81 para. 52. *Hirst v. The United Kingdom* (NO. 2), Judgement of 6 October 2005, Application No. 74025/01, para. 61.

<sup>196</sup> *Hirst v. The United Kingdom* (NO. 2), Judgement of 6 October 2005, Application No. 74025/01, para. 61

<sup>197</sup> *Hirst v. The United Kingdom* (NO. 2), Judgement of 6 October 2005, Application No. 74025/01, para. 62.

is that if mere equality of treatment cannot adequately realise the right to political participation for individuals belonging to minorities, affirmative measures should be taken to facilitate the exercise of their political participation.

The issue of positive measures by states regarding mechanisms of political participation, however, does not directly engage states failure regarding the right to political participation by national minorities. The Strasbourg Court, in one of its judgements, states:

It is [...] for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness[...].<sup>198</sup>

Moreover, the requirement of ‘constant review’ as required by ACFC indicates that the margin of discretion should be considered as a possibility for states to consider their domestic needs and circumstances. In other words, a wide margin of discretion cannot become an instrument for states to arbitrarily or unjustifiably compromise the right to public participation for individuals belonging to minorities.<sup>199</sup> Indeed, states should ensure that existing participatory mechanisms are effective, and the lack of positive measures does not render the right to participation of individuals belonging to minorities an illusory right. It is in this regard that governments should constantly keep the existing participatory mechanisms under check to ensure they are capable of corresponding to the needs of the minority population, and can effectively protect the essence of the right guaranteed under article 15 of FCNM.<sup>200</sup>

### **5.3. Legitimate Limitations to the Exercise of Public Participation**

The principle of *pacta sunt servanda*, as enshrined in article 31.1 of the Vienna Convention on the Law of Treaties (VCLT), states that any interpretation of treaties should be in line with the principle of good faith, (*pacta sunt servanda*) and in light of the objectives of the respective treaty.<sup>201</sup> Restrictions put on minority communities is justified, when it meets the principle of good faith enshrined in VCLT. In other words, limitations cannot be arbitrary, should be in

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<sup>198</sup> Mathieu-Mohin and Clerfayt v. Belgium, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 52.

<sup>199</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, p. 7.

<sup>200</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, paras 149-150.

<sup>201</sup> Vienna Convention on the Law of Treaties, 27 January 1980, Article 31.1; see also VCLT preamble and Article 26.

accordance with the law and for the protection of other individuals' rights. In this respect, limitations on political participation of a minority group might be due to cultural practices which are against the content of guaranteed individual rights.

Martin Scheinin examines the permissibility to grant political authority to certain cultural groups that violate the human rights of their members. He argues that within the human rights discourse the vertical relationship between individuals and state pertains to the obligation of states to ensure that third parties which states might have delegated certain functions of authority under the category of minority rights, respect and protect the human rights of their members.<sup>202</sup>

Therefore, states should give due consideration to the primary importance of individual human rights of the members of national minority groups, especially in the context of political participation. In other words, the quality of the internal structure of the group and its ability to protect equality and human rights of its members is an important matter in the context of political participation of national minorities. The Strasbourg Court in the *Refah Partisi* found it justifiable to restrict the activities of a political party due to its affiliation with a set of Islamic dogmas, which are not dynamic and could infringe the principle of non-discrimination and protection of human rights of individuals.<sup>203</sup> Therefore, when a minority group utilises democratic means to maintain an internal undemocratic structure, in relation to its members or imposes restrictions on the human rights of its member, states can legitimately apply restrictions on the political activities which aim to promote such practices.

Also, the prevention of circumventing legal rules concerning the protection of national minority groups is another legitimate ground for limiting the political rights of a community, which claims a national minority status. It seems that the Court recognises a special position for national minority groups, regarding the right to political participation. The Court expresses awareness that communities with disputed national minority status might seek to overcome the rule of equality in order to gain facilitated access to political positions.<sup>204</sup> These suspicious demands have been one

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<sup>202</sup> Scheinin, Martin. "How to Resolve Conflicts between Individuals and Collective Rights?" *Rethinking Non-discrimination and Minority Rights*, edited by Scheinin, Martin and Toivanen, Reeta, 2004, p. 231.

<sup>203</sup> *Refah Partisi and others v. Turkey*, European Court of Human Rights, 13 February 2003, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 123.

<sup>204</sup> *Gorzelik and Others v. Poland*, European Court of Human Rights, Judgement of 17 February 2004, Application No. 44158/98, para 76.

of the grounds by which the Court found it legitimate for states to introduce restrictions to protect the human rights of others.<sup>205</sup>

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<sup>205</sup>*Gorzelik and Others v. Poland*, European Court of Human Rights, Judgement of 17 February 2004, Application No. 44158/98, para 76.

## 6. Electoral Systems and National Minorities' Representation

When minorities' political participation using free elections is concerned, it can be useful to distinguish between two aspects of the right to free elections, namely, the active and the passive aspect of this right. The active aspect refers to the right of everyone to vote in the periodic and free elections. The passive aspect is concerned with the right of everyone to stand as a candidate in elections. From the perspective of minority rights, these two aspects require special considerations that need to be fulfilled to protect the substance of minorities' right to political participation through elections.

### 6.1. Active Aspect

The active aspect of the right to free elections means that everyone should have the right to vote for his or her chosen candidate in free elections, which are governed by the principle of one-person, one-vote. This aspect of the voting right is mostly concerned with a range of affirmative measures that states should take to enable members of minority communities to exercise their right to public participation. The most important measures, which constitute a general good practice regarding the holding of elections, are listed in codes of good practices issued by organs, such as the Venice Commission, which is the advisory body of the CoE in electoral and constitutional matters, and the Office for Democratic Institutions and Human Rights of OSCE. Among these good practices regarding the active aspect of voting, which can affect the voting rights of individuals belonging to national minorities, are printing the ballots and other important information in the language of minorities in addition to the official language of the state,<sup>206</sup> and determining the constituency boundaries impartially to avoid any detrimental effect on the participation of national minorities.<sup>207</sup> Furthermore, states should provide civic education and voter information to national minority voters to learn about their rights, the purpose of democratic institutions, and the voting process in areas where they live and in a language used by them.<sup>208</sup> Also, states should provide individuals

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<sup>206</sup> UN Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 12.

<sup>207</sup> The Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, October 2002. Article 2.2. VI-VII.

<sup>208</sup> The Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, October 2002, Article 3.1.b.iii. See also Office for Democratic Institutions and Human Rights, International Standards and Comments on the Right to Democratic Elections: A practical Guide to Democratic Elections Best Practice, 20 November 2002, OSCE/ODIHR draft paper, ODIHR.GAL/44/02/Rev.1, p. 12.

who belong to national minorities with easy and equal access to voting stations, especially those national minority groups who are far from urban centres and live in marginal areas.<sup>209</sup>

It is worth mentioning that the listing of such measures does not imply that these measures are exhaustive. In fact, it emphasises their enabling importance for the minorities to be able to exercise their voting rights equally.

Although the measures mentioned above are best practices and cannot engage states' legal obligations directly, in certain circumstances, the lack of affirmative measures might cause deliberative negligence that can violate the right to political participation of minorities. For example, deliberately decreasing the number of accessible polling sites in places where minority communities live or prohibiting electoral advertisements in minority languages can impair the essence of the right to political participation for persons belonging to national minorities.

In this regard, the Human Rights Committee emphasises the importance of affirmative measures to overcome specific difficulties which might prevent persons belonging to minority groups to exercise their guaranteed right under article 25 of ICCPR.<sup>210</sup> For instance, it is mentioned that state parties should include information on positive measures taken to remove such barriers regarding minorities' right to political participation in their periodic reports.<sup>211</sup> Therefore, the lack of concrete measures to facilitate the possibility of voting for individuals belonging to a minority group can, in certain circumstances, trigger the responsibility of states regarding the protection of the active aspect of the right to political participation.

## **6.2. Passive Aspect**

The passive aspect of the right to public participation refers to the direct participation of individuals in the political process of their country to represent and follow the interests of their constituents in decision-making processes. From the perspective of minorities' protection, it means that persons

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<sup>209</sup> See the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, Joint Opinion on the Draft Law on Voters List of Croatia, 16 July 2007, CDL-AD(2007)030, para. 75. It should be noted that the issue of facilitation of access to voting stations should not be understood to imply that minorities can be limited to vote in certain or designated voting stations.

<sup>210</sup> UN Human Rights Committee, CCPR General Comment No. 25, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 12.

<sup>211</sup> Ibid

who belong to a national minority group or individuals who make themselves accountable to stand as the representatives of national minorities in national decision-making forums.

The representation of minorities in national parliaments or other elected bodies of states is an essential aspect of the universal right to vote in free elections. It is based on the simple, and principal notion of democratic franchise or accountability in democracies, which implies that an election is not free unless there is a link or connection between voters and representatives.<sup>212</sup> In this regard, when candidates are restricted or banned to represent minorities' identities the voters become disenfranchised.

### **6.3. Design of Electoral Systems for Minorities' Participation**

Electoral systems in the world, despite the variety in each state, can be categorised into two main categories of majority system and proportional system.<sup>213</sup> The majority system allocates the seats to candidates or a list of candidates or a party that wins the majority of votes. The proportional system aims to ensure the fair reflection of political interests, through the distribution of the seats among candidates according to the votes they obtained. This system is the most widely used system among the CoE member states.

