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## **BACKGROUND DOCUMENT BY THE INDEPENDENT EXPERT ON MINORITY ISSUES, GAY MCDUGALL, ON MINORITIES AND EFFECTIVE POLITICAL PARTICIPATION<sup>\*</sup>**

### **Summary**

This background document summarizes the relevant basic international legal principles, the preconditions for ensuring effective political participation by minorities, and some of the models and conceptual tools that States are using in order to meet their international obligations in this domain

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<sup>\*</sup> Late submission.

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## **I. INTRODUCTION**

1. The right to effective participation is a fundamental human right, affirmed in a number of key international legal instruments. Effective participation underpins the realization of all human rights of women and men belonging to ethnic or national, religious and linguistic minorities. It is through effective participation that a person expresses and protects her or his identity, ensuring the survival and dignity of the minority. The right to effective participation recognizes the fact that the participation of minorities in various areas of life is essential for the development of a truly inclusive and just society.

2. Effective participation should give minorities a stake in society. Measures taken towards ensuring the effective participation of minorities contribute to the alleviation of tensions, and thus serve the purpose of conflict prevention. Therefore, in addition to being a legal obligation, creating the conditions for the effective participation of minorities should be considered by States to be an integral aspect of good governance.

3. It is for these reasons that the United Nations independent expert on minority issues has chosen effective political participation as the theme of the second session of the United Nations Forum on Minority Issues, to be held in Geneva on 12 and 13 November 2009. This background document summarizes the relevant basic international legal principles, the preconditions for ensuring effective political participation, and some of the models and conceptual tools that States are using in order to meet their international obligations.

## **II. THE RIGHT OF MINORITIES TO EFFECTIVE PARTICIPATION**

4. The right to effective participation of persons belonging to minorities is far-reaching and encompasses many aspects of what constitutes a just society. The right to effective participation includes participation in political decision-making at both the local and national levels. In addition, persons belonging to minorities should be given the means to participate effectively in the public, cultural, religious, social, and economic spheres

of their societies. It should be underscored from the outset that the subject of minorities and effective political participation does not encompass separatist movements. Rather, the purpose of the subject, as well as of the right to effective participation, is to ensure the inclusion of all persons belonging to minorities in a just and fair society.

5. Public participation is a broad concept. It comprises the right to take part in the conduct of public affairs, the right to vote and to be elected, and to have access to public services. Moreover, it entails participation in governmental bodies, the judiciary and other agencies of the criminal justice system, decentralized and local forms of government, consultation mechanisms, as well as through cultural or territorial autonomy arrangements.

6. Participation in economic and social life encompasses participation in development projects, as well as proper access to employment, land and property, housing, health care, social welfare and pensions, among others. Participation in social and cultural life covers areas such as proper access to education, media and the protection of cultural identity. In all of these areas, effective participation entails meaningful consultation, programmes designed to address the particular needs and circumstances of minorities, as well as the full and equal access to the necessary services.

7. The human rights principle of non-discrimination is crucial. The exclusion of minorities from fully participating in political processes is primarily grounded in discrimination. Affirmative measures, time-bound and specifically designed to address systematic, historic and institutionalized discrimination, must be employed to enable minorities to participate effectively, especially if this would otherwise remain out of their reach.

### **III. THE RIGHT TO EFFECTIVE PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS LAW**

8. The right to effective participation, the prohibition of discrimination and special measures are firmly rooted in international human rights law. The right of all persons to take part in the conduct of public affairs, directly or through freely chosen representatives, as well as to vote and be elected in genuine periodic elections is affirmed in article 25 of the International Covenant on Civil and Political Rights. This provision is an elaboration of article 21 of the Universal Declaration of Human Rights, which states: “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

9. The United Nations Human Rights Committee has interpreted the conduct of public affairs broadly as the exercise of power in the legislative, executive and administrative branches.<sup>1</sup> In the view of the Committee, the provision covers all aspects of public administration, including the formulation and implementation of policy at international, national, regional and local levels. Furthermore, citizens may participate in the conduct of public affairs directly or indirectly. Once a mode of participation is established, no distinction should be made between citizens as regards their participation on such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and no unreasonable restrictions should be imposed.<sup>2</sup>

10. The right of persons belonging to national or ethnic, religious and linguistic minorities to participate effectively in cultural, religious, social, economic and public life is further affirmed in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“the Declaration”).<sup>3</sup>

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<sup>1</sup> Human Rights Committee, general comment No. 25: article 25 (Participation in public affairs and the right to vote), 1996, para. 5.

