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## **Roma right to effective participation in public affairs – between soft and hard law**

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## Abstract

This report inquires if a special Roma right to political participation exist, in which framework, and, if so, how the lack of legal binding force impacts on its effectiveness.

The research found that the Roma right to political participation may be qualified as European soft law. It entrenches European states’ political, soft law obligations. But the soft character of most documents guiding states’ duties may be circumstantiated because international hard and soft law seems difficult to separate neatly. Moreover, in the framework of the European governance, soft law seems to be hardening as the soft law voluntary implementation is fuelled through interlocked political bargaining.

Framework Convention States Parties have a duty to consult Roma on inclusion policies while the procedures to ensure Roma influence in decision-making remain in the states margin of appreciation. Roma has the correlative right to be consulted on their own inclusion. For the Roma, the ‘public affairs affecting them’ covers all social fields of inclusion – a broader notion than the affairs affecting cultural identity which is usually associated with national minorities’ participation. Besides advancing Roma interests, the coordination of Roma inclusion policies fosters cooperation in the European governance framework. That is why, the European Roma inclusion policy seems as much a goal in itself as a mean for European integration.

**Keywords:** Roma inclusion, soft law, hard law, political participation

## Introduction

The 1st report concluded that Roma, as historic minority, seems to have stronger entitlements than immigrants to participate in public affairs and more precisely they are entitled to shared-ownership of public decision-making. This report inquires if a special Roma right to political participation exist, in which framework, and, if so, how the lack of legal binding force impacts on its effectiveness.

The emphasis on a national minorities' right to effective participation in public affairs<sup>1</sup> developed in the late twenty years, especially after the Framework Convention for the Protection of National Minorities (Framework Convention) was adopted. It build on the citizen's right to political participation, as it was acknowledge in the International Covenant on Civil and Political Rights (International Covenant) and provided, in its turn, ground for further development of a soft normative basis for Roma<sup>2</sup> active participation in public life, including decision-making. While United Nations have also shown interest in Roma social situation, there is at the European level where it developed into an incipient normative framework for Roma political participation going beyond simple political agreements.

There is an extensive juridical and social sciences literature on political participation and representation of national minorities, including Roma. While national minorities' right to participation seems convincingly justified, how much the effective participation of minorities in public affairs depends on political bargaining between states, their national minorities and international or supranational bodies needs still to be clarified. Also, for the principle of active participation of the Roma in their own inclusion to develop into a special right, even soft, clarification of its content, limits, right-holders and duty-bearers as well as remedies seems still needed.

The study asks which are the obligations, if any, which may be imposed to states members to the Framework Convention and EU in order to achieve effective political participation of Roma and the extent to which the content of a Roma right to political participation can be outlined. The theory on hard and soft law is used to elaborate on the nature – political or/and juridical – of states' obligations in the context of the European governance<sup>3</sup> while the international practice helps to discern between states options and obligations, as the wording of the international norms seems rather vague on this respect.

The study found that the national minorities' including Roma right to political participation may be qualified as soft law, but without assuming that its implementation rests entirely on states' will. The European soft law on Roma political participation is hardening as a result of interlocked political

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<sup>1</sup> This article uses expressions such as *(national) minorities' right to effective participation in public life* or *(national) minorities' political participation* in the sense of *right or participation of the persons belonging to national minorities*. Acknowledging the possible differences in meanings, I use the notion of *political participation* as synonym for *participation in public life* or *participation in public affairs*.

<sup>2</sup> Here «Roma» is used as a generic name for diverse ethnic groups auto-identified as Roma, Gypsy, Tzigans, Sinti, Manouchs, Romanichels, Kales, Bohemians while nevertheless confess sharing a common history, or comparable traditions, cultures, languages and a feeling of solidarity. The Swiss, German and Austrian Janisches may not pertain to this group, for example.

<sup>3</sup> European governance, i.e., the structure, the rules, processes and behaviour of the actors that affect the way in which powers are exercised at European level, Nicholas Moussis, *Access to the European Union*, 19th updated edition, Rixensart, 2011.

bargaining in the European Union and Council of Europe frameworks<sup>4</sup>. In this context, the consultation of Roma in their own inclusion emerges as a minimum state obligation and a correlative Roma right.

The research will be limited to the international and European Union instruments for national minorities' and especially Roma political participation, excluding the cultural, social and economic elements as well as autonomy arrangements from its main scope.

## **'Hard' and 'soft' international, human rights and EU law**

The international and EU norms on the national minorities' – including Roma – right to effective political participation can hardly be described as legally binding.

That is why the first issue to be addressed is how much the 'softness' of the documents guiding states' behaviour on these issues actually weighs. I will address the issue on general international law, than on human law and on the EU law level. This section argues first that a neat demarcation between hard and soft law is difficult to draw, secondly that the soft law is hardening at least in the European governance framework as a result of interlocked political bargaining, and thirdly that the European Roma inclusion policy is as much an opportunity to enhance inter-states cooperation in the European context as it is a tool to consolidate justice and stability in Europe.

The juridical and social science literature debated extensively on the hard and soft features of international law. Resuming, it can be said that it is – on one of the ends of a continuum – the view that soft law is not 'law' at all, strictly speaking<sup>5</sup> and – at the other end – the opinion that, at least when it comes to domestic implementation, international hard law is not much more than soft law<sup>6</sup>. Explaining, on Shaffer and Pollack<sup>7</sup>, there are three perspectives on the hard and soft law: the legal positive, the rational and the constructive approaches.

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<sup>4</sup> Also in the framework of the Conference for Security and Cooperation in Europe (CSCE)/ Organisation for Security and Cooperation in Europe (OSCE).

<sup>5</sup> Andrew Guzman, Timothy Meyer, *Explaining Soft Law*, p. 1, <http://www.asil.org/files/guzman.pdf>.

<sup>6</sup> Abbott, Kenneth W. and Snidal, Duncan, *Hard and Soft Law in International Governance* (2000). International Organization, Vol. 54, p. 421, 2000. <http://ssrn.com/abstract=1402966>.

<sup>7</sup> Gregory Shaffer, Mark Pollack, *Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance*, Minnesota Law Review, 2010, p. 706–792.

‘Legal positivists tend to favor hard law and view hard and soft law in binary terms. For them, hard law refers to legal obligations of a formally binding nature, while soft law refers to those that are not formally binding but may nonetheless lead to binding hard law. Rationalists, in contrast, contend that hard and soft law have distinct attributes that states choose for different contexts. They also find that hard and soft law, in light of these different attributes, can build upon each other. Constructivists maintain that state interests are formed through socialization processes of interstate interaction which hard and soft law can facilitate. Constructivists often favour soft-law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation.’<sup>8</sup>

‘Most international law is «soft» in distinctive ways’. To this respect, the asymmetric roles of powerful and less powerful states in shaping the form – hard or soft – and content of international law is to be noted: if powerful states manage to shape to some extent the content of international law – hard or soft – they may still face difficulties in ensuring actual implementation in each consenting state. In this respect, weak states may prove actually stronger than they may appear and stronger than they may suppose<sup>9</sup>. So, when it comes to achieving the supposed result, hard law may be not as different to soft law as it seemed. Abbott and Snidal<sup>10</sup> propose a framework to appreciate on the ‘hardness’ or the ‘softness’ of a norm stating that ‘legalization in international relations varies across three dimensions—(i) precision of rules; (ii) obligation; and (iii) delegation to a third party decision maker—which taken together can give laws a «harder» or «softer» legal character. In this respect, hard law «refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.» (...) By contrast «[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.»<sup>11</sup> The hard or soft law character of some human right documents will be latter assessed applying these criteria.

Soft law has advantages: it reduces the costs and barriers to cooperation, permitting the integration of all interested parties in the law-making process, proved flexible, simple and rapid to put in practice<sup>12</sup>. When negotiating, international actors not only have an already made agenda, but are also open to some extent to learn and to be convinced. Precisely because soft law relies on voluntary implementation, it may enhance persuasion, learning, argumentation and socialisation.

The vulnerabilities of soft law instruments must also be pointed out. Not only they are not legally binding, but, in the measure that their ‘softness’ refers to their lack of clarity, they may be criticized for ‘cultivation the uncertainty’ which ‘is a favoured technique of intimidation by authoritarian governments’, hence endangering the rule of law<sup>13</sup>. If their legal weakness springs from the lack of

<sup>8</sup> Gregory Shaffer, Mark Pollack, *supra* note no. 8, p. 708.

<sup>9</sup> Terence C. Halliday, Bruce G. Carruthers, *Bankrupt: Global law-making and systemic financial crisis*, 2009, p. 422.

<sup>10</sup> Kenneth Abbot, Duncan Snidal, *supra* note no. 7.

<sup>11</sup> Gregory Shaffer, Mark Pollack, *supra* note no. 8, p. 714 citing Kenneth W. Abbott et al., *The Concept of Legalization*, International Organization, Vol. 54, 2000, 401.

<sup>12</sup> Trubek, David M., Cottrell, M. Patrick and Nance, Mark Thomas, 'Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity (November 2005). U of Wisconsin Legal Studies Research Paper No. 1002. <http://ssrn.com/abstract=855447> or <http://dx.doi.org/10.2139/ssrn.855447>.