Regarding the realisation of the effective right to political participation of individuals belonging to national minorities, elections, and electoral systems act as the gateways which enable individuals belonging to minorities to enter into public decision-making forums. As was earlier examined in this thesis, the current *corpus* of international law does not obligate states to design or alter their electoral systems to become more favourable to their national minorities. In fact, the right to stand as minorities' candidate cannot be a basis to constitute another right to a particular electoral system which is more favourable for winning seats in the elected bodies for minorities.<sup>214</sup>

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<sup>212</sup> See ACFC, 2nd ACFC opinion on Hungary, ACFC/INF/OP/2(2004)003, paras. 25 and 28

<sup>213</sup> For more information on electoral systems see O'Leary, Brendan. "Electoral Systems and the Lund Recommendations. Political Participation of Minorities." *Political Participation of Minorities*, edited by Weller, Marc, 2010, pp. 363-399.

<sup>214</sup> See *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, *Application No. 10226/03*. The Court in this case holds that the essence of the right to stand as candidate of minority groups is not impaired. The main justification of the government of Turkey in the aforementioned case is that candidates could exercise the right guaranteed under P1.3 of ECHR through collaboration with a bigger party. In other words, political parties representing a minority group could make coalitions with other majority parties and represent minorities through this channel.

However, it does not imply that the essence of the right to political participation of minorities can be impaired by deliberately designing an electoral system which might subtly and structurally exclude minorities from public participation. In this regard, the GC No. 25 of the UN Human Rights Committee states that the committee does not require states to set any particular electoral system but whatever system is utilised by states, “it must guarantee and give effect to the free expression of the will of its electors.”<sup>215</sup> In the same line of argument, the former European Commission of Human Rights declares that although a proportional system is more favourable to minority representation, it is within the discretion of state parties to decide on their electoral systems in general.<sup>216</sup>

Regardless of the merits and disadvantages of each of these systems, the majority system or the proportional system, we will consider the implications of each system for the right to political participation of national minorities below.

### **6.3.1. Proportional Systems**

The proportional system offers a better possibility for the participation of national minorities and facilitates the representation of minority communities.<sup>217</sup> However, it should be taken into account that even though this electoral system is more suitable for the representation of smaller groups, it does not automatically guarantee the representation of minorities because the main impediment to the representation of minorities in the proportional system is the issue of minimum thresholds. Minimum thresholds ensure that only those parties or representatives can acquire seats which received the minimum percentage of votes determined in the electoral laws. Thresholds in proportional systems are necessary due to a fundamental need to avoid fragmentation in parliaments and to ensure cohesiveness in parliamentary decisions.

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<sup>215</sup> UN Human Rights Committee, General Comment No. 25, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 21.

<sup>216</sup> *Kennedy Lindsay and others vs. United Kingdom*, European Commission of Human Rights, Decision of 8 March 1979, Application No. 8364/78.

<sup>217</sup> OSCE High Commissioner on National Minorities, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life*, High Commissioner on National Minorities, 1 September 1999, para 9. See also OSCE High Commissioner on National Minorities, *The Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 1 September 1999, para 9.



Minimum thresholds can become an obstacle for the representation of national minorities when a minority community has a small number of members to be able to meet the minimum threshold requirement. It can, in effect, lead to the exclusion and marginalisation of political voices of these small minorities, and subsequently, paralyse them to have any significant influence on public decisions which affects them.

Despite the abovementioned consequences, there are no international law standards which provide for the exemption from thresholds for the representatives or the parties representing a national minority. The issue of thresholds is mainly left to the discretion of states because firstly, complexities of each state, concerning its electoral system, make it difficult for an international body to standardise electoral designs, which are dependent on domestic circumstances of each state. As the Strasbourg Court states, “the number of situations provided for in the legislation on elections in many member states of the Council of Europe shows the diversity of possible choice on the subject.”<sup>218</sup> Further, the Court states, “Any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another.”<sup>219</sup> The Court is of the opinion that as long as electoral systems can fulfil their very objective, which is a reflection of people opinion, they do not violate the right to political participation.<sup>220</sup> In this regard, the Court formulates two contrasting tasks for electoral systems:

[...] electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand to reflect fairly faithfully the opinions of the people, and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will.<sup>221</sup>

Therefore, although exception from minimum threshold might not be legally supported, there are constraints for the application of the minimum threshold requirement. Indeed, minimum thresholds cannot be used as an instrument to push aside the political voices of numerically weak groups, such as national minorities. In this respect, the UN Human Rights Committee in GC No.25 states,

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<sup>218</sup> *PY v. France*, European Court of Human Rights, Judgement of 11 January 2005, Application No. 66289/01, para. 46

<sup>219</sup> *Ibid*

<sup>220</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, para. 111.

<sup>221</sup> *Ibid*, para. 112; See also *Partija Jaunie Demokrāti and Partija Mūsu Zeme v. Latvia*, Decision of 29 November 2007, Application Nos.10547/07, 34049/07.

“If a candidate is required to have a minimum number of supporters for nomination, this requirement should be reasonable and not act as a barrier to candidacy.”<sup>222</sup>

Moreover, the Lund Recommendations also require member states, however in a non-binding manner, to provide lower thresholds for minorities.<sup>223</sup> The Framework Convention does not contain any provision on the electoral thresholds. However, the Thematic Commentary on Art 15 implicitly refers to the issue of the effect of thresholds on national minorities’ representation. It considers exemption from minimum electoral thresholds, as one of the ways which facilitate representation of minorities’ representatives in elected bodies, without requiring any further step to be taken by members states in that regard.<sup>224</sup> However, contrarily ACFC in its opinion on Lithuania, when the government of Lithuania withdraws the exemption from thresholds in 1996, the withdrawal of thresholds is not criticised by the Advisory Committee.<sup>225</sup>

The case law of the Strasbourg Court indicates that the Court has been very conservative in its attitude to electoral thresholds. Even in cases that there were grounds to be sceptical regarding the proportionality of high electoral thresholds, which could affect the representation of minorities, the Court adopts the same conservative approach. The Court reiterated the position of the former Commission that even, “a system which fixe[d] a relatively high threshold,” falls under the wide margin of appreciation of states.<sup>226</sup> Similarly, in a case against Germany, the Court adopted the view that although FCNM advises states to have more favourable treatment in this regard, ECHR did not call for any differential treatment in favour of minority parties. The Court stated in its

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<sup>222</sup> UN Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 17.

<sup>223</sup> OSCE High Commissioner on National Minorities, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1 September 1999, para. 9; OSCE High Commissioner on National Minorities, The Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life, High Commissioner on National Minorities, 1 September 1999, para. 9.

<sup>224</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para 82.

<sup>225</sup> ACFC, First Opinion on Germany, 1 March 2002, ACFC/INF/OP/I (2002)008, para. 63; First Opinion on Poland, 27 November 2003, ACFC/INF/OP/I (2004)005, para. 86; Second Opinion on Serbia, 25 June 2009, ACFC/INF/OP/II (2009)001, para 102; See Joseph, Marko. "The Council of Europe Framework Convention on the Protection of National Minorities and Advisory Committee's Thematic Commentary on Effective Participation." *Political Participation of Minorities*, edited by Weller, Marc and Nobbs, Katherine, Oxford University Press, 2010, p. 235.

<sup>226</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, para. 113; *Magnago and Südtiroler Volkspartei v. Italy*, European Commission of Human Rights, Decision of 15 April 1996, Application No. 25035/94.

judgment, “there is not any obligation derived from FCNM provisions to exempt national minorities from the requirement of meeting the electoral thresholds.”<sup>227</sup>

Subsequently, the Court maintains its former position on the issue of the minimum threshold that it falls under the wide margin of discretion of member states. The Court maintained that the issue of minimum threshold does not automatically constitute a violation of the rights guaranteed under P1.3 unless the very essence of the right to political participation is impaired. In *Yumak and Sadak*, the Court seems held that even a 10% threshold in the case of Turkey, which is the highest percentage among the CoE member states, does not impair the essence of the right to political participation of national minorities.<sup>228</sup> The Court considered such a high threshold as a legitimate aim under the rubric of the wide margin of appreciation.<sup>229</sup>

In the joint dissenting opinion, Judge Tulkens, Judge Vajic Jaeger and Judge Šikuta, regarding the imposition of higher than usual minimum thresholds, reject the Courts’ reluctance concerning the representation of national minorities. They state that the high minimum thresholds, “[...] virtually eliminated the possibility of minority parties to enter the Turkish Grand National Assembly[...].”<sup>230</sup> Therefore, the Court gave a wide margin of appreciation to states, not only in relation to the exemption from thresholds but also regarding the issue of high thresholds and refused to judge on any fixed minimum threshold, which could have the effect of introducing permissible rates regarding the issue of electoral threshold for member states of the CoE.

The reasoning of the Court, in addition to the wide margin of discretion of states in relation to their domestic social and political circumstance, is that minorities’ right to political participation does not foresee a guarantee for winning in elections.<sup>231</sup> In other words, neither minority candidates nor minority voters can be given any guarantee that they can win in electoral competitions or they can be ensured to find their preferable candidates on the candidates’ lists.

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<sup>227</sup> *Partei Die Friesen v. Germany*, European Court of Human Rights, Judgement of 28 January 2016, Application No. 65480/10. 28, paras. 36 and 43.

<sup>228</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, para. 113, para. 84.