<sup>2</sup> *Ibid.*, paras. 5-7.

<sup>3</sup> Article 2; articles 4 (5) and 5 (1) are also relevant.

11. Article 25 of the International Covenant on Civil and Political Rights places explicit emphasis on non-discrimination in the exercise of the rights contained therein, as they are to be enjoyed “without any of the distinctions mentioned in article 2 [of the Covenant].” Article 2 secures the respect for the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status. This basic principle of prohibition of discrimination is repeated elsewhere in the Covenant and articulated in a number of instruments.<sup>4</sup>

12. Furthermore, all forms of racial discrimination are explicitly prohibited and equality in the enjoyment of political rights is guaranteed by the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5). The Convention on the Elimination of All Forms of Discrimination against Women creates an obligation on States to take all appropriate measures to eliminate discrimination against women in the political and public life of the country (art. 7).

13. The right to effective participation has more recently been strengthened with regard to groups strongly at risk of marginalization. Article 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families protects the rights of documented and regular migrant workers and their families to participate in the public affairs of their State of origin and to be elected through elections of that State. Perhaps more importantly, article 42 requires the States of employment to facilitate the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities; States of employment may, moreover, grant migrant workers the enjoyment of political rights.

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<sup>4</sup> Article 26 of the Covenant contains a general prohibition against discrimination. See also e.g. article 2 of the Universal Declaration of Human Rights.

14. The Convention on the Rights of Persons with Disabilities requires that States ensure that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected” (art. 29).

15. The right to effective participation is further upheld in provisions within existing regional human rights treaties. These include the African Charter on Human and Peoples’ Rights,<sup>5</sup> the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,<sup>6</sup> the American Convention on Human Rights<sup>7</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.<sup>8</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) protects the right to free elections through its Protocol No. 1 (art. 3). And the Framework Convention for the Protection of National Minorities creates an obligation for States to ensure the effective participation of persons belonging to national minorities (art. 15). Comparable provisions on the prohibition of discrimination are also contained in the regional human rights treaties.<sup>9</sup>

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<sup>5</sup> Article 13 of the African Charter on Human and Peoples’ Rights safeguards the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives”.

<sup>6</sup> Article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa protects the right of women to participate in the political and decision-making process.

<sup>7</sup> Article 23 of the American Convention on Human Rights protects the rights of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives, as well as to vote and to be elected in genuine periodic elections which shall be by universal and equal suffrage and by secret ballot.

<sup>8</sup> Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women recognizes the right of women to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.

<sup>9</sup> They are articles 2 and 13 of the African Charter; articles 2 and 9 of the Protocol on the Rights of Women in Africa; article 1 of the American Convention; article 14 of the European Convention, as well as its Protocol No. 12. Moreover, equality before the law is guaranteed and any discrimination based on belonging to a national minority is prohibited by article 4 of the Framework Convention.

16. To eliminate discrimination and achieve full equality, not only in law but also effectively in practice, the Human Rights Committee has held that States parties are sometimes required to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”, and that “[s]uch action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population ... as long as such action is needed to correct discrimination in fact”.<sup>10</sup>

17. This principle has been articulated in several legal instruments which allow for the adoption of special measures. The International Convention on the Elimination of All Forms of Racial Discrimination permits the implementation of special measures “for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms” (art. 1 (4)). The Convention goes on (art. 2 (2)) to refer to special and concrete measures taken by States parties in the social, economic, cultural and other fields the purpose of which is to guarantee the full and equal enjoyment of human rights and fundamental freedoms. The Convention on the Elimination of All Forms of Discrimination against Women also allows for “temporary special measures” which accelerate the de facto equality between men and women (art 4 (1)). At the regional level, the same approach is taken in the Framework Convention for the Protection of National Minorities, which allows States parties to “adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority” (art. 4 (2)). Special measures do not constitute discrimination and therefore should not be considered such.<sup>11</sup>

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<sup>10</sup> Human Rights Committee, general comment No. 18 (Non-discrimination), 1989, para. 10.

<sup>11</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (4); Framework Convention for the Protection of National Minorities, art. 4 (3).