<sup>13</sup> W. Michael Reisman, *Soft Law and Law Jobs*, Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), pp. 25–30.

states' consensus concerning the content of their obligations, which is the case for guiding principles issued by international experts, for example, the issue of legitimacy may be invoked. But none of these critics are insurmountable obstacles. On the first concern, all norms are, by their general and abstract nature indeterminate, to a certain extent, and jurisdictional bodies are called to determine the content of concrete rights and obligation in every case and, in time, to clarify norm's content and scope. Secondly, if soft norms result from experts' research and debates, their legitimacy may stay on the hard law from which drafters have carefully drawn their opinions, guidelines or recommendations.

Hard and soft law may be not only complements or alternatives, but also antagonists. When this happen, the 'hardening of the soft law regimes' – reducing advantages of consensus built on information sharing and persuasion – and 'softening of the hard law regimes' – reducing legal certainty and predictability – may result<sup>14</sup>. It will be observed in the following that hardening of soft law regimes may be noticed also when soft law complements the hard law, as it happens in the national minorities' political participation field.

Thus, in general international law, hard and soft law are still meaningful conceptual tools, but they are not in such an opposition as it may first seem. From mandatory legal norms to facultative political or independent views, hard, soft law and simple political instruments seems more difficult to put in different boxes than to arrange gradually from one end of a continuum to another.

Human right is part of international law, resting on common basic principles. The binding feature of human right soft law – international bodies jurisprudence, opinions, recommendations, guidelines – find a juridical basis in the «General rule of interpretation» (Art.31) of the 1969 Vienna Convention on the Law of Treaties. In this light, the subsequent practice (soft law) in the application of the treaty (hard law) may be considered for interpreting it. It will be helpful for latter argumentation to remember that in human right area the interests of international actors – state or nonstate – are more difficult to assess since these treaties have an 'objective' character – they are not reducible to bilateral exchanges of advantages between the contracting parties<sup>15</sup>, but «concern the endowment of individuals with rights»<sup>16</sup>.

Applying the previously mentioned criteria: obligation, precision and delegation to assess the hard or soft law character of some human right documents, European Convention on Human Rights (European Convention) is considered hard law because its binding force results from states consent and is precise enough to allow to the delegated organ, the Court of Strasbourg, to draw decisions in particular cases. The European Court of Human Rights (ECtHR or the Court) jurisprudence is mandatory only *inter partes litigantes*, otherwise, the future effect of previous decisions stands, beside the general rule of treaties' interpretation already examined, on the Court determination to consolidate its power by acting predictable, so its jurisprudence pertains to soft law. The Court considers itself

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<sup>14</sup> Gregory Shaffer, Mark Pollack, *supra* note no. 8, p. 709.

<sup>15</sup> Olivier de Schutter, *The Status of Human Rights in International Law*, in Catarina Krause, Martin Scheinin, eds., *International Protection of Human Rights: A Textbook*, Abo Akademi University, Institute of Human Rights, 2009, p. 53.

<sup>16</sup> High Commissioner for Human Rights, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant : 11/04/1994, CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), para. 17.

bound by its previous decisions, if stronger motives do not advise otherwise, its case-law being sometimes called ‘hard jurisprudence’ – an apparent contradiction in terms. The Framework Convention is also a treaty legitimated by states consent to be internationally bound, endowed also with a delegated body to monitor its application – the Advisory Committee. But the indeterminacy of its text makes states’ obligations vague and lives to the states parties a margin of discretion which brings Framework Convention application close to voluntary implementation, as it is the case for typical soft law instruments. That is why the Framework Convention hard law feature is disputable. Latter it will be argued that the combined international practice on diverse human right instruments helps clarifying Framework Convention content and thus hardening its provisions. The Framework Convention Advisory Committee opinions on states interpret the treaty seeming typical soft law, states being called to make comments rejecting or accepting tacitly Advisory Committee’s interpretation on the convention. But the Framework Convention Advisory Committee general comments or the independent experts opinions and guidelines – as the Venice Commission for democracy through law or the Foundation on Inter-Ethnic Relations Lund Recommendations<sup>17</sup> – seems distant of states consent, their qualification as soft law being controversial.

The now-a-days presumably preference for soft law in some human rights areas rests, on Kalin<sup>18</sup>, on four arguments: i). treaty making has become very difficult in the area of human rights because, among others, negotiations are long and include a growing plurality of ideas and positions among states, while some soft law instruments provide a ready-to-use normative framework, ii). if a text is finally adopted, there is no guarantee that the treaty is successful because of not being ratified by enough states or because some states have developed techniques that allow them to avoid implementation, iii). in some areas it may be premature to draft a treaty and iv). to negotiate a new treaty may not really be necessary in the areas where existing treaties already covers, at least implicitly, the targeted rights to a large extent. It was also observed<sup>19</sup> that states may also transfer soft law making authority to nonstate jurisdictional (European Court of Human Rights) or specialised bodies (Human Right Committee or the Advisory Committee on the Framework Convention on National Minorities) in order to circumvent the requirement that a state consent before being bound by a legal obligation. Those entities pronouncements’ power presumably springs, as mentioned, from the 1969 Vienna Convention on the Law of Treaties according to which «the subsequent practice under the treaty establishing the agreement of the parties» is one element of the «General rule of interpretation» (Art.31 para 3 b) of treaty provisions<sup>20</sup>,

I believe the arguments for choosing soft law in human rights area answer the question on the preference for soft law on national minorities’ – including Roma – right to effective participation in public affairs. Due to the diversity of situations and interests, of opinions displayed in the scientific literature, an international or European treaty on minority political participation may be long and difficult to adopt and if adopted, the coming into force and domestic implementation may be prob-

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<sup>17</sup> OSCE High Commissioner on National Minorities (HCNM), ed., *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, September 1999 (Lund Recommendations).

<sup>18</sup> Walter Kälin ‘How hard is soft law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework’ in *Recent Commentaries about the Nature and Application of the Guiding Principles in Internal Displacement*, Brookings-CUNY Project on Internal Displacement, April 2002, p. 2.

<sup>19</sup> Andrew Guzman, Timothy Meyer, *supra* note no. 6.

<sup>20</sup> Martin Scheinin, *Characteristic of Human Rights Norms* in Catarina Krause, Martin Scheinin, eds., *International Protection of Human Rights: A Textbook*, Abo Akademi University, Institute of Human Rights, 2009, p. 21.



lematic. Due to the divergent views and practice on the national minorities in general and on their political participation, a hard law instrument may be premature and require some period of harmonisation before adopting; the existing hard law on political rights in general and on national minorities' equality and political participation may suffice to draw on targeted soft norms making use of the flexibility allowed by the indeterminacy of the international human rights' vocabulary. The published work of the ECtHR (case-law), the Framework Convention Advisory Committee and the Venice Commission (opinions) or even the Lund experts (recommendations<sup>21</sup>) interpret and concretize the hard European Convention and the semi-hard Framework Convention based on indirect state consent. Their decisions and opinions have been appreciated as different types of soft law from hard jurisprudence to less than soft law independent opinions which are not even negotiated by states<sup>22</sup>.

In the EU framework, soft law was defined as 'rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects'<sup>23</sup>. It interacts with hard law, possible in the same domain and involving the same actors, shaping different forms of governance. One of these is the new Open Method of Coordination. A short description of this method may facilitate understanding on the EU Roma social inclusion policy which presumably employs it. The OMC aims to provide a space for participation and power-sharing, experimentation and knowledge creation, among others. By difference to the Classic Community Method which works on binding uniform rules, justiciable and including sanctions for the Member States, the OMC uses general objectives and guidelines for MS behaviours, not binding and not justiciable. States experience is further integrated in the common framework through reporting and best practices. This kind of approach seemed desirable in social policy, namely in social inclusion field because of the diversity of state economic development, institutional structure, normative aspirations which makes difficult to apply uniform rules<sup>24</sup>. While states performances may be assessed individually through the OMC, it does not mean the implementation of the agreed measures depends on the unrestricted will of each state as the EU already disposes of a web of policies and conditionalities which harden the soft law agreements through interlocked political bargaining. In this context soft law form seems enough to ensure compliance with its substance being also easier to adopt than hard law norms.

While it seems clear that EU Roma inclusion documents are not part of the hard law, it may still be unclear if they are all, or part of them, soft law or simple political documents. On Guzman and Meyer, the difference between simple political positions and soft law refers to the creation of expectation about future conduct. If pure political document can be changed at will<sup>25</sup>, soft law are 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'<sup>26</sup>. From this perspective it may be quite safely assume that the EU documents on Roma inclusion are not simple political documents but create expectation of a continuous present and future European policy aiming to achieve the effective equality between Roma and the rest of the European Union citizens.

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<sup>21</sup> See supra note no. 18.

<sup>22</sup> Walter Kalin, supra note no. 18, p. 6.

<sup>23</sup> Francis Snyder *The Effectiveness of EC Law*, in T Daintith (Ed.) *Implementing EC Law in the UK* (1995)

<sup>24</sup> David M. Trubek, Patrick Cottrell, and Mark Nance, supra note no. 13, p. 15.

<sup>25</sup> For this understanding of political documents see Andrew Guzman, Timothy Meyer, supra note no. 6, p. 2.