<sup>229</sup> *Ibid*

<sup>230</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, Joint Dissenting Opinion, para. 1.

<sup>231</sup> *Partija Jaunie Demokrāti and Partija Mūsu Zeme v. Latvia*, Decision of 29 November 2007, Application Nos.10547/07, 34049/07.

Although it can be argued that the Court took a justified position in a case against Germany, about the exemption of minority candidates from minimum threshold requirements,<sup>232</sup> it is not clear why the Strasbourg Court failed to distinguish between the guarantee for winning seats and the guarantee to compete on equal terms with parties that represent the majority population. Because the latter does not imply the exemption of national minorities' representatives from the requirement of the minimum threshold, but quite the opposite, it recognises the necessity of thresholds in a proportional manner, which does not impair the representation of minorities in the elected bodies. In this respect, the numerical weakness of national minorities makes it extremely difficult for parties or candidates who represent them to meet the high minimum threshold requirements. The imposition of higher minimum thresholds can, in fact, impede national minorities to become represented in the national legislative bodies, which in practice impairs the essence of the right to political participation of national minorities indirectly.

Presumably, solutions such as forming multi-party coalitions might not be appealing for directly representing minorities' interests in important decision-making bodies, such as the national parliaments. As stated in the joint dissenting opinion in the *Sadak and Yumak* case, there is no certainty that forming multi-party coalitions, "will remain available in the future."<sup>233</sup> Also, the dissenting judges argued, "to achieve such alliances, candidates from one party have to be accepted, even approved of, by another party, [which] undermines the independence of parties especially in respect of their representatives standing as candidates on other parties' lists."<sup>234</sup>

In general, the Court takes into account the political and constitutional systems of member states in its assessment of elections. Despite the wide discretion of states, the Court maintains its position, "to determine in the last resort whether the requirements of Protocol No. 1 have been complied with."<sup>235</sup> The historical context of states, as well as the stage of evolution of the country under review concerning democratic values, are factors for determination of any divergence from the guaranteed right under P1.3.<sup>236</sup> As was remarked several times in this thesis, although a one-size-

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<sup>232</sup> *Partei Die Friesen v. Germany*, European Court of Human Rights, Judgement of 28 January 2016, Application No. 65480/10, para 43.

<sup>233</sup> *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, Joint Dissenting Opinion, para. 4.

<sup>234</sup> *Ibid*

<sup>235</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 52.

<sup>236</sup> European Court of Human Rights, Guide on Art 3 of Protocol No. 1 – Right to Free Elections, April 2018, para 16

fits-all approach regarding issues of national minorities' political participation is not a feasible approach, the Court could have followed its logic of case by case assessment more effectively regarding the issue of minorities' representation.

### **6.3.2. Minority Representation in Majority Systems: the Effect of Electoral Boundaries**

It is worth mentioning that the thesis does not intend to prescribe the proportional system over the majority or vice versa because it does not have any legal basis in the current body of international law standards. It is only intended to take into account some special measures which might have a negative or positive impact on the right to political participation of national minorities. In this regard, some of these measures might even hamper the essence of the right to political participation.

The primary concern in states with a majority system is the issue of drawing electoral boundaries, which can have a detrimental effect on the right to political participation of minorities. The Black's Law Dictionary defines Gerrymandering as, "The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."<sup>237</sup>

Therefore, gerrymandering, as indicated in the above definition, is a manipulative practice of changing electoral boundaries to change electoral results in the advantage of a group, and it is a relevant issue in majority systems. When minorities are concentrated in one part of the territory of a state, the drawing of boundaries can positively or negatively affect their voting rights and their representation in decision-making bodies. In addition to the negative effects of gerrymandering on the right of political participation of minorities, it can undermine the equality of voters and the principle of one-person, one-vote as a foundational principle, which makes an election genuine and capable of expressing the wills of citizens.<sup>238</sup>

The Human Rights Committee in GC No. 25 deals with the issue of drawing electoral boundaries and holds that states have a general obligation to ensure that their electoral systems are compatible with the rights protected by article 25 of ICCPR. The Committee states, "the drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or

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<sup>237</sup> Garner, Bryan A, Campbell Black, Henry. *Black's Law Dictionary*. 2004, P. 2024.

<sup>238</sup> ICCPR, entered into force 23 March 1976, Article 25 (b)

discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.”<sup>239</sup> The same position is reflected in Art 16 of FCNM as well as FCNM Explanatory Report.<sup>240</sup> Article 16 of FCNM stipulates, “The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present Framework Convention.”<sup>241</sup> However, as the Explanatory Report of FCNM clarifies, these alterations can be done if a legitimate aim is pursued.<sup>242</sup> For instance, if the construction of a dam requires the resettlement of persons who belong to a minority group.<sup>243</sup> The negative effect of changing constituency boundaries on the right to public participation of individuals belonging to national minorities is mentioned in the Thematic Commentary to Article 15 of FCNM, which asks member states to consult with minorities if any reform is to be made.<sup>244</sup> Therefore, states cannot adopt measures to reduce the proportion of minorities in the areas inhabited by them as an instrument to limit the possibility of their representation.<sup>245</sup>

Furthermore, the principle of good faith as enshrined in the preamble and Article 26 of the Vienna Convention on the Law of Treaties requires that states should discharge their obligations with good faith.<sup>246</sup> Also, Article 17 of ECHR and Article 5.1 of ICCPR both provide for the prohibition of the abuse of rights, which prohibits states from destructing the meaningful exercise of the guaranteed human rights and freedoms.<sup>247</sup> Naturally, the practice of redrawing electoral boundaries if aims for a covert limitation of the right to political participation by national minorities will constitute an unlawful measure. In other words, it can trigger states responsibility concerning the protection of the right to political participation. The approach of the Strasbourg Court, in its case law dealing with Article 3 of Protocol No.1, confirms that despite the wide margin of appreciation

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<sup>239</sup> UN Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 21.

<sup>240</sup> FCNM, 1998, Art 16; CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1995, paras. 81-82.

<sup>241</sup> Ibid

<sup>242</sup> CoE, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1998, para. 82.

<sup>243</sup> Ibid

<sup>244</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, paras. 88-90.

<sup>245</sup> Ibid

<sup>246</sup> Vienna Convention on the Law of Treaties, entered into force 27 January 1980, Article 26 & preamble.

<sup>247</sup> ECHR, entered into force 3 September 1953, Article 17; ICCPR, entered into force 23 March 1976, Article 5.1.

of member states regarding P1.3 they cannot render the right guaranteed under P1.3 ineffective. In this regard, deliberately changing electoral boundaries have a negative effect on political participation of national minorities and is against the principle of good faith, which falls short of respecting the content of the right to political participation for national minorities.<sup>248</sup> Also, within the non-binding framework of OSCE, the Lund Recommendations highlights the potential negative effect of boundaries on the equal representation of minorities.<sup>249</sup>

Although gerrymandering is against the principle of good faith, states can take affirmative measures to facilitate the representation of national minorities by positive gerrymandering. States can draw electoral boundaries as a leverage to increase the possibility of representation for national minorities. Thus, redrawing electoral boundaries in favour of national minorities is permissible if it aims to overcome the problem of underrepresentation of national minority groups in legislative bodies. In this regard, Thematic Commentary on FCNM can be interpreted to welcome reforms in electoral boundaries that increase opportunities for representation of national minorities.<sup>250</sup>

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<sup>248</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 52

<sup>249</sup> OSCE High Commissioner on National Minorities, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 1 September 1999, para. 10.

<sup>250</sup> ACFC, *Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs*, 5 May 2008, ACFC/31DOC(2008)001, para 90.

## **7. Issues Concerning Minorities Representations in the Legislature**

### **7.1. The knowledge of the Official Language**

One aspect of the right of individuals belonging to national minorities to political participation is the issue of the knowledge of the official language, as a condition for the eligibility of representatives of national minority groups to stand as candidates. The international human rights provisions that guarantee the right to political participation, including Article 25 of ICCPR and P1.3 of ECHR, do not foresee the requirement of the knowledge of the official language as a prerequisite for the exercise of this right. However, ACFC considers the issue of language requirements, concerning the provisions of FCNM but follows two different approaches. On the one hand, the Advisory Committee in its Thematic Commentary on Article 15 provides that the knowledge of the official language of the state should not impede members of a minority group to stand as candidates in elections.<sup>251</sup> In this regard, ACFC, in its first opinion on Estonia, encourages the government of Estonia to nullify these requirements due to their negative effect on the right to political participation of individuals who belong to national minorities.<sup>252</sup>

On the other hand, ACFC takes a different approach in relation to public administration bodies, and state organs that provide public services. ACFC adopts the view that the requirement of language proficiency in order to access certain jobs in the public administration is justified, as far as the proficiency requirements are not disproportionate and states have provided language training courses to individuals belonging to national minorities.<sup>253</sup> It implies that although the knowledge of the official language is required, it should not be disproportional and opportunities to learn the official language should be easily available to persons who belong to national minorities.<sup>254</sup>

Therefore, ACFC is of the opinion that requirements related to the knowledge of the official language are justified to the extent they are objective and proportionate. However, the approach of ACFC is different concerning the language requirements for the exercise of the right to political participation. ACFC holds that the requirement of the knowledge of the official language is

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<sup>251</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para 102.

<sup>252</sup> ACFC, 1<sup>st</sup> opinion on Estonia, 14 September 2001, ACFC/INF/OP/I (2002)5, para. 55.