18. The international legal framework has repeatedly recognized the need for special and concrete measures to protect certain groups with the purpose of guaranteeing them full and equal enjoyment of human rights and fundamental freedoms. The use of special measures is in fact a fundamental component of the realization of the right to non-discrimination. Special measures are not merely permissible under the International Convention on the Elimination of All Forms of Racial Discrimination but also, in certain circumstances, a requirement. The Committee on the Elimination of Racial Discrimination has emphasized that “the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation”.<sup>12</sup>

19. The concept of special measures is relevant for the effective political participation of women and men belonging to minorities as it can facilitate the implementation of minorities’ rights to vote and to stand for office. It has been endorsed by the United Nations human rights bodies and by regional human rights institutions. With regard to the right to vote, the Human Rights Committee recognized that “[p]ositive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages.”<sup>13</sup>

20. Arguments for special measures which could ensure the participation of minorities in public bodies are based on the fact that because of their smaller number, minorities can hardly ever determine the outcome of decisions in a majoritarian democracy.<sup>14</sup> In

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<sup>12</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 18 (A/56/18)*, para. 399. See also generally the Committee’s general recommendation No. 32 (The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination), adopted at its seventy-fifth session in August 2009, at <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (English only).

<sup>13</sup> Human Rights Committee, general comment No. 25 (1996), para. 12.

<sup>14</sup> Commentary of the United Nations Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (E/CN.4/Sub.2/AC.5/2005/2), para. 42.

practice, minorities tend to be outvoted, unable to secure representation proportionate with their numbers, thus denying them an effective voice in the public and political life of States. The rationale for special measures is not, as is frequently perceived, to create a privileged position for minorities, but rather to level the playing field, placing minorities in the same position as majorities. Being involved in national political and social processes, contributing to policy-making and participating in (and benefiting from) public services should help to counter marginalization and alienation. States which welcome the participation and integration of minorities tend not only to be more stable, but also more prosperous.<sup>15</sup>

21. Human rights treaty bodies and courts have dealt with a range of cases involving the right to effective participation of minorities and the related prohibition of discrimination. As regards requiring proficiency in an official language, the Human Rights Committee has held that a Government's failure to introduce legislation to permit the use of other languages disproportionately affected certain minority communities, since it denied them the use of their mother tongue in administration, justice, education, public life and Government, thus constituting a violation of article 26 of the International Covenant on Civil and Political Rights. The Committee concluded that the State was under an obligation to provide the community with an effective remedy, namely by allowing its officials to respond in languages other than the official one in a non-discriminatory manner.<sup>16</sup> In another case, barring a member of a minority from standing in local elections on the ground that her proficiency in the official language was not adequate, when such an assessment was conducted in a deficient and arbitrary way and when in fact the person already held a language certificate, was deemed by the Committee to be a violation of articles 2 and 25 of the Covenant.<sup>17</sup> On the same issue of barring a member of a minority from standing in elections because of

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<sup>15</sup> Y. Ghai, *Public Participation and Minorities*, Minority Rights Group International, London, 2003, p. 5.

<sup>16</sup> *J.G.A. Diergaard et al. v. Namibia*, communication No. 760/1997, views adopted on 25 July 2000 (CCPR/C/69/D/760/1997).

<sup>17</sup> *Antonina Ignatane v. Latvia*, communication No. 884/1999, views adopted on 25 July 2001 (CCPR/C/72/D/884/1999).

allegedly inadequate proficiency in the official language, the European Court of Human Rights has found that this can constitute a violation of article 3 of Protocol No. 1 to European Convention. In the particular case, the Court held that it had grave doubts as to the legal basis for subjecting candidates holding language certificates to further tests. The Court also considered that the testing lacked objectivity and procedural fairness.<sup>18</sup>

22. In a number of cases, the European Court assessed situations in which States prevented persons belonging to minorities from establishing associations aimed at furthering the cultural and political interests of the groups. The Court found that such interference constituted a violation of article 11 of the European Convention, which safeguards the freedom of assembly and association.<sup>19</sup>

23. The Court has long asserted that minority protection justifies the application of a different electoral system within the State in order to ensure better minority representation in the legislature.<sup>20</sup> Nevertheless, it has established that, “any electoral system must be assessed in the light of the political evolution of the country concerned”, and, as a result, “features that would be unacceptable in the context of one system may accordingly be justified in the context of another.”<sup>21</sup>

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<sup>18</sup> *Podkolzina v. Latvia*, application No. 46726/99, judgement of 9 April 2002.