<sup>26</sup> Andrew Guzman, Timothy Meyer, supra note no. 6, p. 3.

Thus, the Roma inclusion policy at the EU level consists entirely in soft law instruments, Communications<sup>27</sup> and Resolutions<sup>28</sup>, as it happens at the Council of Europe<sup>29</sup> or at the CSCE/OSCE<sup>30</sup> and UN<sup>31</sup> level<sup>32</sup>. While they are not subject to intern enactment through ratification, there is still question of internal implementation, where member states have still a wide margin of appreciation.

While the European interest for the Roma social situation seems welcomed, the speed of advancement is questioned. Nonetheless, there is agreement on the process presumably long duration, the difficulty to use uniform indicators or to expect similar advancements in states with very diverse realities. But if soft law works through dialogue, persuasion and learning and less through strategic bargaining, there may be less need to worry about the traps of internal implementation. Even less if soft law is indeed capable to include to decision-making all the interested parts. If the Roma inclusion European soft law may prove difficult to implement internally, if tokenism is suspected to be one of the reasons of the late results, this put in question the political will at the European level as it happens at the states level or may argue for the presumed hardening of the soft law.

The European monitoring mechanisms which include periodic state reports, opinions and comments seems to foster soft hierarchical communication practices between member states and monitoring bodies, fostering interlocked cooperation between member states and EU bodies, presumably, in the framework of the European governance. National minorities' protection and Roma social inclusion, to which political participation is related, are subjects over which some form of the Open Method of Coordination seem to develop, not only in the EU context. The procedural state obligation – to report on the Roma inclusion policy or on the Framework Convention implementation seems clear; by comparison, the material state's obligation of result – to advance on these policies remains by large in state's margin of discretion.

The distinction between hard and soft law and simple political agreements seems difficult to draw while the soft law seems hardening especially in the European Union due to the multiple conditionalities which limit members states' discretion on implementing those non-legally binding agreements. European Roma inclusion policy, while progressing on this issue, seems also an opportunity to advance member states' cooperation.

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<sup>27</sup> Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, Brussels, COM(2011) 173/4.

<sup>28</sup> European Parliament Resolution of 24 May 1984 on the situation of Gypsies in the Community, apud. Jean-Pierre Liégeois, *Roma in Europe*, Council of Europe Publishing, 2007, p. 243.

<sup>29</sup> Recommendation Rec(2000)4 of the Committee of Ministers on the education of Roma/Gypsy children in Europe, Congress of Local and Regional Authorities of Europe Resolution 16 (1995)1 on «Towards a Tolerant Europe : the contribution of Roma (Gypsies)».

<sup>30</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990.

<sup>31</sup> UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities Resolution of 31 August 1977, doc. E/CN.4/Sub.2/399, the Human Rights Commission Resolution 1992/65 on the protection of Roma(Gypsies).

<sup>32</sup> See Jean-Pierre Liégeois, *supra* note no. 27, p. 229–257.

## The national minorities' right to political participation

The right of the persons belonging to national minorities to participate in public affairs implies special features than the citizens' right to political participation. The only hard law document protecting this right, the European Framework Convention, only specifies that the participation has to be effective and to refer particularly to the affairs affecting them.

Further clarification of the content – rights and obligations – of this provision comes from other international provisions and subsequent interpretation complementing the Framework Convention Advisory Committee practice. These documents outline the minorities' right to political participation as a procedural right and the states' correlative obligation as an obligation of result, while the effectiveness of participation – from mere presence to control – remains to be appreciated on a case-by-case basis. States' obligation of consultation seems to be already established concerning the indigenous people<sup>33</sup> and, presumably, for other national minorities with respect to matters of special concern for them<sup>34</sup>. The few remarks concerning the meaning of the *matters affecting particularly the national minorities* seems to be related to the protection of the distinct cultural identity<sup>35</sup> or, for the territorial minorities, with the regions in which they live<sup>36</sup>.

### Justification

National minorities' autonomy and self-government demands were justified, among others, through their right to internal auto-determination<sup>37</sup>, corresponding to the peoples' similar right. These demands met at least three counterarguments: i). a political (security) one – as states feared loss of control over their territory and eventual secessionist threats for their frontiers, ii). a juridical one – the lack of a normative justification for a collective right of national minorities and iii). a sociological one – the essentialization of groups which are not internally homogenous<sup>38</sup>.

While focus on auto-determination and resemblance with peoples' juridical status in international public law may have exhausted its power to peacefully advance minorities rights, the right to effective participation in public decision has the merits of providing a new space for these negotiations, sheltered of secessionist suspicions. Even if political participation and representation rights may be exercised mainly in common with other members of the minority group, it isn't considered a collective right<sup>39</sup> and it seems more related to inclusive approaches<sup>40</sup> than to secessionists' goals. The

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<sup>33</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 5.3

<sup>34</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 16.

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

<sup>36</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, Art. 2, para. 2 and 3, A/RES/47/135.

<sup>37</sup> Will Kimlicka, *Multicultural Odysseys*, Oxford University Press, p. 239–244.

<sup>38</sup> Will Kimlicka, *supra* note no. 36, p. 239.

<sup>39</sup> See Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para 6.

main quality of participation rights was perceived to be its neutrality – by not presuming internal homogeneity of interests and views on the side of the minority, nor on the majority or state<sup>41</sup>.

As mentioned in the introduction, the right to effective participation in public affairs acquired international expression on the strength of three reasons. On the security dimension, equally to secessionist demands, permanent exclusion of minorities from any type of public influence fosters conflict. By difference, a right to political participation promises to provide the golden mean/ *aurea mediocritas* to advance with minority-majority dialogue away from these extremes. Nevertheless, empowering marginalized groups – as some of the Roma communities – may not be cost-free on the short run. It may be perceived as a threat by those in power and contrary to their interests<sup>42</sup>. Even if those in power are moderate mainstream parties, convinced of the importance of including national minorities to decision making, this may prove particularly challenging when combined with an ethicized nation-state structure and electorate. Any such attempts may consolidate nationalists' political influence based on the ethnical majority's support.

The second reason to share power with national minorities beyond traditional democratic majority rule lies in the legitimization of the state as such. Now-a-days democracy does not equate majority's tyranny. The respect for majority rule does not seem to suffice anymore as argument to block national minorities' enjoyment of general human or minority specific rights<sup>43</sup>. Persisting exclusion of entire groups from meaningful exercise of citizenship rights may result in state's failure to meet its representativeness requirements<sup>44</sup>.

The third argument refers to the right to substantial equality and non-discrimination which supports special measures going beyond formal equality in order to counter structural or historical disadvantage of national minorities. State's sovereignty understood as responsible sovereignty may also support national minorities' effective participation in public affairs as the concept entails state's duty to protect the human rights of all its inhabitants.

Despite its foundation on stability and democracy, the current minority right to political participation hardly passed the soft law sphere. It seems to have entered hard law only in the Council of Europe area, where a legally bounding treaty, the Framework Convention for the protection of National Minorities is already in force since 1998. There is need to acknowledge though the legal bound of its political participation provision – Art.15 – as of the whole conventions, is controversial, as will be argued in the following.

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<sup>40</sup> Will Kimlicka, *supra* note no. 36, p. 239.

<sup>41</sup> Nevertheless, Will Kimlicka questions this presumption of neutrality of effective political participation in the struggle between minority nationalists and nationalizing state. Will Kimlicka, *supra* note no. 36, p. 244, footnote 81.

<sup>42</sup> Annelies Verstichel, *Understanding Minority Participation and Representation and the Issue of Citizenship* in Mark Weller and Katherine Nobbs, eds., *Political participation of minorities*, Oxford Univ. Press, 2010, p. 79.

<sup>43</sup> This kind of aggressive majorities seems to be currently in power in some Easter European countries as Romania or Hungary.

<sup>44</sup> Marc Weller, *Introduction* in Marc Weller and Katherine Nobbs, eds., *Political participation of Minorities*, Oxford University Press, 2010, p. lxiii.

### *History*

Three phases have been observed in the development of minority rights, the minority right to political participation appearing in the most recent of them. In the initial phase, minority human rights were justified for the protection against destruction, displacement and discrimination, while in the second phase, they aimed for toleration and promotion by recognizing and respecting diversity. In the third phase, when Art. 15 of the Framework Convention was adopted – genuine integration and co-governance aimed to give minorities access to the state and to the society<sup>45</sup>.

The right to effective participation in public affairs of national minorities' members was forged, as other human rights, from opinions, best practices and jurisprudence turn into recommendations and eventually transformed into hard law. In this case, Art.15 of the Framework Convention would be the closest thing to an effectively legally bounding norm<sup>46</sup>.

### *International and European Union Sources. Their relation with the Romanian law*

The human rights body of law has a specific dual nature: it is part of the international public law and to the constitutional law. As the Charter of Fundamental Rights became part of EU primary law, human rights is also part of this supranational law. In this framework, the development of the norms and practice on the special minority right to political participation follows the level of the current international agreement on the issue.

The citizen's right to participate in public life, part of human rights, is generally defined from its expression in the International Covenant. Here it consists in «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;
- (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>47</sup>

As a citizen's right, it is guaranteed or at least can be inferred as being at least implicitly recognised at all three levels: international – being it universal or European regional, European Union and (Romanian) constitutional one.