<sup>253</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 126.

<sup>254</sup> *Ibid*, para 126; see ACFC, 1<sup>st</sup> Opinion on Azerbaijan, ACFC/INF/OP/I (2004)001, 22 May 2003. Para. 79.



incompatible with Art 15 of FCNM.<sup>255</sup> It seems unclear why ACFC hold divergent attitudes, regarding the legislature and the administrative bodies, because the lack of official language by candidates of minorities might affect the communications within the legislature and give rise to difficulties in the functioning of the legislatures in the same manner as the administrative bodies.

The right to stand as a candidate is not an absolute right. The Strasbourg Court acknowledges that states can legitimately impose stricter eligibility criteria on those who want to stand for election.<sup>256</sup> Also, the GC No.25 of the UN Human Rights Committee confirms that states can impose restrictions and requirements concerning the candidacy and direct participation of citizens in elections. There is not any explicit reference to the requirement of knowledge of the official language by minority candidates among the grounds that are banned in the GC No. 25, but the general criterion is that limitations and requirements should be reasonable and proportionate.<sup>257</sup> Restrictions pertaining to the knowledge of the official language of a state, naturally, affect individuals who belong to a national minority group and speak a minority language, which does not have official status. In this regard, states have wide discretion regarding the imposition of the requirement of the knowledge of the official language of the state on national minorities' candidates.

The case law before the European Court of Human Rights indicates that the language proficiency requirements are in themselves perfectly acceptable from the Convention point of view.<sup>258</sup> The Court in the *Podkolzina* case observed that the requirement of the sufficient knowledge of the official language might pursue a legitimate aim, and this decision is determined by the historical and, political considerations, specific to each country.<sup>259</sup> Indeed, states have a legitimate interest

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<sup>255</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 102.

<sup>256</sup> *Melnychenko v. Ukraine*, European Court of Human Rights, Judgement of 30 March 2005, Application No. 17707/02, para. 57.

<sup>257</sup> UN Human Rights Committee, CCPR General Comment No. 25, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, paras. 6 and 15; compare with *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 52; *Matthews v. the United Kingdom*, European Court of Human Rights, Judgement of 18 February 1999, Application No. 24833/94, para. 63; in the cases mentioned above, the judgements of the court are concerned with the non-absolute nature of the right to elections and the wide margin of appreciation that states enjoy in this sphere especially concerning the right to stand as a candidate in elections.

<sup>258</sup> *Zdanoka v. Latvia*, European Court of Human Rights, Judgement of 16 March 2006, Application no. 58278/00, para. 113.

<sup>259</sup> *Podkolzina v. Latvia*, European Court of Human Rights, Judgement of 9 April 2002, Application No. 46726/99, para. 34.

in ensuring that their institutions function properly, and this might require the imposition of a common working language to ensure the smooth work of the elected bodies.<sup>260</sup>

Therefore, the approach of the Court, regarding the language requirements, is that states have a wide margin of appreciation in this regard.<sup>261</sup> Also, the Strasbourg Court, in its analysis of the wide margin of appreciation, does not apply its typical ‘necessity test’ or the existence of a ‘pressing social need’ in relation to qualifications imposed on the exercise of the right to political participation. In other words, states can justify their measures on more grounds than of those grounds listed in Articles 8 to 11 of ECHR, which contain a qualifying clause on the legitimate grounds for the exercise of the rights. The compliance of states’ restrictions with the content of P1.3 requires two criteria, and those are the lack of arbitrariness in imposing restrictive measures (the official language requirement) and the proportionality of restrictive measures or eligibility requirements.<sup>262</sup> Indeed, the Court’s assessment is to clarify whether restrictions and eligibility requirements had the effect of rendering the content of P1.3 ineffective or not.<sup>263</sup> Furthermore, the UN Human Rights Committee adopts the same approach to the assessment of the legality of restrictions imposed on the right to public participation as enshrined in article 25 of ICCPR. The Committee, similarly, follows the two-layered analysis of the legality or the lack of arbitrariness and proportionality.<sup>264</sup>

Considering the requirement of the knowledge of the official language for persons belonging to minorities, the Court in the *Podkolzina* case, based on the general assessment criteria we discussed above, found a violation of Art 3 of protocol No.1 of ECHR. The violation of P1.3, however, was not based on the fact that the government of Latvia imposed language requirements on minorities’ candidates. The violation of P1.3 was based on the process and the degree of restrictions which were not proportional and had the effect of impairing the essence of the right to stand as minorities’

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<sup>260</sup> *Podkolzina v. Latvia*, European Court of Human Rights, Judgement of 9 April 2002, Application No. 46726/99, para. 34.

<sup>261</sup> See ECHR, entered into force 3 September 1953, Articles 8-11.

<sup>262</sup> *Hirst v. The United Kingdom* (NO. 2), Judgement of 6 October 2005, Application No. 74025/01, paras. 73-85; see also *PY v. France*, European Court of Human Rights, Judgement of 11 January 2005, Application No. 66289/01, para. 47.

<sup>263</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, para. 52.

<sup>264</sup> *Marie-Hélène Gillot et al v. France* (Communication No. 932/2000), UN Human Rights Committee, views adopted 15 July 2002, UN Doc. CCPR/C/75/D/932/2000, para. 13.2.

candidate in the election.<sup>265</sup> In fact, although the candidate had a language proficiency certificate, the government did not accept the applicant's certificate because her language competencies might have deteriorated from the time she had received the certificate, and consequently, the applicant's certificate was refused to be taken into account as a proof for her language proficiency.<sup>266</sup> The Court found the restrictions unjustified and stipulated, "Any guarantee of objectivity and the procedure applied to the applicant was incompatible with requirements of procedural fairness and legal certainty."<sup>267</sup>

In general, it seems that the approach of ACFC to the issue of the elimination of the language proficiency requirements for minorities' candidate in the legislature is not supported in the case law of ECtHR. In other words, it might be far-fetched to think of legal obligation for states to eliminate the requirement of the knowledge of the official language for national minorities' representatives who want to stand as candidates in elections. As was observed by the Court, the imposition of language requirements to ensure the normal functioning of national institutions is, "incontestably legitimate," and, "applies all the more to the national parliament, which is vested with legislative power and plays a primordial role in a democratic State."<sup>268</sup>

Those states which host national minorities on their territory might legitimately require the knowledge of the official language of the state. In this regard, states might not have any obligation under international law to exempt individuals belonging to national minority groups from having sufficient language skills. However, they will be in breach of their obligations regarding the protection of the right to political participation of national minorities if they disproportionately employ the official language requirement to impede members of national minority groups from being represented in the elected bodies.

## **7.2. Parliamentary Practices Affecting the Effective Participation of National Minorities**

The right to effective participation in public life is not limited to the framework of elections. Political participation should be understood as a process by which different issues unfold as the process proceeds. The effective participation of minorities, as recalled by the Thematic

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<sup>265</sup> *Podkolzina v. Latvia*, European Court of Human Rights, Judgement of 9 April 2002, Application No. 46726/99, para. 35.

<sup>266</sup> *Podkolzina v. Latvia*, European Court of Human Rights, Judgement of 9 April 2002, Application No. 46726/99, para. 36.

<sup>267</sup> *Ibid*, paras. 36 and 37.

<sup>268</sup> *Ibid*, para. 34.

Commentary to Article 15 of FCNM, should not be understood as a process which is limited to election day.<sup>269</sup> In addition to the considerations which are related to the participation of minorities through elections, it is important to take into account whether the representatives of national minority groups are vested with reasonable means in order to be able to influence the decisions taken by the majority representatives. In this regard, the representation is a necessary requisite for the facilitation of participation of national minorities in political life, but it is not enough to effectively guarantee their influence. The Thematic Commentary of ACFC on Article 15 of FCNM emphasises the participation of national minorities as, “an obligation of result.”<sup>270</sup> Such a result-oriented approach serves as a guide to appreciate what other conditions should be met to give effect to the right to political participation of national minorities. Therefore, in order to analyze the effectiveness of the right to political participation, one should also consider the ability of individuals belonging to minorities to meaningfully influence over the course of decision-making, beyond their mere representation in the elected bodies.<sup>271</sup>

National minorities’ representatives can influence the public decisions taken at parliaments in various ways. The continuum of mechanisms and powers vested in minorities’ representatives range from parliamentary communications by which the representatives can protect their interests, and thus, reflect the perspective of national minorities, to special powers granted to minority representative, such as veto powers to turn down decisions which negatively affect the interests of a national minority group.<sup>272</sup>

One of the main instruments of representatives in parliaments to influence the final result of decision-making is through communication and speech. Parliamentary deliberations have two main benefits, which minority representatives or parties can make the best use of it for the advantage of protecting the interest of their constituencies. The first benefit of deliberations is that

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<sup>269</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, paras, 19, 21. See also Explanatory Report to Framework Convention for the Protection of National Minorities, Council of Europe, 1 February 1995, para. 80.

<sup>270</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 10.

<sup>271</sup> Marko, Joseph, "The Council of Europe Framework Convention on the Protection of National Minorities and Advisory Committee Thematic Commentary on Effective Participation." *Political Participation of Minorities*, edited by Weller, Marc and Nobbs, Katherine, 2010, p. 239.