<sup>19</sup> *Sidiropoulos and others v. Greece*, application No. 26695/95, judgement of 10 July 1998; *United Communist Party and others v. Turkey*, application No. 19392/92, judgement of 30 January 1998; *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, 2 October 2001, applications Nos. 29221/95 and 29225/95.

<sup>20</sup> European Commission on Human Rights, *Lindsey and others v. the United Kingdom*, application No. 8364/78, judgement of 8 March 1979.

<sup>21</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, application No. 9267/81, judgement of 2 March 1987. On the issue of thresholds and their impact on minority participation, dissenting opinion in another European Court case warned that high thresholds virtually eliminate the possibility of regional or minority parties entering parliament and distort the essential purpose of a proportional system, thus suppressing parliamentary criticism and debate, which are the essence of representative democracy. *Yumak and Sadak v. Turkey*, application No. 10226/03, judgement of 8 July 2008.

24. Concerning a national legal requirement for a political party to adopt a structure which was alien to indigenous peoples' customs if it was to be allowed to participate in elections, the Inter-American Court of Human Rights held that such imposition constituted a discriminatory impediment to equal participation in elections. The Court, moreover, determined that the universal rights of equality and political participation give rise to an obligation on the State to adopt affirmative and targeted measures to guarantee equal participation of indigenous groups.<sup>22</sup>

#### **IV. PRECONDITIONS FOR AND OBSTACLES TO EFFECTIVE POLITICAL PARTICIPATION**

25. A continuing and substantive dialogue is required in order to ensure the effective participation of women and men belonging to minorities in their society. This dialogue should be multidirectional: it must involve persons belonging to minorities as well as majority populations, and it also must be between persons belonging to minorities and the authorities. Such dialogue can be achieved only if effective channels of communication are in place.<sup>23</sup> Such channels must take into account the specific needs of minority women, as well as other marginalized segments of minority communities exposed to intersectional discrimination.

26. A central issue in relation to the political participation of minorities is how to determine that the quality of participation is truly "effective".<sup>24</sup> When considering whether participation of persons belonging to minorities is effective, two of the most important aspects of participation must be examined. The first relates to the means which promote full and effective equality of persons belonging to minorities. The second assesses the impact of these means on the situation of the persons concerned and

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<sup>22</sup> *Yatama v. Nicaragua*, case 12.388, judgement of 23 June 2005.

<sup>23</sup> Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities ("Advisory Committee"), Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs, adopted on 27 February 2008 (ACFC/31DOC(2008)001), para.11.

<sup>24</sup> Declaration, art. 2, paras. 2 and 3.

on the society as a whole. This impact may be viewed differently by different actors, depending on their engagement in the processes. It is not sufficient for States to ensure formal participation of persons belonging to minorities; States must also ensure that the participation of minority representatives has a substantial influence on decisions which are taken, so that there is, as far as possible, a shared ownership of the decisions taken.<sup>25</sup>

27. Mere political participation, therefore, is not sufficient to constitute “effective” participation, and a number of considerations arise in this regard. One relates to the legitimacy of minority political representatives. It must be kept in mind that minority communities are heterogeneous and this diversity must be reflected in pluralist representation. Moreover, the political representatives can alienate themselves from their core constituencies, thus failing to fulfil the function of being genuine and effective spokespersons. And if minority representatives are not empowered to make substantial and influential decisions on issues of relevance for their communities, their participation will be tantamount to tokenism and not “effective participation”.

28. It is therefore paramount that the participation mechanisms be continuously re-examined and evaluated to ensure that they allow for effective participation. As circumstances and realities change over time, the participation mechanisms should be reviewed and, if necessary, adjusted. This, however, should not result in the curtailing of the acquired rights.

29. Discrimination is a key cause of the widespread marginalization of minorities in societies worldwide. It is also an obstacle to the effective participation of minorities. Discrimination can take different forms. Certain segments of minority populations are exposed to multiple forms of discrimination; in addition to being discriminated against on account of their belonging to a national or ethnic, religious or linguistic minority, they are discriminated against because of their gender, age, disability, sexual orientation or other grounds.

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<sup>25</sup> Advisory Committee, paras. 18 and 19.