The indeterminate right of every citizen to participate in the democratic life of the Union is recognized in Art 10 para. 3 of the Consolidated Version of the Treaty on European Union while the Ro-

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<sup>45</sup> Marc Weller, *Article 15*, in Marc Weller, ed., *The Rights of Minorities in Europe*, Oxford University Press, 2005, p. 430.

<sup>46</sup> For more details about the history of the Art. 15 of the Framework Convention see M. Weller, *supra* note no. 46, p. 431–432 and European Commission for Democracy through Law (Venice Commission), *Explanatory Report to the Proposal for a European Convention for the Protection of national Minorities*, CDL-MIN (93) 22, 22 February 1993, para.42 *apud* M. Weller, *supra* note no. 46, p. 432.

<sup>47</sup> International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, Art. 25.

manian Constitutions only mentions the rights to vote and to be elected, the other elements of the right to political participation content presumably being implicitly recognised from the democratic feature of the state and its declared commitment for fundamental human and citizen's rights.

At the universal level it appears in the 1948 Universal Declaration of Human Rights (Art 21) and, as a juridical binding norm, in the 1966 International Covenant on Civil and Political Rights (Art25). In the European region, the 1990 Document of the Copenhagen Meeting of the Conference on Human Dimension of the CSCE (paras 6–7), the 1990 Charter of Paris for a New Europe, as well as other CSCE/OSCE soft law documents, mentions the political participation as a general human right belonging mainly to citizens.

The right of the persons belonging to national minorities to effectively participate in public affairs cannot be the classical human right of individuals who coincidentally belong to minorities (such a reading would render the clause useless) but specifically, individual rights necessary for those people who belong to minority groups. This conforms to the standard of minority protection as developed by international law<sup>48</sup>. As a specific minority right it does not appear in the Primary European Union Law<sup>49</sup> or in the Romanian Constitution, its only source being found in international human rights law and more in its soft law part.

There is no binding universal treaty specifically on minority rights<sup>50</sup>, but the interpretation of the Human Rights Committee on Art 27 of the International Covenant has included effective political participation of minorities under the scope of this non-discrimination clause<sup>51</sup>. Also from the non-discrimination perspective, the same right is internationally guaranteed for national minorities members through Art 5 (c) of the International Convention for Elimination of All Forms of Racial Discrimination<sup>52</sup>. Mentions about a minority specific right to effective participation in public affairs are also to be found in soft law documents: the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Art 2). In the Council of Europe, legally binding treaties as the Framework Convention for the Protection of National Minorities (Framework Convention) mentions the corresponding minority specific right in Art 15<sup>53</sup> and also the European Charter for Regional or Minority Languages (Art 7 para 4) while the CSCE Copenhagen Document (para 35) and the 1994 Central European Initiative Instrument for the Protection of Minority Rights (Arts 20 and 22) contains politically bounding provisions. All these documents had

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<sup>48</sup> Gabriel N. Toggenburg, *The EU's evolving policies vis-a-vis minorities: a play in four parts and an open end*, MIRICO: Human and Minority Rights in the Life Cycle of Ethnic Conflicts, 2008, p. 12, [http://www.eurac.edu/en/research/institutes/imr/Documents/Web\\_del30EUandminortyprotection.pdf](http://www.eurac.edu/en/research/institutes/imr/Documents/Web_del30EUandminortyprotection.pdf).

<sup>49</sup> Nevertheless, the primary EU law guarantee equality and non-discrimination through Article 2 of the Treaty on the European Union and in particular from Article 21 of the Charter of Fundamental Rights of the European Union; Article 3 of the Treaty on European Union as well as Articles 9 and 10 of the Treaty on the Functioning of the European Union; on the basis of Article 19 of the Treaty on the functioning of the European Union, the EU Council adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>50</sup> See Mark Weller, *Effective Participations of Minorities in Public Life*, in M. Weller (ed.), *Universal Minority Rights*, Oxford University Press, 2007, p. 481.

<sup>51</sup> See Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

<sup>52</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

<sup>53</sup> Framework Convention for the Protection of National Minorities, 1995, H(1995)010.

been ratified by Romania and no reservation has been made with regard to the right in question. The Lund Recommendations and the Warsaw Guidelines to Assist National Minority Participation in the Electoral Process<sup>54</sup> may be considered soft law recommendations.

As most of the human rights texts, the ones above referred, and the Framework Convention particularly, is rather indeterminately formulated. This is why the appurtenance of the Framework Convention Art.15 provision to hard law may be questioned. Nevertheless, the Comments and Opinions of the bodies entrusted with the International Covenant and the Framework Convention application seems especially important. They may presumably qualify, as mentioned – at least when states do not explicitly distanced themselves from that interpretation<sup>55</sup> – as «subsequent practice under the treaty establishing the agreement of the parties»<sup>56</sup>. This is the perspective from which I will refer to the General Comment No. 25 on the International Covenant<sup>57</sup> and to the Advisory Committee's Commentary on the art 15 of the Framework Convention<sup>58</sup>. This international practice can be framed as soft jurisprudence as already argued. The European Court of Human Rights developed a significant body of jurisprudence of relevance to minorities<sup>59</sup>. The hard jurisprudence on national minorities' political participation only springs from the implementation of the general human rights to hold free elections and to stand for elected office, to free association, free speech and non-discrimination recognised in the European Human Right Convention and its 1<sup>st</sup> Protocol.

The soft law observance is ensured mainly through the international law principle of good faith and the interpretation of UN Charter which refer to human rights as a purpose to be achieved by the organization and by its Member States<sup>60</sup>. At least from the perspective of the United States doctrine adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States*<sup>61</sup>, some of those human rights declarations or resolutions, could be considered as evidence of state 'practice' demonstrating a clear commitment of the international (or regional) community towards certain values<sup>62</sup>. The consequences could be either to back up a certain interpretation of the international treaty law or to support an emerging principle or custom in general international law. From another perspective jurisprudence is not binding with respect to future conduct, but only *inter partes litigantes* while the opinions and guidelines of international bodies, if they have not jurisdictional power, are not binding at all<sup>63</sup>. While current international law seems to supports each of these opposite

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<sup>54</sup> The Warsaw Guidelines to Assist National Minority Participation in the Electoral Process adopted in 2001 under OSCE auspices.

<sup>55</sup> Martin Scheinin, *supra* note no. 20, p. 21

<sup>56</sup> The 1969 Vienna Convention on the Law of Treaties refer to this under the title «General rule of interpretation» (Art.31 para 3 b). The effective political participation dispositions of the above mentioned human right treaties shall be interpreted in the light of all the elements of the general rule of interpretation specified in the Art 31 of the Vienna Convention, including the practice of the special treaty bodies as subsequent state practice.

<sup>57</sup> General Comment No. 25 on the International Covenant of the United Nation High Commissioner on Human Rights (HCHR), *The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25) from 12 July 1996.

<sup>58</sup> The Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001.

<sup>59</sup> See Mark Weller, *supra* note no. 51, p. 483.

<sup>60</sup> Olivier De Schutter, *supra* note no. 16, p. 39.

<sup>61</sup> Olivier de Schutter, *supra* note no. 16, p. 42.

<sup>62</sup> Olivier de Schutter, *supra* note no. 16, p. 42.

<sup>63</sup> Andrew Guzman, Timothy Meyer, *supra* note no. 6.

opinions, the first seems to get additional support when international law is considered in its connection with international relations, namely international political bargaining and interdependence. By difference to domestic law, international hard law implementation depends ultimately on political decision similar to soft law, as previously argued. From this perspective a clear cut difference between treaty provisions and its' practice is difficult to draw. Additionally, the closer interdependence between international actors – states and nonstates – may provide enough political leverage to ensure soft law compliance, the costs of hard law making<sup>64</sup> being avoided.

In the EU framework, there is no mention about a special Roma right to political participation, but the active participation of Roma is one of the ten basic common principles of Roma inclusion policies – a 2009 politically bounding European Union document. Further consideration on the developments in the European Union context will follow.

For Romania, only the Roma Inclusion Strategy for the period 2011–2020, the Annexe of the Government Decision no.1221/2011<sup>65</sup>, mentions among its principles the «active participation of all vulnerable groups including Romanian citizens belonging to Roma minority in developing, implementing and monitoring the public policies affecting them». Presumably, this is the sole reference from the Romanian internal normative framework closer in meaning to the national minorities' members' right to effective participation in public affairs. It is hierarchically subordinate to the Constitution, laws and government's ordinances. As international norm ratified by Romania, this right is nevertheless part of the Romanian legal order. Through Art.20 of the Romanian Constitutions hard international human rights law, including the Universal Declaration of Human Rights penetrates internal legal order and ranks on the same level as the Constitution. A more detailed discussion on the Romanian Roma inclusion policy exceeds the hard/soft law analysis.

### *Content*

From Carl Wellman's general theory of norms' perspective, every human right has, a 'core' element – the rights and the duties which form the primary relationship between the right-holder and the duty-bearer – and one or more protective elements regulating the duty of third parties (like judicial courts), state authorities or international organs, to ensure that the core element receives appropriate protection<sup>66</sup>. I shall use the notion of 'content' to refer to the 'core' of the right to effective political participation of persons identifying themselves as members of national minorities.