<sup>272</sup> Protsyk, Oleh, "Making Effective Use of Parliamentary Representation." *Political Participation of Minorities*, edited by Weller, Marc and Nobbs, Katherine, 2010, pp 401-402

deliberations are informative, and representatives of minorities can present the claims of minorities in a national decision-making forum.<sup>273</sup> It will have the effect of introducing the concerns of minority communities, and this will have the advantage of giving knowledge to members of parliament who might be unaware of the issues related to minorities.

The second benefit of deliberation is the transformative effect of deliberation, which is especially true when legislative proposals can affect minorities negatively.<sup>274</sup> Indeed, decisions concerning minorities can be transformed, altered, and better appropriated regarding the cultural interests of national minority groups through the use of deliberation by national minorities' representatives.<sup>275</sup>

The Strasbourg Court also recognises the importance of debates in parliaments, or their equivalents with legislative authority, in respect of presentation and protection of interests of different segments of society.<sup>276</sup> In fact, the correlation between an effective political democracy and an effective parliament, which enables the members of parliament to participate equally in parliamentary proceedings, is highlighted by the Court.<sup>277</sup> The legislative bodies should allow representatives of national minorities to participate in debates and discussions to present their ideas freely. In this regard, the Court acknowledges a heightened level of protection for the right to freedom of expression for representatives and states:

There can be no doubt that speech in Parliament enjoys an elevated level of protection. Parliament is a unique forum for debate in a democratic society, which is of fundamental importance. The elevated level of protection for speech therein is demonstrated, among other things, by the rule of parliamentary immunity.<sup>278</sup>

Therefore, statements made by national minorities' representatives, through debates and communications in parliaments, might even call into question the current constitutional order or organisation of a state for the aim of promotion and protection of their specific cultures and interests. The ability of minorities' representatives for presenting their priorities and perspectives cannot be pushed aside, because they invoke secessionist sentiments or question the territorial integrity of a state. As stated by the Court, "it is of the essence of democracy to allow diverse

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<sup>273</sup> Protsyk, Oleh, "Making Effective Use of Parliamentary Representation." *Political Participation of Minorities*, edited by Weller, Marc and Nobbs, Katherine, 2010, pp. 406-407

<sup>274</sup> Ibid, pp. 406-407.

<sup>275</sup> Ibid, p. 406

<sup>276</sup> *Karacsony and Others v. Hungary*, European Court of Human Rights, Judgement of 17 May 2016, Application Nos. 42461/13 and 44357/13, para. 138.

<sup>277</sup> Ibid, para. 141.

<sup>278</sup> Ibid, para. 138.

political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”<sup>279</sup>

The obligation of result, mentioned in ACFC Commentary on Article 15 of FCNM regarding the provision of effective political participation for national minorities, can be read in lights of the real opportunities that allow minorities to reflect their concerns through their representatives in legislative bodies. It is through this opportunity that everyone’s voice is heard and the final result of public decisions can be a consensus, which is not disadvantageously against a minority community.

The importance of the inclusion of minorities’ voice through deliberations is a fundamental aspect of the protection of minorities’ cultural identity. In this regard, the UN Human Rights Committee, in *Apirana Mahuika* stated, “the enjoyment of the right to one’s own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>280</sup> The requirement for providing a real opportunity for debate and consultation, with representatives of persons belonging to national minorities in decision-making, is also confirmed in the views of the UN Human Rights Committee. The Committee, in GC No. 23, holds that the protection of the right to enjoy culture guaranteed under article 27 of ICCPR might require states to ensure effective political participation of individuals belonging to minorities in matters which directly affect them.<sup>281</sup> In this regard, the Committee finds no violation of article 27 in the individual communications, such as *Apirana Mahuika* and *Länsman*, because governments had gone through extensive consultation with minorities and they were allowed to contribute sufficiently throughout the course of decision-making.<sup>282</sup> In fact, the measures of governments of New Zealand and Finland could have directly affected the members of national minorities’ lifestyle and could have potentially triggered state responsibility regarding the protection of minorities’ right to freely enjoy their culture. However, because affected communities had the opportunity to participate in the negotiation processes, the

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<sup>279</sup> *Socialist party and Others v. Turkey*, European Court of Human Rights, 25 May 1998, Application No. 20/1997/804/1007, para. 47.

<sup>280</sup> *Apirana Mahuika et al v. New Zealand* (Communication No. 547/1993), UN Human Rights Committee, Views adopted 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, para. 9.5.

<sup>281</sup> UN Human Rights Committee, General Comment No. 23, April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7.

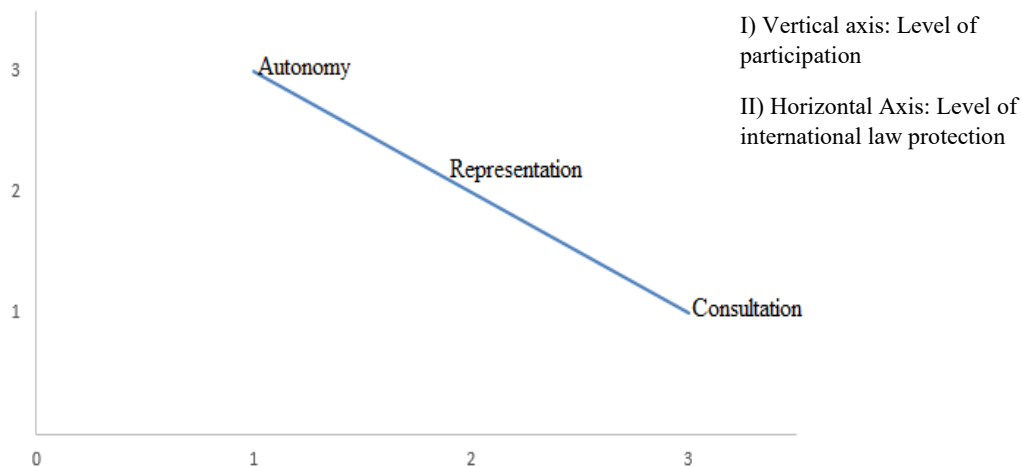
<sup>282</sup> *Apirana Mahuika et al v. New Zealand* (Communication No. 547/1993), UN Human Rights Committee, Views adopted 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, para. 9.8.

Committee found no violation of Article 27. Therefore, an effective right to public participation of individuals belonging to minorities can only be exercised when the voice of minority representatives is taken into account through debate and consultation in matters which directly can affect their cultural rights.

## 8. Participation of Minorities through Autonomous Arrangements

### 8.1. Autonomous Arrangements: a Legal Right or a National Compromise

Minorities' participation in political and public life can be designed in two distinguished levels, namely, their participation within the legislative body of states to protect and promote their culture, and interests through representation and the exercise of electoral rights (as was discussed in the previous chapters). The public participation through channels of representation and elections is also a guaranteed human right embedded in international human rights law instruments. The second aspect is national minorities' participation through means of self-governance or autonomous arrangements, which allows them to control their affairs directly. The following graph illustrates the different levels of minorities' participation in decision-making on a continuum of participation and the level of protection which is afforded in the current *corpus* of international law.



*Participation Graph*

For more clarity, we should first look into the definition and types of autonomy. Autonomy, as Hannum Hurst states, “[is] a relative term which describes a degree of independence of a particular entity [...]”.<sup>283</sup> Markku Suksi argues, “[...] autonomy arrangements are often very pragmatic *ad hoc* solutions that escape generalizations.”<sup>284</sup> Suksi suggests that autonomies can be divided, concerning their spatial dimension and legislative powers.<sup>285</sup> Regarding the spatial dimension, autonomies can be divided into territorial and non-territorial autonomies. In fact, territorial autonomy exists when territorial boundaries determine the authority of an entity.<sup>286</sup> The non-territorial form of autonomy (cultural autonomy) is not based on territorial boundaries; however, it exercises its authority over individuals who wish to be affiliated with a national minority group.

The spatial dimension of autonomies can be coupled with another distinction which is related to types of powers and authorities of these entities. They can be divided into autonomous arrangements with legislative powers and regulatory powers.<sup>287</sup> Those autonomous entities that enjoy legislative powers, either territorial or non-territorial, have the power of norm-setting (law-making) and as a consequence would entail administrative and regulatory powers in extensive areas.<sup>288</sup> Regulatory power, however, can usually be exercised in matters related to administration, budgetary powers, and so forth and need to be compatible with the legislation of the national parliaments.<sup>289</sup>

On the basis of this analysis which considers autonomy as a need-based arrangement, one can conclude that the *ad hoc* nature of autonomous arrangements is based on the will of states to limit their sovereignty and transfer it to a form of a sub-state entity to meet the demands of a particular national minority group.<sup>290</sup> When autonomy is conferred to a national minority group through democratic legislative institutions, where national minorities are already represented, this indicates that structures of inclusive decision-making respecting principles of pluralism and non-

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<sup>283</sup> Hanum Hurst, Lillich, Richard. "The Concept of Autonomy in International Law." *Models of Autonomy*, edited by Dinstein, Yoram, 1981, p. 249.

<sup>284</sup> Suksi, Markku. "Introduction: Rethinking the Forms of Autonomy at the Dawn of the 21st Century." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, p. 149.

<sup>285</sup> Ibid

<sup>286</sup> Ibid, p. 144.

<sup>287</sup> Ibid, p. 145.

<sup>288</sup> Ibid, p. 146.