30. Discrimination which inhibits the political participation of minorities may manifest itself in, among others: a type of electoral system which negatively affects minority representation; political parties which are adverse to minority issues and minority membership; widespread prejudice among the electorate which punishes parties willing to include minority candidates or voice minority issues; media which are hostile to minority concerns and participation. Given the centrality of the issue of discrimination to the right to effective participation, Governments should consider instituting independent monitoring and individual complaints mechanisms, such as the ombudsperson function adopted in a number of countries.

31. The right to effective participation is meaningless unless a group has the ability and the resources to exercise it. An important precondition for the political participation of minorities is the capacity to participate. The capacity of minority communities to participate in the public life encompasses a broad range of issues. It hinges on the ability of persons belonging to minorities to exercise the full gamut of cultural, economic and social rights, among them language rights, the right to education, the right to work, the right to health, the right to food, the right to housing, and others. In the view of the Human Rights Committee, States should take positive measures to overcome specific difficulties.<sup>26</sup>

32. Legal, cultural or linguistic biases may also hinder effective minority participation in public life. High electoral thresholds usually have an adverse effect on the ability of minority communities to secure political representation and can constitute indirect discrimination. Requirements for the registration of political parties can restrict in an unreasonable and disproportionate way the ability of persons belonging to minorities to exercise their freedom of assembly and association. The delineation of electoral districts may distort the distribution of voters, thus having a discriminatory effect on a particular group or resulting in gerrymandering. Constitutional provisions on minority

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<sup>26</sup> See paragraph 19 above. Human Rights Committee, general comment No. 25 (1996), para. 12.

participation are alone insufficient to guarantee effective participation. Specific laws and policies enabling the implementation of such constitutional principles are necessary. The implementation of the latter must, in turn, be monitored and minority participation in their articulation, implementation and monitoring must be secured.

33. Linking political participation exclusively with ethnic identity by requiring that candidates standing for election be members of certain ethnic groups and that voters belonging to certain ethnic groups be allowed to vote only for candidates from their respective groups can be detrimental to the effective political participation of minorities. As previously noted, language proficiency requirements imposed on candidates can also negatively impact the effective participation of persons belonging to minorities and in certain cases have been deemed illegal by human rights bodies and courts.

34. The collection of data disaggregated by ethnicity, age, gender, geographical distribution and other relevant categories is an important precondition for the development of adequate and efficient models of participation of persons belonging to minorities. Such data make it possible to monitor the participation of minorities and ascertain whether fair and representative participation mechanisms have been put in place. The collection of disaggregated data must take place in accordance with international standards on personal data protection, as well as respecting the right of persons belonging to minorities to choose freely to be treated or not as minorities. Representatives of minorities should be involved in the process of data collection, and the data collection methods should be designed in close cooperation with them.

35. Accurate voters' registers are another important precondition for enabling the effective political participation of minorities. Voter registration must be implemented in a non-discriminatory way, taking into account the special needs of minorities as they may arise in the areas of language, cultural appropriateness and accessibility of registration processes.

36. Recognition of minorities is essential to secure the rights of minority groups in a State, including the right to effective participation. Since non-recognition hinders the enjoyment of internationally established rights, it ultimately leads to the marginalization of minorities and their exclusion from political processes. Recognition based on self-identification is the first step in the process of securing minority rights and safeguarding the position of members of minorities as equal members of the society.

37. Although article 25 of International Covenant on Civil and Political Rights guarantees the exercise of the right to public participation to citizens, it has come to be widely recognized that citizenship requirements can hamper effective participation in certain fields of public affairs. While it remains accepted for States to impose certain restrictions on non-citizens concerning the right to vote and to be elected, such restrictions should not be applied more widely than necessary. Denial of citizenship has been used by States to exclude minorities from the enjoyment of their rights. States should consider allowing non-citizens belonging to minorities to vote, stand as candidates in local elections and be members of the governing boards of self-governing bodies, while making sure that access to citizenship is regulated in a non-discriminatory manner.<sup>27</sup> Positive examples of this kind exist in a number of States.

## **V. EXISTING FORMS AND MECHANISMS FOR EFFECTIVE POLITICAL PARTICIPATION**

38. While no single, one-size-fits-all solution exists to ensure proper implementation of the right to effective participation, a number of features of participation models and mechanisms can be identified. As regards the choice of a particular electoral system, international law does not impose any specific solution either. The Human Rights Committee has held that “the system must be compatible with the rights protected by article 25 [of the Covenant] and must guarantee and give effect to the free expression of the will of the electors”.<sup>28</sup>

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<sup>27</sup> Advisory Committee , paras. 100 and 101.