To outline the content of the right to effective participation in public life of national minorities' members, the specific provisions of Article 15 of Framework Convention- 'The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities (...) in public affairs, in particular those affecting them.' – add to the general human right standard established by Article 25 of the International Covenant – already mentioned.

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<sup>64</sup> For details about hard law costs see Gregory Shaffer, Mark Pollack, *supra* note no. 8.

<sup>65</sup> See *The 2012–2020 Romanian Government Strategy for the inclusion of Romanian citizens belonging to Roma minority*, published in Official Journal no. 6 bis/04.01.2012.

<sup>66</sup> *Apud.* Martin Scheinin, *supra* note no. 20, p. 34–35.



Accordingly, *the persons belonging to national minorities shall have the right and the opportunity, without any of the distinctions such as race, colour, national or ethnic origin and without unreasonable restrictions:*

- (a) To *effectively* take part in the conduct of public affairs, directly or through freely chosen representatives, *in particular those affecting them;*
- (b) To vote and to be elected at genuine periodic elections;
- (c) To have equal access to public service in his country,

*while the state shall create the conditions necessary for the effective exercise of this right.*

As already mentioned, reading the special norm on national minorities' political participation – mainly art.15 of the Framework Convention – together with the corresponding general human right – mainly art.25 of the International Covenant – the two must not be similar as content and differentiate only through right-holders. Such an interpretation would render the 'specific' norm redundant and, by this, useless. Only a particularity of content of the specific minority right to political participation – going beyond the general human right – would cohere with the principles of law interpretation and the human right framework.

From this assumption, my questions are:

- what concrete measures are authorised and required by the domestic law of the state in question to implement these international obligations,
- which are the specific obligations of the state, under international law, to secure the enjoyment of the right to effective political participation of national minority' members in relation with the public authorities and with other private parties and
- which are the rights of national minorities (members) <sup>67</sup>.

Before going into details, scholars agree that the state obligation in this respect is an obligation of result, specifically, the state has to ensure that national minorities' members have, individually or in community with the others, the conditions to influence public affairs at all levels of government. With regard to the means put in place to reach this goal, the state has a wide margin of discretion. But the minorities' right is a procedural right: the participation of national minorities in public life is the purpose of this particular provision, but also it is not a purpose in itself, it is only a way to ensure that other minorities rights, as the right to education or to public use of mother tongue, are fully addressed, that minority's interests and perspective are taken into account. The political affairs in which national minorities has the right to participate may range from those affecting mostly minority members to those affecting all the citizens, including minority members, even if the first hypothesis is highlighted in Art. 15 of the Framework Convention<sup>68</sup>. From a larger perspective, the national

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<sup>67</sup> Martin Scheinin, *supra* note no. 20, p. 36.

<sup>68</sup> See the interpretation given to this aspect by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 16, 17.

minorities' political participation is also a mean to ensure that democracy goes beyond majority rule and does not confuse with ethnical majority dictatorship. Hence, the state has an obligation of result, but this result consists in establishing an inclusive procedure of reaching decisions. An inclusive procedure should presumably outreach majority voting.

The political participation of national minorities implies, as mentioned, for the states an obligation of result; currently, there are hardly mandatory measures to be taken in order to ensure compliance with this norm. But, as the Advisory Committee highlights in its' 2008 Commentary on the Article 15, the states' practice has already drawn some lines which may help to devise the country-specific systems of effective participation in public life for national minorities. Despite the fact that the Framework Convention is excluded from the ECtHR jurisdiction, it fostered a substantial implementation practice which confirms the increasingly high standard for measures to be taken by the state in observance of the right to political participation of minorities. The states are invited to review their political and legislative framework and to analyse the options for national minorities' members' participation in public life.

- in the legislative process, through political parties, the design of the electoral system and administrative and constituency boundaries, reserved seats and parliamentary practice or 'veto' rights, avoiding any citizenship or language proficiency requirements which could result in disenfranchising minorities.
- through specialised governmental bodies,
- through consultative mechanisms,
- in public administration, in the judiciary and in the executive,
- through autonomy arrangements.

Additionally, the Commentary also tackles the issues of

- availability of financial resources
- the media as a source for effective participation and
- the participation in the monitoring of the Framework Convention.

This is not the only possible reading of the specific norm.

How far the policy of national minorities' inclusion in public affairs has to go – for a state to meet its obligations under Article 15 of the Framework Convention – is a matter of evolving interpretation. As most of the human rights documents, this too, is a 'living' standard, also because of the indeterminacy of the vocabulary. The meaning of 'participation' may go all the way from mere 'presence' to 'consultation' and 'influence' and to 'control'<sup>69</sup>. The 'effectiveness' of 'participation' implies that

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<sup>69</sup> Annelies Verstichel, *supra* note no. 43, p. 79.

participation has to have the chance to change the outcome<sup>70</sup>. For this, in most views<sup>71</sup>, it is the state's obligation to ensure to national minorities a certain degree of 'influence' on the outcome of the decision, while scholars<sup>72</sup> and the Advisory Committee<sup>73</sup> clearly states that consultation is not participation.

On this scale, from presence to control in decision-making, Will Kimlicka differentiate three possible meanings to attach to this right:

«On the most minimal reading (...) members of national minorities should not face discrimination in the exercise of their standard political rights to vote, engage in advocacy and run for office. (...) On a somewhat more robust reading, effective participation requires not just that members of minorities can vote or run for office, but they actually achieve some degree of *representation* in the legislature» (...). In both these interpretations minorities «may still be permanent losers in the democratic process». The maximalist reading would start from the presumption that «participation should have an effect – i.e. that participation changes the outcome». «The only way to ensure that participation by minorities is effective (...) is to adopt counter-majoritarian rules that require some form of power-sharing. This may take the form of internal autonomy or of consociational guarantees of a coalition government.» But «states are not going to accept an interpretation of effective participation that provides a back door for autonomy»<sup>74</sup>.

Mark Weller<sup>75</sup> also observes two possible approaches of this right; the consociationist, which would sit on the idea of power-sharing and which would foster identity, on Annelies Verstichel<sup>76</sup> opinion, and the integrationist. On the latter, the national minorities' political participation seems to rest in the limits of effective equality principle, which could also justify entitlement for special measures in the area of political participation.

On the consociationist path, Mark Weller proposes complex power-sharing solutions consisting in

- Territorial autonomy for ethnic communities in area where they live
- Guaranteed rights of co-decision (or veto) in the central institutions of the state
- Roughly proportionate representation in the executive and other organs of state authority

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<sup>70</sup> Kristin Henrard, 'Participation', 'Representation' and 'Autonomy' in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions, *International Journal on Minority and group Rights* 12, 2005, p. 133–168.

<sup>71</sup> Annelies Verstichel, *supra* note no. 43, p. 79.

<sup>72</sup> Knut Vollebaek, *Foreword*, in Mark Weller and Katherine Nobbs, eds., *Political participation of minorities*, Oxford Univ. Press, 2010, p. viii.

<sup>73</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, adopted on 27 February 2008, ACFC/31DOC(2008)001, p. 7.

<sup>74</sup> Will Kymlicka, *Multicultural Odysseys*, Oxford University Press, 2007, p. 240–241

<sup>75</sup> Weller and Metzger (eds), *Settling Self-determination Disputes: Complex power-sharing in theory and practice* (2008) apud M. Weller, *supra* note no. 45, p. lxii.

<sup>76</sup> Annelies Verstichel, *supra* note no. 43, p. 79

- Wide ranking human and minority rights provisions guaranteeing their ethnic identity throughout the state and
- Certain functions of governance to be delegated upwards, to international actors, or at least supervised by them<sup>77</sup>

But the measures mentioned above are just proposals, while the field of political participation is considered to be part of the constitutional design or, especially, of the electoral system which are currently viewed as expressions of state's sovereignty<sup>78</sup>.

*International practice on the content of the minorities' right to political participation*

In this case, there still remains the question if the states have, under this provision, any other obligation in addition to the indeterminate requirement of ensuring effective minority participation in public affairs. International bodies, including the Advisory Committee avoided to make abstract and general considerations, but answer may be positive depending on the particular circumstances in that state.

The study will follow the well-established custom<sup>79</sup> to correlate the distinct human rights advancements made through different path. It will refer mostly to the European Court of Human Rights' jurisprudence and United Nation Human Rights Committee practice to complement the Framework Convention Advisory Committee opinions on particular countries and general comments.

Recognising the limits of understanding human rights in terms of negative or positive rights and obligations, there is still possible to observe that, first of all, states have the duty to abstain from restricting general participatory rights on grounds as the appurtenance to a national minority<sup>80</sup>.

Also, if, for example, through its constitution, the state is designed as the state of a particular nation or ethnic group rather than of all its citizens, particular steps may be needed from the state part in order to enhance effective participation of other groups as well<sup>81</sup>.

In cases of historically well-established autonomy regimes more advanced and broad autonomy provisions seems to be featured than in those more recently created<sup>82</sup>.

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<sup>77</sup> M. Weller, supra note no. 45, p. lviii. Also Weller and Metzger (eds), *Settling Self-determination Disputes: Complex power-sharing in theory and practice*, 2008.

<sup>78</sup> M. Weller, supra note no. 51, p. 515

<sup>79</sup> See for example the preliminary statements on the international standards for effective participation, Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, p. 10.