<sup>289</sup> Ibid

<sup>290</sup> Vizi, Balazs. "Minority Groups and Autonomy from an International Political Perspective." *Minority Governance in Europe*, edited by Gál, Kinga, 2002, p. 51.



discrimination are already existent. In other words, it is through the exercise of the right to political participation which members of a national minority group can give an institutional aspect to their right to political participation, in the form of autonomy. This understanding of autonomy is confirmed by a group of scholars, such as Suksi,<sup>291</sup> Friedlander,<sup>292</sup> and Eide<sup>293</sup> who believe that autonomy is not a right but a claim, which can be considered in a democratic setting. Such understanding of autonomy is more in line with the current *corpus* of international law, because it is difficult to find a solid legal ground for justification of autonomy as a right for national minority groups, and consequently, an obligation to be discharged by states in relation to their national minorities.

It can be argued that the right to effective political participation, only indirectly, suggests the possibility of an autonomy arrangement for a minority group in the sense that when channels for minorities' political participation are open as a result of national consensus, a national minority group might acquire an autonomous arrangement.

## **8.2. Autonomy and Self-Determination**

Autonomy or self-governing arrangements are mechanisms for the facilitation of participation of minorities in political and public life. Autonomous arrangements, in the most general term, place national minority groups in direct control of matters, which are crucial to the preservation of their cultural identity. Due to such direct control, autonomous arrangements are one of the most effective means of minorities' public participation for the purpose of protection of their interests. In fact, autonomy is an advanced and, "institutionalized form of participation in decision-making,"<sup>294</sup> which allows persons who belong to national minority communities to have more authority over matters of cultural or economic importance, such as education, public budget determination or the use of budgetary sources.

However, autonomy is a political concept, which cannot find any apparent basis in international law. There have been attempts, in the legal literature, to find a proper legal justification for

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<sup>291</sup> See Suksi, Markku. "On the Entrenchment of Autonomy". *Autonomy: Application and Implications*, edited by Suksi, Markku, 1998, p. 152.

<sup>292</sup> Friedlander, A. Robert. "Autonomy and the Thirteen Colonies: Was the American Revolution Really Necessary?" *Models of Autonomy*, edited by Dinstein, Yoram, New Brunswick: Transaction Books, 1981, p. 137.

<sup>293</sup> UN Commission on Human Rights, Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, 10 August 1993, UN Doc. E/CN.4/Sub.2/1993/34, para. 88.

<sup>294</sup> Gál, Kinga. "Minority Governance on the Threshold of the Twenty-First Century." *Minority Governance in Europe*, edited by Gál, Kinga, Budapest: Local Government and Public Service Initiative, 2002, p. 3.

autonomy on the basis of the right to self-determination as enshrined in the common Article 1 of ICCPR and the International Covenant on Economic, Social and Cultural Rights. Some legal commentators contemplate autonomy as a component of the right of peoples to self-determination. In this form of contemplation, self-determination is considered as a legal concept, which is pregnant with different political options, such as federalisation, independence, association with another independent state, and autonomy or self-government.<sup>295</sup> This understanding of autonomy, as a component of self-determination, emerges only after the post-colonial era. In this period, the orthodoxy regarding the right to self-determination which understands self-determination only in the context of decolonisation and the liberation movements is abandoned by some commentators.<sup>296</sup> In the past decades, the concept of self-determination has gone under transformation. In fact, some scholars distinguish between external self-determination, which refers to the formation of new states and change of boundaries and the doctrine of internal self-determination, which focuses on the decentralisation of state power without change of state boundaries.<sup>297</sup> The move towards articulating an internal dimension for the right to self-determination confirms the existing reluctance of international community to accept any change in state boundaries and reiterates the principality of territorial integrity of sovereign states in international law. The doctrine of internal self-determination, which autonomy relies on it, presumes the sovereignty and territorial integrity of states. However, it claims for the decentralisation of state authority in favour of national minority communities to enable them to exercise self-government over matters of cultural importance to them.

Despite the scholarly attempts to find legal justification for autonomy through internal self-determination, autonomy remains a vague concept within international law with no clear legal consequences. In this regard, except for Article 7 of ILO Convention No. 169,<sup>298</sup> which addresses the right of indigenous people to autonomous arrangements, there is no firm ground in international

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<sup>295</sup> Brownlie, Ian. *Treaties and Indigenous Peoples*, 1992, p. 48.

<sup>296</sup> Welhengama, Gnanapala. *Minorities' Claims: From Autonomy to Secession: International Law and State Practice*. 2000, pp. 128-132.

<sup>297</sup> See Cassese, Antonio. *Self Determination of Peoples: A Legal Reappraisal*. Cambridge University Press: Cambridge, p. 332. Kimminich, Otto. "A federal Right of Self-determination." *Modern Law of Self-Determination*, edited by Tomuschat, Christian, Dordrecht: Martinus Nijhoff Publications, 1993, p. 100.

<sup>298</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, entered into force 5 September 1991, Article 7.

law instruments regarding autonomous arrangements for national minorities.<sup>299</sup> According to Suksi, “There is undoubtedly no right to autonomy at the level of general international law. Autonomy is thus not a specific human right, formulated as such”.<sup>300</sup> In the same line of argument, Hurst Hannum characterises autonomous arrangements as, “one step below full self-determination but one step above minority rights.”<sup>301</sup> Therefore, one can assert that autonomous arrangements as a form of political participation of national minorities are not within reach of international law and their articulation is better situated in the setting of constitutional law.

### **8.3. Establishing the Right to Autonomy and the Problem of Legal Status**

After the peace treaty of Westphalia in the 17<sup>th</sup> century, which ended the thirty years war in Europe, the international community was founded upon the concept of the sovereign state.<sup>302</sup> Despite erosions of state sovereignty, such as obligations of states to comply with international human rights law, the Westphalian foundation of international law reinforces the importance of the principle of state sovereignty and the authority of states over their domestic affairs. Regarding autonomous arrangements, the adoption of such entities falls under the domestic competency of states. Therefore, international organisations do not seem to be the competent bodies to decide on the necessity of such arrangements. Indeed, any claim to autonomous arrangement shall be made through the channels of legislation provided in national constitutions and through a democratic process of decision-making.

One of the theoretical legal difficulties that arise from treating territorial autonomy as a right is the problem of legal status, which can be explained by drawing upon Robert Alexy’s explanation of legal status.

According to Alexy, there are four categories of status concerning the relationship between individuals and states. These categories are passive status, negative status, positive status, and

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<sup>299</sup> Kingsbury, Benedict. "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy." *American Journal of International Law*, vol. 92, No. 3, 1998, p. 439.

<sup>300</sup> Suksi, Markku. "On the Entrenchment of Autonomy". *Autonomy: Application and Implications*, edited by Suksi, Markku, 1998, p. 152.

<sup>301</sup> Hannikainen, Lauri. "Autonomy: Applications and Implications". *Autonomy: Applications and Implications*, edited by Suksi, Markku 1998, p. 620. The speech given at the Nordic Human Rights Symposium at the ÅboAkademi Institute for Human Rights on 19 October 1996 quoted in the Lauri Hannikainen article, *Autonomy: Applications and Implications*, 1998, p. 86.

<sup>302</sup> Quer, Giovanni Matteo, Memo, Sara. "Releasing Minorities From the "nationalist Trap": From Territorial to Personal Autonomy in a multiple Demoi Europe." *Cuadernos Europeos De Deusto*, issue. 47, 2012, p. 151.

active status.<sup>303</sup> The passive status refers to the duties of individuals to obey certain laws; in other words, it is the realm of command and prohibition issued and enforced by the state.<sup>304</sup> The negative status includes liberties and freedoms which states should refrain from interfering; these are mainly negative freedoms and rights, which might have a positive aspect as well.<sup>305</sup> For example, the right to non-interference in one's privacy. The positive status encompasses the rights and freedoms that states need to take measures to protect them. This might also include the rights and freedoms which fall under the category of negative status. Indeed, these are the rights and liberties that states need to refrain from interference, and at the same time, they should take measures to prepare the necessary conditions for the enjoyment of those rights.<sup>306</sup> For instance, the right to privacy requires a state not to interfere within the private sphere of individuals, but it also requires states to take measures to protect it regarding third-party actors. Also, the right to protect universal education is another example that falls under the category of positive status. The active status, however, refers to a granted capacity beyond that of natural rights and liberties. This status is concerned with the conferred legal power to participate in the process of public decision-making of a state.<sup>307</sup> The active status, according to Alexy, has a special position regarding the other three categories of status because it reflects more or less, elements of the other three categories, especially the negative and the positive status.<sup>308</sup> In this regard, giving shape to the content of the active status is, "left free to the individual."<sup>309</sup>

With these categories of legal status, we are provided with a proper abstract tool to examine the plausibility of considering autonomy as a right. Based on the model provided by Alexy, the active status presumes the right of individuals to participate in political affairs through democratic channels of participation. Indeed, the active status gives individuals, "the capacity to become active for the state" in the form of representation or voting in elections.<sup>310</sup> In this regard, envisage of further participatory mechanisms, such as autonomies, are left for participants to determine. In other words, individuals are at first guaranteed a right to participate in the political life of a state,

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<sup>303</sup> Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers, 2002, pp. 161-173

<sup>304</sup> Ibid, pp. 164-165

<sup>305</sup> Ibid, pp. 166-169

<sup>306</sup> Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers, 2002, pp. 169-172

<sup>307</sup> Ibid, pp. 172-173

<sup>308</sup> Ibid, p. 173

<sup>309</sup> Jelinek, System der subjektiven öffentlichen Rechte, p. 121.