<sup>28</sup> Human Rights Committee, general comment No. 25 (1996), para. 21.

39. A range of legal and political mechanisms have been used around the world to increase the political participation of minorities at the local, regional and national levels in legislative, executive and administrative bodies. While minority representation is in itself important, consideration must also be given to the mechanisms needed to ensure that minority issues are addressed effectively in the governmental process.

40. Political participation of minorities encompasses a broad range of decision- and policy-making processes and mechanisms in the legislative, executive, self-governance and traditional spheres. Moreover, participation takes place at the local, regional (i.e. subnational), national as well as international levels.

41. Legislative representation is a key mechanism for minority participation, enabling access for minorities to all levels of legislative representation in national parliaments, regional legislatures and local, municipal assemblies.

42. Access to membership in viable political parties is important for the effective mobilization of minorities in the political process, both in elections and in the conduct of the business of the legislature and administrative bodies. In some countries ethnicity-based or faith-based political parties are prohibited by law or greatly discouraged. In other countries, minorities or religious groups may either have their own political parties, or their interests may be represented by mainstream parties. The nature of the electoral system may impact on the nature of political parties and the way in which minority interests are, or are not, addressed. Both types of parties have advantages and disadvantages for minorities: minority-focused parties may address minority issues but they will risk having fewer resources and less political influence and may, if narrowly focused, increase the public perception of minorities and minority issues as marginal. Of course, political party platforms that are racist in content violate international law whether adopted by minority or majority parties.

43. Unless the minority population constitutes a majority in an electoral district, the election of representatives of minority-based parties is more likely to be successful under proportional representation systems, where the cumulative votes of minorities are taken into account.<sup>29</sup> Reducing the registration requirements for political parties may facilitate the creation of new minority-focused parties.

44. Minorities also face challenges when participating in majority parties. Even if they do address minority issues, majority parties may not prioritize in their broader agendas, or may lose sight of, those issues important to minority communities. Certain types of electoral systems or political structures may make it advantageous or necessary for political parties to obtain the support of a broad spectrum of voters; this can create incentives for mainstream parties to address minority interests and/or select minority candidates to broaden their appeal. Mainstream political parties may also have internal diversity programmes, including training and mentoring, in order to encourage an increase in the number of minority politicians and activists. Where the electoral system requires parties to present a list of candidates for election, as opposed to single-candidate constituencies, there may be a legal or policy requirement that the list be ethnically mixed or have a minimum number of minority candidates. Other special measures may be applied, especially to facilitate the election of women candidates.<sup>30</sup>

45. Ultimately, political participation through political parties may entail working through a combination of minority-focused and mainstream parties. Minority representatives may, for example, enter into coalitions with other parties, whether minority or mainstream. The configuration of the other parties may give them greater influence, for example, if they hold the balance with respect to the other parties. Even where numbers might not so warrant, the governing party may decide on a voluntary basis to include minority representatives in the Cabinet.

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<sup>29</sup> Ghai, p. 15.

<sup>30</sup> A. Reynolds, *Electoral Systems and the Protection of Minorities*, Minority Rights Group International, 2006 (“Reynolds 2006”), pp. 25-26; Ghai, p. 15.

46. Some types of electoral systems may be more conducive than others to the election of minority representatives, and mechanisms specifically designed to enhance minority representation may also be incorporated into the electoral system. The electoral system prescribes how votes are translated into seats and different systems can lead to different outcomes on the same number of votes. The Human Rights Committee has stressed that “[t]he principle of one person, one vote, must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another.”<sup>31</sup> As a matter of general principle, therefore, each voter has one vote. However, in certain circumstances, in particular where the minority is small and as a special measure to improve the integration of a minority into the political system, members of minorities may have the right to vote for both a minority representative with a reserved seat and a general non-minority representative.<sup>32</sup>

47. A common mechanism used to facilitate minority representation is the allocation of special seats in the legislature to representatives of certain minorities (reserved seats). This is usually done under majority electoral systems which otherwise cannot guarantee minority representation, but is sometimes also used in proportional representation or mixed systems. Usually, members of the minority group, who have to register as such for this purpose, elect these representatives. The number of reserved seats generally seeks to reflect the proportion of the minority in the overall population, so it is likely to be small. If there are a number of very small minorities, they may be assigned a combined seat, although it may not be easy for one representative to represent genuinely the interests of all such groups. Mainstream parties may have an interest in mobilizing the reserved seats.