<sup>80</sup> M. Weller, supra note no. 51, p. 514.

<sup>81</sup> Advisory Committee on Framework Convention, Opinion on Croatia, 2002, para.62 apud M. Weller, supra note no. 46, p. 435. See Preamble Of the Constitution of Croatia «the Republic of Croatia is established as the national state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens, and who are guaranteed equality with citizens of Croatian nationality and the realization of national rights in accordance with the democratic norms of the United Nations Organization and the countries of the free world.»

Territorial minorities seem to have stronger entitlement to be involved in regional decisions in the area they traditionally live<sup>83</sup>.

In most of the views, states have a more concrete responsibility when changing their constitutional design – including administrative or constituency's boundaries – or their electoral system. In these situations, states have an obligation not to engage in reform aiming to demographic or electoral manipulation. Even more, states have the duty to ensure they do not unequally affect national minorities already established rights, especially their political rights to vote or to be elected. The withdrawal of provisions aiming to provide representation for national minorities, once granted, give rise to concern. This is the case of removal of reserved seats in regional legislature for Crimean Tatars in Ukraine<sup>84</sup> or the case of termination of a special ministry after a short period of existence in Albania<sup>85</sup>. In case of public administration reforms, given that they would also affect national minorities, the reform should be designed in a manner that contributes also to the effective participation of persons belonging to national minorities in public affairs<sup>86</sup>.

In Courts views, the state has also a positive obligation to protect parties aiming for the protection of a national minority from foreseeable violence when able to do so<sup>87</sup>. But, even if a clear interest in devising a right of persons belonging to national minorities to set up their own political parties may be noticed<sup>88</sup>, currently such a right is still dependant of particular circumstances of every country. Nevertheless, direct restriction on 'minority parties' remains controversial<sup>89</sup>.

The practice of special measures to facilitate minority representation in parliaments in widespread, but this too, did not emerge into a right<sup>90</sup>. On this issue, state margin of discretion is broad, from the point of view of international standards<sup>91</sup>.

With regard to the freedom of expression, the limits of permissible criticism (of public policy) are wider with regard to the government than in relation to a private citizen. Specifically, the freedom of expression of an elected representative in parliament may be wider and, correspondingly, the interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court<sup>92</sup>.

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<sup>82</sup> See Finland, Italy, Russian Federation State Reports on the Framework Convention from 1999 and Moldova and Slovenia State Reports on the Framework Convention from 2000.

<sup>83</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001.

<sup>84</sup> See Advisory Committee Opinion on Ukraine, 2001, para. 70 and Advisory Committee Opinion on Croatia, 2002.

<sup>85</sup> Advisory Committee Opinion on Albania, 2003, para. 68.

<sup>86</sup> Advisory Committee Opinion on Slovak Republic, 2001, para 48, apud. M. Weller, supra note no. 46, p. 438.

<sup>87</sup> ECtHR, *Ouranio Toxo and Others v. Greece*, Judgement of 20 October 2005.

<sup>88</sup> See Art 6 of the Recommendation 1201/1993 of the Parliamentary Assembly of the Council of Europe.

<sup>89</sup> M Weller, supra note no. 46, p. 440. See Bulgaria State Report on the Framework Convention, 2003, Albania abolished such restrictions following international criticism.

<sup>90</sup> See Romania State Report on the Framework Convention, 1999, Slovenia State Report on the Framework Convention, 2000.

<sup>91</sup> Framework Convention Advisory Committee Opinion on Hungary, 2001, para. 49.

<sup>92</sup> ECtHR, *Castels v. Spain*, Judgement of 23 April 1995, Sadak and Others v. Turkey, Judgement of 11 June 2002.

The matters that particularly affect national minorities are not *a priori* specified. The Lund Recommendations mentions the Copenhagen Document to refer to activities related to the «the protection and promotion of the identity of such minorities»<sup>93</sup> or those at the regional level concerning the regions in which they live<sup>94</sup> as matters of special concern for national minorities. The Framework Convention Advisory Committee refers to the indigenous people representative right to participate to decisions affecting the land use in their traditional areas of residency but also to the more vaguely «specific cultural, social and economic policies»<sup>95</sup> (emphasis added). Additionally, the idea that socially vulnerable groups – as immigrants or institutionally discriminated national minorities – have a wider right to participation than other ethnic groups is sustained by the Ljubljana Guidelines on Integration of Diverse Societies<sup>96</sup> which emphasises that the «representatives of all interested groups should be effectively consulted when elaborating and implementing integration policies. They should also participate in monitoring and evaluating the effectiveness of such policies.» Also, when adopting measures that affect or interfere with the culturally significant economic activities of a minority, the acceptability of such measures depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy<sup>97</sup>.

This way, it is also possible to notice a widespread agreement on the existence of a minority right to consultation in decisions that affect them. This is particularly true for indigenous communities, but may be extend to territorial minorities because the reasoning was based on relevant articles of International Covenant and European Convention<sup>98</sup>. On the ILO Convention No. 169 indigenous people enjoy a particularly strong right of consultation<sup>99</sup>. Nevertheless, the right to consultation – to which it correspond the obligation of the state to consult national minorities' members in matters that concern them directly – do not amount to the requirement to gain agreement of the affected groups<sup>100</sup>. Even more, the Advisory Committee expressed dissatisfaction when consultative bodies are made up of a majority or exclusively of public officials<sup>101</sup>. Also consultation is insufficient for 'effective' participation.

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<sup>93</sup> Para. 35 of the 1990 Document of the Copenhagen Meeting on the Human Dimension.

<sup>94</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, Art. 2, para. 2 and 3, A/RES/47/135.

<sup>95</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001.

<sup>96</sup> The Ljubljana Guidelines on Integration of Diverse Societies<sup>96</sup> & Explanatory Note, November 2012.

<sup>97</sup> Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

<sup>98</sup> Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

<sup>99</sup> M. Weller, *supra* note no. 51, p. 508.

<sup>100</sup> Human Rights Committee, *Jouni E. Lämsman et al. v. Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

<sup>101</sup> Framework Convention Advisory Committee Opinion on Switzerland, 2003, Framework Convention Advisory Committee Opinion on Germany, 2002, para 65.

There is little practice relating to a positive right of gaining access to the public service, due to the need to include minorities in the administration of the state<sup>102</sup>. Nevertheless, the criteria and process for appointment must be objective and reasonable<sup>103</sup>.

The international practice highlighted the interrelation between effective participation and other minority rights. The enjoyment of the right to one's own culture may require positive legal measures by the state and measures to ensure the effective participation of members of minority communities in decisions that affect them<sup>104</sup>. To a significant extent, the fundamental freedoms of expression, assembly and association give scope to the possibilities of participation, even if it do not prescribe any particular form of government.<sup>105</sup> On the other part, language rights do not enter under the scope of Article 3 of the 1<sup>st</sup> Protocol of the European Convention: the European Convention alone do not give the right to use minority language for electoral purposes<sup>106</sup> or for speaking or voting in an assembly<sup>107</sup>.

### *Limitations, restrictions, derogations*

The right to effective participation to public affairs of national minorities' members may be subject to lawful limitations, restrictions and derogations.

On Weller opinion<sup>108</sup>, perhaps the greatest value of the HRC and ECtHR jurisprudence lies in the fact that it addresses the restrictions to the exercise of these rights that are sometimes applied by the states.

On the basis of Art. 4 and 5 of the International Covenant and Art. 19 of the Framework Convention and Art.15 of the European Convention, the derogations are possible in time of public emergency which threatens the life of the nation, provided that the existence of such situation is officially proclaimed and the Secretary-General of the United Nations is immediately informed. The derogatory measures must extend only to those strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

With regard to restrictions, they must be prescribed by law and are necessary in a democratic society in the public interests or for the protection of the rights and freedoms of others and proportionate with such interest. Addressing the protection of democratic process, in *Selim Sadak and Others v Turkey*<sup>109</sup>, the Court of Strasbourg endorsed the prohibition of an entire political party which gained significant representation in parliament on the motivation that its religious ideology is incompatible

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<sup>102</sup> M. Weller, supra note no. 51, p. 507.

<sup>103</sup> Human Rights Committee, *Wieslaw Kall v. Poland*, Communication No. 552/1993 (31 March 1993), CCPR/C/60/D/552/1993.

<sup>104</sup> Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).

<sup>105</sup> Sir Nigel Rodley, *Civil and Political Rights*, in Catarina Krause and Martin Scheinin (eds.), 'International Protection of Human Rights: A Textbook', Abo Akademi University Institut for Human Rights, 2009, p. 120

<sup>106</sup> ECommHR, *Fryske Nasjonale Partij and Others v. the Netherlands*, Decision of 12 December 1985

<sup>107</sup> ECtHR, *Georges Clerfayt, Pierre Legros et al v. Belgium*, decision of 17 May 1985.