<sup>310</sup> Jelinek, System der subjektiven öffentlichen Rechte, p. 87.

but further institutional forms of political participation (establishing autonomous arrangements) are something that should be the result of a public decision within a state.

Therefore, autonomy is a specific model for public participation, and the determination of the form of participation is dependent on the agreement reached by democratic negotiations in a parliament or other decision-making body. In other words, autonomy is better placed in the constitutional fabric of states and is the outcome of a national compromise.

#### **8.4. Autonomy: Protection of Minorities' Cultural Life**

There have been attempts to construct the concept of autonomy upon the guaranteed human rights, such as the freedom of association and the right to freely enjoy culture, as enshrined in ICCPR and ECHR. Autonomy, in this sense, is a non-territorial autonomy with limited authority only concerning cultural matters of minority communities. Such elaborations on autonomy separate themselves from an understanding of autonomy as an institution with legislative authority or territorial boundaries. The origins of such contemplations of autonomy with limited authority, which encompass only the self-governance of cultural affairs, can be traced back to Otto Bauer and Karl Renner, who developed the idea of cultural autonomy to enable individuals belonging to minority groups to decide over their cultural matters.<sup>311</sup> This form of autonomy is usually called cultural autonomy. Asbjørn Eide defines cultural autonomy as, “[...] the right to self-rule, by a culturally defined group, regarding matters which affect the maintenance and reproduction of its culture”.<sup>312</sup> Taking into account that the protection of national minorities' culture is one of the principal aims of the right to political participation of persons belonging to minorities, cultural autonomy, can provide minorities with mechanisms to further their interests by directly deciding over their cultural matters.

There have been attempts to find a legal justification for the doctrine of cultural autonomy, based on Article 27 of ICCPR in conjunction with the right to freedom of association, to give an institutional aspect to the right to freedom of culture. Such an approach to cultural autonomy allows minority groups to self-rule the cultural aspects of their communities through certain private forms

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<sup>311</sup> Eide, Asbjørn, et al. "Cultural Autonomy: Concept, Content, History and Role in the World Order." *Autonomy: Applications and Implications*, edited by Suksi, Markku 1998, pp. 266-268

<sup>312</sup> Ibid, p. 252.

of institutions.<sup>313</sup> This institutional dimension of the exercise of the right to culture is also mentioned by Article 27 of ICCPR which states, “[...] persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>314</sup> The reference to the practice of culture, “in community with others,”<sup>315</sup> carries an institutional necessity with it.<sup>316</sup> In fact, the exercise of the right enshrined in Article 27 of ICCPR, as Suksi claims, presumes an organised form for the practice of culture in the forms of private institutions, such as corporations and associations to self-rule certain aspects of the cultural identity of a minority group.<sup>317</sup>

In this regard, the concept of autonomy, as a non-legislative, non-territorial form of self-rule over limited aspects of cultural life, has the potential of envisaging a form of autonomy which can meet the cultural needs of members of minority communities. It is especially beneficial for those minorities who might not have access to means of participation in public decision-making. For instance, Romas that are traditionally non-territorial minorities due to their nomadic lifestyle can benefit from such arrangements.<sup>318</sup> Therefore, unlike autonomous arrangements with either territorial features or legislative powers, non-territorial forms of autonomy do not necessarily need to be vested with special legislative competencies in matters related to a minority culture.<sup>319</sup> In fact, under the model of personal autonomy, as Suksi explains, members of minority communities can preserve their cultural needs using already guaranteed individual human rights, such as the right to culture and the freedom of association which states have the responsibility to respect and protect.<sup>320</sup>

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<sup>313</sup> Suksi, Markku. "Personal Autonomy as Institutional Form – Focus On Europe Against the Background of Article 27 of the ICCPR." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, pp. 160-163

<sup>314</sup> ICCPR, entered into force 23 March 1976, Article. 27.

<sup>315</sup> Ibid

<sup>316</sup> Suksi, Markku. "Personal Autonomy as Institutional Form – Focus On Europe Against the Background of Article 27 of the ICCPR." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, p. 177.

<sup>317</sup> Ibid, pp. 160-163

<sup>318</sup> Quer, Giovanni Matteo, Memo, Sara. "Releasing Minorities From the "nationalist Trap": From Territorial to Personal Autonomy in a multiple Demoi Europe." *Cuadernos Europeos De Deusto*, issue 47, 2012, p. 161.

<sup>319</sup> Suksi, Markku. "Personal Autonomy as Institutional Form – Focus On Europe Against the Background of Article 27 of the ICCPR." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, p. 157.

<sup>320</sup> Suksi, Markku. "Personal Autonomy as Institutional Form – Focus On Europe Against the Background of Article 27 of the ICCPR." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, pp. 158-159.

According to Suksi, there are two major differences between the self-governance of minority communities, in the form of private associations, and self-governance, in the form of a public law entity. First, the self-governance of minority communities' cultural matters under the rubric of personal autonomy and other types of cultural self-governance is that the former uses self-governance in a horizontal fashion whereas, the latter seeks to establish a vertical relationship between the autonomous entity and members of the minority group.<sup>321</sup> Secondly, self-governance of cultural matters under the form of private associations can be protected as a human right while cultural self-governance in the form of a public governmental entity is a claim which can be granted only under the public law of a country.<sup>322</sup> If we presume that the ultimate objective of public participation of minorities is to enable members of minority groups to control over affairs important for their cultural identity, the cultural self-governance of private associations can have important implications for the preservation of minorities' cultural identity.<sup>323</sup>

Nonetheless, autonomous arrangements, in the form of personal autonomy or a private entity, cannot be a compromise or a substitute for the participation of members of national minority groups in decision-making institutions. It is because they neither can influence national decision-making nor have any regulative authority to control matters which directly concern them. In this respect, cultural autonomy understood as personal autonomy with no legislative powers or any state-like authority cannot even meaningfully encompass aspects of the cultural life of minorities. For example, certain minority groups might have cultural norms, regarding issues with legal characteristics, such as inheritance, and marriage. Presuming that such cultural norms are in accord with international human rights law standards, states should, in one way or another, grant minority communities a form of competency to exercise self-rule in matters which are otherwise within the competency of national laws and national courts of states. In this regard, the historical model of Millet in the Ottoman Empire, which is reflected in the legal order of some Middle Eastern

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<sup>321</sup> Suksi, Markku. "Personal Autonomy as Institutional Form – Focus On Europe Against the Background of Article 27 of the ICCPR." *International Journal on Minority and Group Rights*, vol. 15, issue. 2-3, 2008, p. 161.

<sup>322</sup> *Ibid*, p. 163.

<sup>323</sup> *Ibid*

countries, such as Iran<sup>324</sup> and Egypt,<sup>325</sup> allows certain national minority groups to have personal autonomy over legal and cultural affairs of their members. Such autonomy is in the form of competency of minorities to have competency over managing issues with cultural importance to them. In this regard, it seems that even articulation of autonomous arrangement in the sense of personal autonomy cannot transplant the idea of autonomy in the present structure of international law order. It highlights the fact that even an effective personal autonomy needs some form of political will to be formed domestically to entrench an institutional form for minorities to self-govern their cultural practices. Therefore, one can argue that until the emergence of new binding rules in international law, which provide for some form of autonomy for national minority groups, autonomy as such cannot be regarded as an institution for public participation of members of minority groups in the form of a human right.

As was discussed in section 8.1, the participation of minorities can be distinguished in two different categories. One is political participation in national governing bodies, such as the legislative bodies of states, to pursue their interests in the process of national decision-making. The other form is through allowing national minorities to establish their institutions and give them a form of autonomy for self-governance.

Cultural autonomy, with no regulative capacity, can be beneficial for the preservation of minorities' cultural autonomy. This form of autonomy can be justified based on the right to freedom of association guaranteed in Article 11 of ECHR and Article 22 of ICCPR. Nonetheless, these associations cannot be a substitute for the participation of national minorities in national decision-making bodies. The Strasbourg Court also confirms the crucial importance of the freedom of association in relation to the preservation of minorities' cultural identity; however, the Court

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<sup>324</sup> Article 12 of Iran 1979 constitutional Law defines 'personal status' as matters related to cultural practices of national religious minority groups include, *inter alia*, marriage, divorce, inheritance, and bequest which recognized national minorities can govern "in accordance with their own jurisprudence." In this regard Article 13 of Iranian Constitution states "Zoroastrian, Jewish, and Christian Iranians are considered the only recognized religious minorities. They may exercise their religious ceremonies within the limits of the law. They are free to exercise matters of personal status and religious education and they follow their own rituals."

<sup>325</sup> See Article 2 and 3 of Egypt's Constitution of 2014. Article 2 states that "Islam is the religion of the state [...]. The principles of Islamic Sharia are the principle source of legislation." Article 3 concerning the status of the religious law of national minorities' states: "The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders."



highlights the primary importance of political participation as the cornerstone of an effective democracy. The Court states:

It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations which they may integrate with each other and pursue common objectives collectively. [...]. Indeed, forming an association in order to express and promote its identity may be instrumental in helping minority to preserve and uphold its rights.<sup>326</sup>

As was examined, the major implication of personal autonomy in the form of civic associations is for the protection of the right to culture of non-national minorities, such as newly formed minorities or minorities with nomadic lifestyles. Therefore, respect for the right of individuals belonging to minorities to freely practice their culture in conjunction with the right to freedom of association can become a framework to accommodate cultural needs of members of such minority groups the manner in which states can be held responsible for respecting such civic arrangements.

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<sup>326</sup> *Gorzelik and Others v. Poland*, European Court of Human Rights, Judgement of 17 February 2004, Application No. 44158/98, paras. 92-93

## 9. Conclusion

The events of the 1990s, such as the dissolution of the Soviet Union and the ethnic conflicts in the Balkan region, had important effects on the emergence of a different attitude towards democracy and the right to political participation. The issue of minorities' protection, and especially their inclusion in the political life of states, came to the foreground when the nationalism along the line of ethnicity in Central and Eastern Europe led to violent ethnic conflicts.<sup>327</sup> In response to this course of events, there were legal and political attempts by states which placed the protection of minorities both as a solution for the prevention of future conflicts and as one part of the project of human rights, which states were obliged to protect.

The Conference on Security and Cooperation in Europe introduced the human dimension project in 1990 Copenhagen and 1992 Helsinki Documents. These attempts, although they were non-legal, provided the foundation for further development of standards, which made Europe a leading example of the development of minority rights protection. Taking into account the unsuccessful attempts to include an additional protocol to ECHR on the protection of minority rights the entry into force of FCNM in 1998 as the only legally-binding instrument of international law for the protection of minority rights marks a decisive point in the evolution of minority rights.

The FCNM has several deficiencies, such as compromising the content of its provisions by giving a wide margin of discretion to member states and adopting a vague language.<sup>328</sup> Nonetheless, Article 15 of FCNM and the Thematic Commentary on Article 15 highlight the importance of the right to political participation of members of national minority groups (a sensitive political issue). Article 15 of FCNM not only entitles minority groups a share in the political life of member states but also goes beyond what a decade before the adoption of FCNM was as a matter of domestic politics.<sup>329</sup> The importance of the right to political participation for individuals belonging to national minorities is the extent to which ACFC, as the monitoring body of the Framework

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<sup>327</sup> Vernon, Bogdanor. "Overcoming the Twentieth Century: Democracy and Nationalism in Central and Eastern Europe." *Human Rights in Eastern Europe*, edited by Pogany, Istvan, 1995, pp. 20-25.

<sup>328</sup> Thiele, Carmen, "Minorities and Minority Rights in Europe". *Human Rights in Europe: A Fragmented Regime*, edited by Brosig, Malte, 2006, p. 125.

<sup>329</sup> See American Law Institute. "Restatement of the Foreign Relations Law of the United States." Restatement of the Law Third, comment e, 1987, § 203.

Convention, considers public participation along with full equality and freedom of culture as three foundational pillars of FCNM.<sup>330</sup>

In the CoE region, the protection of the right to political participation of members of minority groups is not limited to FCNM. The ECtHR has developed an ever-increasing body of case law, which fully or partially, deals with some aspects of the right to political participation and can be relied upon concerning the right to political participation of individuals who identify themselves as belonging to national minorities. The Strasbourg Court, in its case law, acknowledges the wide margin of discretion of member states in the implementation of P1.3 of ECHR. However, at the same time, it develops principles which can be used to outline the content of the right to political participation for individuals belonging to national minorities. Those are the principle of pluralism, the prohibition of discrimination, and the idea of effective realisation of the rights and freedoms guaranteed in the Convention. The application of these considerations leads us to the conclusion that states cannot use their discretion to render the right to political participation an illusory right with regard to national minorities.<sup>331</sup>

Elections as the most crucial channel for political participation in contemporary representative democracies and the issues pertaining to their procedural fairness have important consequences for the right to political participation of national minorities. Special circumstances of members of national minority groups might give shape to the component elements of electoral rights including, the right to vote and the right to stand as candidates in the election. In this regard, issues of electoral systems cannot be treated as only matters of technical design due to their substantial impact on the exercise of the right to political participation of national minorities.

The main position of the Court is that “Article 3 of Protocol 1 does not impose a particular kind of electoral system.”<sup>332</sup> However, while admitting the wide margin of appreciation and the non-absolute nature of the right to free elections the Court, “preserves its role in the last resort to

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<sup>330</sup> ACFC, Commentary on the Effective Participation of persons Belonging to National Minorities in Cultural, Social and Economic Life and In public Affairs, 5 May 2008, ACFC/31DOC(2008)001, para. 15.

<sup>331</sup> See *Magyar Helsinki Bizottsag v. Hungary*, European Court of Human Rights, Judgement of 8 November 2016, Application No. 18030/11, paras. 121, 155. *Broniowski v. Poland*, European Court of Human Rights, Judgement of 22 June 2004, Application No. 31443/96, para. 185

<sup>332</sup> *Kennedy Lindsay and others v. United Kingdom*, European Commission of Human Rights, Decision of 8 March 1979, Application No. 8364/78.

determine whether the requirements of Protocol No. 1 have been complied with.”<sup>333</sup> In determining whether the requirements of P1.3 have been complied with, the Court conducts an effectiveness test<sup>334</sup> to examine if measures adopted by states under their margin of discretion have curtailed the very essence of the right in question.<sup>335</sup> Although the Court has been very conservative in this regard,<sup>336</sup> it removes any normative ground from under any claim which aims to exclude national minority voices from participating in political institutions.

The present thesis examined the right to political participation of members of national minority communities, mostly concerning various aspects of the right to free elections. However, autonomy is another form of participation which places national minorities in direct control of their affairs. Although much can be achieved through establishing arrangements of self-governance for minority groups, there seems to be no discrepancy among legal scholars that in the current body of international law there is no solid legal justification for a right to autonomous arrangements.<sup>337</sup> Also, the practice of the UN Human Rights Committee confirms that attempts to construct demands to autonomy on the basis of Article 1 of ICCPR were not admissible. It is due to the collective nature of Article 1 does not allow individual communications to be lodged according to the procedures of Optional Protocol to ICCPR.<sup>338</sup> Therefore, autonomy as a form of political participation for national minorities cannot be legally justified and enforced within the present framework of international law.<sup>339</sup>

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<sup>333</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, Para. 52.

<sup>334</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, European Court of Human Rights, Judgement of 2 March 1987, Application No. 9267/81, Para. 52.

<sup>335</sup> *Ibid*

<sup>336</sup> See *Yumak and Sadak v. Turkey*, European Court of Human Rights, Judgement of 8 July 2008, Application No. 10226/03, para. 113. Despite the imposition of higher minimum thresholds by the Government of Turkey, which was the highest rate comparing to other CoE members states, the Court controversially rejects the view that the right to political participation of members of minority groups guaranteed under P1.3 of ECHR is violated by such measure.

<sup>337</sup> Hannikainen, Lauri. "Self-determination and Autonomy in International Law." *Autonomy: Applications and Implications*, edited by Suksi, Markku, 1998, p. 87.

<sup>338</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 167/1984). UN Human Rights Committee, views adopted 26 March 1990, UN Doc. CCPR/C/38/D/167/1984, para. 32.1. See also *Ivan Kitok v. Sweden* (Communication No. 197/1985), UN Human Rights Committee, views adopted 27 July 1988, UN Doc. CCPR/C/33/D/197/1985, para 6.3. In both communications, the Committee based on Article 3 of Optional Protocol declares the communications inadmissible because the Optional Protocol permits individuals to complain about a violation of their rights.

<sup>339</sup> Welhengama, Gnanapala. *Minorities' Claims: From Autonomy to Secession: International Law and State Practice*. 2000, pp. 132-133.

Participation in political life lies at the heart of democracy. Democracy, itself, is the only form of governance that goes hand in hand with respect for human rights. The nexus between democracy and political participation is also related to the idea of pluralism that is one of the principal values of genuine and inclusive democracy. The importance of pluralism is the extent to which the European Court of Human Rights considers pluralism as a constitutive requirement for democracy.<sup>340</sup> In this regard, as was examined in the present thesis, the content of the right to political participation for national minorities does not contain a new substantive right regarding national minorities. In fact, current international law standards and the idea of pluralist democracy can normatively cover the political participation of persons belonging to national minorities.

The content of the right to political participation for minorities might, if circumstances demand, necessitate affirmative measures to be taken by states to enable them to exercise their right to political participation. In this regard, the difference in lifestyle, language, and cultural identity of persons who belong to national minority groups coupled with numerical inferiority and possible historical marginalisation might cause special circumstances in which the lack of affirmative measures can render their right to political participation illusory. Furthermore, the cultural identity of national minorities intensifies the need of national minority groups to political participation in order to be able to influence public decisions which affect their identities.

Hannah Arendt reiterates the importance of the plurality of political voices. Arendt stated that “[...] no one could be called happy without his share in public business, that no one could be called free without his experience in public freedom, and that no one could be called either happy or free without participating and having a share in public power.”<sup>341</sup> In the case of political participation of national minorities, the meaningful protection of their identity cannot be achieved unless members of national minority groups have confidence in the governance of the state and are entitled to have their share of influence over the institutions of decision-making.

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<sup>340</sup> *Freedom and Democracy Party v. Turkey*, European Court of Human Rights, 8 December 1999, Application No. 23885/94, para. 37.

<sup>341</sup> Arendt, Hannah. *On Revolution*, 1963, p. 255.

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