<sup>108</sup> M. Weller, supra note no. 51, p. 515

<sup>109</sup> ECtHR, *Selim Sadak and Others v Turkey*, Judgement from 11 June 2002.

with the democratic pluralism. This kind of argumentation would presumably prohibit also a minority party wishing to implement religiously inspired governance. Also, in *Osmani and Others v. the Former Yugoslav Republic of Macedonia*<sup>110</sup> the European Court of Human Rights found inadmissible the application of an ethnic Albanian mayor in Macedonia who was convicted following the decision to fly Turkish and Albanian flags together with Macedonian state one. The mayor also organised a popular resistance to state authorities' action to implement a Court decision requesting the removal of the flag. The inadmissibility decision was motivated on the mayor contribution to the risk of violence and failure to execute the constitutional and legal order of Macedonia. While restrictions on the freedom of assembly and expression are generally closely scrutinized, they may be subject to a wider margin of appreciation where the organization in question espouses violence<sup>111</sup>.

But restrictions to party registration can be justified only by compelling reasons<sup>112</sup>. Minority identity of the party members or supporters or a party programme dedicated towards enhancing minority interests, may not in themselves be considered such reasons<sup>113</sup>. In the case the *Socialist Party and Others v. Turkey* the Court did not endorse the view that a state should have the right to determine only according to its own interests whether a group constitutes a minority<sup>114</sup> and can accordingly be eligible for political representation<sup>115</sup>. Even more, any direct restriction on 'minority parties' is controversial<sup>116</sup>.

Also, the general right to vote may not be restricted because of national origin<sup>117</sup>. Nevertheless, the exercise of the electoral rights established in the 1<sup>st</sup> Protocol of the European Convention does not exclude limitations to the right to vote<sup>118</sup> and to stand in elections as long as they are not arbitrary and do not infringe the free expression of the opinion of the people<sup>119</sup>. Restrictions must not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness<sup>120</sup>. Limitations to the right to stand for elections may be stricter than for the right to vote<sup>121</sup>.

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<sup>110</sup> ECtHR, *Osmani and Others v. the Former Yugoslav Republic of Macedonia* Final decision as to the admissibility of 6 April 2000.

<sup>111</sup> M Weller, supra note no. 51, p. 512.

<sup>112</sup> ECtHR, *The Socialist Party and Others v. Turkey*, Judgement of 25 May 1998: «the fact that such a political programme (the self-determination of the 'Kurdish nation' and its right to 'secede') is considered incompatible with the current principles and structures of the Turkish state does not make it incompatible with the rules of democracy». See also *Stakov and the United Macedonian Organization Ilinden v. Bulgaria*, Judgement of 2 October 2001.

<sup>113</sup> M. Weller, supra note no. 51, p. 516.

<sup>114</sup> Also, in the Human Rights Committee opinions, the enjoyment of international minority rights does not depend on the state recognition of national minority status. See Human Rights Committee, *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

<sup>115</sup> ECtHR, *Gorzelić and Others v. Poland*, Judgement of 17 February 2004, also *The Socialist Party and Others v. Turkey*, Judgement of 25 May 1998.

<sup>116</sup> M Weller, supra note no. 46, p. 440. See Bulgaria State Report 2003, Albania abolished such restrictions following international criticism.

<sup>117</sup> ECtHR, *Aziz v. Cyprus*, Judgement of 22 June 2004.

<sup>118</sup> For example limitation of the right to vote only for residents with long standing ties with the territory. See , ECtHR, *Py v. France*, Judgement of 6 June 2005.

<sup>119</sup> ECommHR, *X v. Austria*, Decision of 12 July 1974, ECtHR, *Py v. France*, Judgement of 6 June 2005.

<sup>120</sup> ECtHR, *Py v. France*, Judgement of 6 June 2005.

<sup>121</sup> ECtHR, *Zdanoka v. Latvia*, Judgement of 16 March 2006.



*Right-holders*

International human rights gave birth mainly to state obligations towards international institutions and to a lesser extent to justiciable rights for human beings. While individuals were traditionally seen as third party beneficiaries of international human rights norms, the Human Right Committee clearly stated that their aim is to endow individuals with rights<sup>122</sup>.

In the same line of thoughts, the right to political participation seems grounded on a view of people not as passive recipients of decisions affecting them, but as implicated in the design of such decisions.

The first issue to address is whether the beneficiaries of this right are only the citizens of a particular country or any human being. Traditionally, political rights were reserved only to citizens and grounded on the specific link of loyalty that citizenship presumes. But now it is wide spread practice that long-term residents can participate in local elections. So, there seems more difficult to justify voting rights restriction on citizenship criteria for local elections. This seems especially important for countries like Estonia or Latvia with an important Russian speaking population which does not qualify for citizenship, due to state's policy on this issue<sup>123</sup>.

The second issue would be the qualification of this right as individual or collective right. The effective participation right provides an arena to settle disputes on power-sharing between national minorities and majorities precisely because of its distinctiveness from the collective right of self-determination. But the distinction between individual and collective dimension of the right is not water-tight<sup>124</sup>: In an individual opinion to the Communication No. 760/1997, J.G.A. Diergaardt v. Namibia, HRC<sup>125</sup>, opposed the emphasis put by the UN HRC on the individual nature of the right of participation as established by Article 25 of the International Covenant. On Martin Sheinin opinion, Article 25 would also be interpreted in connection with article 1 of the Covenant, addressing the right of self-determination. «Some form of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.» He reiterates this view in scientific works qualifying national minority rights as semi-collective rights<sup>126</sup>.

Another debated issue of effective political participation, repeatedly put forward in Roma political participation, is representation. In which conditions the rights of individuals belonging to national minorities may be exercised by their representatives? Are there some specific requirements for effective representativeness to be ensured? Who has the responsibility to safeguard for these requirements to be fulfilled?

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<sup>122</sup> Human Rights Committee, General Comment no. 24, para. 17, CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments).

<sup>123</sup> See Framework Convention Advisory Committee Opinion on Estonia, 2002.

<sup>124</sup> M. Weller, *supra* note no. 51, p. 481.

<sup>125</sup> Human Rights Committee, *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000). Individual Opinion by martin Sheinin (concurring).

<sup>126</sup> Martin Scheinin, *supra* note no. 20, p. 24.

Scholars highlight two forms of representation<sup>127</sup>: ‘the mirror representation’ also called ‘self-representation’ or ‘descriptive representation’ and what I call ‘democratic representation’. If a national minority is descriptively represented whenever one of its members hold a public office, the minority is democratically represented only when the office holders are elected through a procedure which ensures the minority’s interests are served and the office holder is accountable to the national minority. The question of their legitimacy and accountability rises when persons representing national minorities are elected or appointed. This is available irrespective of the consultative or decision-making nature of the body, the level where it acts: national, regional or local or the competences it has: legislative, governmental or administrative issues.

Nevertheless, only the mirror representation is possible when public office requires political neutrality and objectivity<sup>128</sup> from its holder. This is the case when persons belonging to national minorities are recruited in public sector, including in army, judiciary, police force, administration and executive through special measures in order to compensate historical or structural disadvantage and to ensure effective equality.

On the issue of who is entitled to fulfil the function of representation on behalf of the minority, the HRC asserted in the case of *Grand Chief Donald Marshall v. Canada* that Article 25 (a) of the International Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. The failure of the state party to invite representatives of the Mikmak tribe to the constitutional conferences on aboriginal matters did not infringe their right to political participation<sup>129</sup>.

As previously mentioned, minority representation through political parties is protected through the rights to effective participation, to be elected and to freedom of association, even if these parties advocate self-determination and secession, but not if they call for violence or for the imposition of a non-democratic system of governance.<sup>130</sup> This correspondingly applies with respect to the right to initiate and maintain other form of minority representative organizations<sup>131</sup>.

The states’ practice as well as the international bodies’<sup>132</sup> recommendations does not seem to consider the free election of the minority’s representative as mandatory. The application of the general disposition of Article 25 of the International Covenant to the national minorities effective participation seems to impose to the state only the duty to allow to minority members to participate in the free election of people’s representatives on equal footing with all other citizens, but not to directly elect special representatives, even if diverse forms of special representation in at least in central legislative bodies is strongly encouraged<sup>133</sup>. The design of the electoral system enters in the state’s margin of

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<sup>127</sup> See Annelies Verstichel, *supra* note no. 43, p. 79 and Peter Vermeersch, *Minority Associations*, in Mark Weller and Katherine Nobbs, eds., *Political participation of minorities*, , Oxford Univ. Press, 2010, p. 682–701.

<sup>128</sup> EctHR, *Py v. France*, Judgement of 6 June 2005.

<sup>129</sup> Human Rights Committee, *Marshall v. Canada*, Communication No. 205/1986, U.N. Doc. CCPR/C/43/D/205/1986 at 40 (1991).

<sup>130</sup> M. Weller, *supra* note no. 51, p.516.

<sup>131</sup> M. Weller, *supra* note no. 51, p. 516.

<sup>132</sup> See Lund Recommendations, *supra* note no. 18, p. 8–9.

<sup>133</sup> See Lund Recommendations, *supra* note no. 18, Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, p. 7.

discretion, as an expression of its' sovereignty<sup>134</sup>. When national minorities representative failed to gain seats in parliament, at least minorities concerns should be included in the agenda of the elected bodies<sup>135</sup>. Consultative bodies of public officers and experts, besides national minorities' representatives are sometimes put in place to ensure that national minorities concerns get to be addressed at state, regional or local level<sup>136</sup>. The representative nature of these bodies is to be assessed in every particular case on criteria as the appointment procedure, their independence from government and inclusiveness.

Another issue reflecting on representativeness is the internal democracy of minority community. It was tackled in theoretical works<sup>137</sup> and in the Advisory Committee Commentary in relation to the legitimacy of representation<sup>138</sup>. Two requirements have been emphasized: i). that the state must permit minority communities to arrange for their own decision-making processes and ii). That minority organizations are under certain obligations<sup>139</sup>, including ensuring accountability and transparency of minority governance arranged according to genuinely democratic principles.<sup>140</sup> On the same issue, a balance in political/ideological orientation among groups representing the same national minority is desirable, while an overemphasis on just one of several representative organisations has been criticized<sup>141</sup>.

#### *Duty-bearers*

As a rule for all human rights, the state is the primary duty bearer in the right of minorities' political participation framework. With regard to the content of states' obligation, some main points have been elaborated on the basis of the hard and soft jurisprudence of ECtHR and Framework Convention AC.

The link between *effective participation – self-determination* and *responsible sovereignty* justifies and enhances states' duties towards its inhabitants and strengthens it with a responsibility towards what it is called 'the international community' which have been legitimised to intervene – overlapping general principles of international law – inside states frontiers through the medium of *humanitarian intervention* and, more recently, the *responsibility to protect*.

The content of the measures to be taken in order to reach 'effective participation' of national minorities, especially in decision-making seems to remain largely in states' margin of discretion.

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<sup>134</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 80, p. 24.

<sup>135</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 81.

<sup>136</sup> See Framework Convention Advisory Committee Opinion on Switzerland, 2003.

<sup>137</sup> Annelies Verstichel, *supra* note no. 43, Kristin Henrard, *supra* note no. 71, Peter Vermeersch, *supra* note no. 128.

<sup>138</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001.

<sup>139</sup> See Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, adopted on 27 February 2008, ACFC/31DOC(2008)001.

<sup>140</sup> M. Weller, *supra* note no. 46, p. 431.

<sup>141</sup> The Framework Convention Advisory Committee Opinion on Romania, 2002, para 67.

## Remedies

In accordance, presumably, with the wide margin of appreciation states indulge, little practice and theoretic developments are available on the remedies topic. In the Czech Republic have been put in place a Special Ombudsperson<sup>142</sup> for minorities' issues; but generally, states reports tend to offer few insights into remedies that may be available.<sup>143</sup>

Current international practice on the minorities' political participation acknowledges minorities' right to influence public affairs in the widest meaning, while recognising states' obligation only to consult them in matters of special interest for national minorities, that is mainly cultural or regional issues.

## The Roma right to political participation

Roma's right to political participation is grounded in the universal hard law International Covenant as a citizens' right, in the semi-hard law Framework Convention as a national minority's right and in the soft law EU documents on Roma social inclusion.

This section explores the existence and content of a special Roma right in the European Union or Council of Europe framework.

*The EU Framework for National Roma Integration Strategies up to 2020*<sup>144</sup>, its follow up, *National Roma Integration Strategies: a first step in the implementation of the EU Framework*<sup>145</sup> are probably among the most advanced and high-level issued EU documents on Roma. They build upon the EU primary<sup>146</sup> and secondary law<sup>147</sup> and previous soft law Roma specific documents<sup>148</sup>.

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<sup>142</sup> M. Weller, supra note no. 46, p. 451, Czech Republic State Report 1999.

<sup>143</sup> M. Weller, supra note no. 46, p. 451.

<sup>144</sup> See European Commission Communication no. 8727/6.04. 2011 and EU Council Conclusions from 19.05.2011 «*An EU Framework for national Roma integration strategies up to 2020*», [www.eur-lex.europa.eu/LexUriServ](http://www.eur-lex.europa.eu/LexUriServ)

<sup>145</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *National Roma Integration Strategies: a first step in the implementation of the EU Framework*, COM(2012) 226, Brussels, 21.5.2012, available at [www.eur-lex.europa.eu/LexUriServ.do?uri](http://www.eur-lex.europa.eu/LexUriServ.do?uri).

<sup>146</sup> Article 2 and 3 of the Treaty on the European Union, Articles 9, 10 and 19 of the Treaty on the Functioning of the European Union; Article 21 of the Charter of Fundamental Rights of the European Union.

<sup>147</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>148</sup> The Presidency Conclusions of the European Council (December 2007 and June 2008); the Council Conclusions on the Inclusion of the Roma (December 2008); the Council Conclusions on the Inclusion of the Roma and the Common Basic Principles on Roma Inclusion annexed thereto (June 2009); the Council Conclusions on Advancing Roma Inclusion (June 2010); the European Council Conclusions adopting the Europe 2020 Strategy (June 2010) and the Council Conclusions on the Fifth report on economic, social and territorial cohesion (February 2011); the European Parliament Resolutions on the Situation of Roma women in the European Union (June 2006); on the Social situation of the Roma and their improved access to the labour market in the EU (March 2009); on the Situation of the Roma people in Europe (September 2010); and on the EU strategy on Roma inclusion (March 2011); the Communication of the Commission on the social and economic integration of the Roma in Europe, and the accompanying Staff Working Document "Roma in Europe: The Implementation of European Union Instruments and Policies for Roma Inclusion – Progress Report"; the European Roma Summits which

According to these instruments, no specific Roma right is acknowledge, only the equal enjoyment for Roma of the human, citizen and national minority's rights previously mentioned.

In this reading, the late of the ten basic common principles of Roma inclusion policies, Active Participation of Roma, refers to the national minorities right and opportunity, without any of the distinctions such as race, colour, national or ethnic origin and without unreasonable restrictions (a) To effectively take part in the conduct of public affairs, directly or through freely chosen representatives, in particular those affecting them; (b) To vote and to be elected at genuine periodic elections; and (c) To have equal access to public service in his country.

The Roma right to participate in 'public affairs, in particular those affecting them' specifically refer to the domain of Roma inclusion policies: education, employment, health and housing. This may encompass a wider domain than the one usually referred as public affairs particularly affecting national minorities, which seems to encompass, as previously argued, the issues affecting the distinct cultural identity of national minorities or those of particular interest for the region in which national minorities traditionally live. Additionally, the socially vulnerable groups seems to have a wider right to participation – that is at least consultation – in elaborating, implementing, monitoring and evaluating the effectiveness of integration policies<sup>149</sup>. To the conclusion that Roma has an undisputed right to participate in their own inclusion at least through continuous consultation and in respect to all instances points the Framework Convention Advisory Committee Third Opinion on Romania<sup>150</sup>, but this right doesn't seems special because its content may be already covered by the large formulation of the general minority right to political participation of Art.15 Framework Convention.

If there seems clear that Roma have the right to participate, at least at the level of consultation, in their own inclusion, at the European Union, Member State and local level and in all phases of inclusion policies, from design to implementation, monitoring and assessment, there is still unclear who will represent the various Roma communities, legitimately and accountable. The International Roma Union and the European Roma and Travellers Forum are international Roma NGOs aiming to fill this need, but both have to face various contestations equally to some of Roma representative organisations acting at the state level. Their representativeness of various groups designated as Roma, the democratic and transparent feature of the internal elections, the accountability of their leaders and the relation with the grass-route Roma communities as well as the difficulty to compile and promote a common Roma political agenda question their legitimacy and weaken their credibility.

## Conclusion

Roma's right to effective participation in public affairs is currently undisputed, being legitimised as a citizen's right and as a minority right.

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took place in Brussels on 16 September 2008 and in Córdoba on 8 April 2010; the Opinion of the Committee of Regions on the Social and economic integration of the Roma in Europe (December 2010); Regulation (EU) No 437/2010 of the European Parliament and of the Council of 19 May 2010 amending Regulation (EC) No 1080/2006 on the European Regional Development Fund as regards the eligibility of housing interventions in favour of marginalised communities.

<sup>149</sup> The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note, November 2012, p. 10.

<sup>150</sup> See Framework Convention Advisory Committee Third Opinion on Romania, 2012, p. 2 and 37.

If the citizen's right is international hard law, some special measures for minorities' political participation legally bind states in the Council of Europe area. The Roma right to political participation entrenches European states' political obligations. But the importance of the soft character of most documents guiding states' duties may be circumstantiated first because international hard and soft law seems difficult to separate neatly – the implementation of both depending possibly more on the consent than on force – and second in the framework of the European governance soft law seems to be hardening as the soft law voluntary implementation is fuelled through interlocked political bargaining.

Framework Convention States Parties have at least a duty of consulting the Roma on inclusion policies while the procedures to ensure Roma influence in decision-making remain in the states margin of appreciation. Correspondingly, Roma has the right to be consulted on their own inclusion. For the Roma, the 'public affairs affecting them' cover virtually all social fields touched by the inclusion policy – a broader notion than those affecting cultural identity in which national minorities are usually participating.

It is also clear that Roma are to be included in public processes at all levels – local, state and European – and phases – in design, implementation, monitoring and assessment of public affairs affecting them. But who participate to decision as legitimate Roma representative remains to be clarified. Sole appurtenance to Roma minority doesn't warrant credibility in advancing Roma diverse views and interests.

Additionally to advancing national minorities' interests, the Framework Convention monitoring procedure and the EU Roma inclusion policy foster cooperation in the European governance framework.

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