48. Where the electoral system requires parties to present a list of candidates for election, the electoral law may require that the list be ethnically mixed or have a

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<sup>31</sup> Human Rights Committee, general comment No. 25 (1996), para. 21.

<sup>32</sup> Council of Europe, European Commission for Democracy Through Law (“Venice Commission”), Report on Dual Voting for Persons Belonging to National Minorities (CDL-AD(2008)013), paras. 9-10, 63-72.

minimum number of minority candidates.<sup>33</sup> In “closed list” systems, where the party, rather than the voter, determines the order of priority of the candidates, the party may place the minority candidate high on the list to ensure that she or he gains a seat, regardless of voters’ actual preferences.<sup>34</sup> Of course, such lists can be a barrier to effective minority representation if mainstream political parties place minority candidates low on their lists.

49. There are electoral systems where voters can vote for more than one candidate from different parties, ranking them in order of choice, and the lower-order preferences are taken into account if no candidate reaches a threshold number of votes on the first-preference votes. This system may facilitate minority representation and is also thought to promote inter-group cooperation as parties seek second-preference votes from other parties’ supporters. It may also encourage mainstream parties to take up minority issues.

50. Electoral systems often have a threshold percentage of votes which parties must obtain in order to have a representative in parliament. This may be modified either generally or in the area where a minority is concentrated, in order to permit the creation of parties that represent small minorities.<sup>35</sup> Conversely, high thresholds will inhibit minority representation as minority parties will often be unable to gain sufficient votes.

51. The demarcation of boundaries of electoral districts may also be carried out in such a way as to facilitate representation of minorities if the minority is territorially

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<sup>33</sup> Organization for Security and Cooperation in Europe, Warsaw Guidelines to Assist National Minority Participation in the Electoral Process, 2001 (“Warsaw Guidelines”), p. 23; B. Reilly, “Democratic Levers for Conflict Management”, in International Institute for Democracy and Negotiators (IDEA), *Democracy and Deep-rooted Conflict: Options for Negotiators*, 1998, p. 200; A. Reynolds, “Public Participation by Minorities: Minority Members of the National Legislatures”, in Minority Rights Group International, *State of the World’s Minorities 2007* (“Reynolds 2007”), p. 19; Reynolds 2006, p. 18; Ghai, p. 15.

<sup>34</sup> Ghai p. 15; Venice Commission, Report on Electoral Rules and Affirmative Action for National Minorities’ Participation in Decision-Making Process in European Countries (CDL-AD (2005) 009), p. 17.

<sup>35</sup> Reynolds 2007, pp. 19-20; Warsaw Guidelines, p. 22; Reynolds 2006, p. 19; Council of Europe, The Participation of Minorities in Decision-Making Processes by J.A. Frowein and R. Bank (“Frowein and Bank”) (DH-MIN(2000)1, p. 6.

concentrated, even though there is no reserved seat for the minority as such. The number of minority seats may also be increased by creating smaller electoral districts and thereby increasing their number. To ensure that boundaries do not unfairly prejudice any group, an official demarcation body independent of Government and with a fully representative membership should be set up.

52. Minority participation in Government (the executive or administrative branch) is another crucial form of minority participation, that is, as members of the Cabinet and other such bodies. Measures which may increase minority participation in Government include the allocation to minorities of membership in key committees, advisory bodies or other high-level organs; the creation of high-level bodies to address issues of relevance to minorities, preferably run by members of minorities; and the institutionalization of active consideration of minority issues across relevant ministries through, for example, personnel or a division appointed to address minority concerns within each relevant ministry, the issuance of standing directives, and the creation of inter-ministerial working groups to facilitate coordination. A careful balance between mainstreaming and targeting should be achieved in this regard to make minority participation most effective and to avoid having minority issues marginalized in a single, possibly disempowered, department.

53. The participation of minorities in administration, the judiciary, public bodies and public companies is another important aspect of the realization of the minority right to effective participation. Minority participation in decision-making is facilitated if members of minorities work as civil servants in a broad range of bodies, and are not confined exclusively to bodies dealing with minority issues. In some cases, there may be legal or constitutional requirements for proportional representation in the public administration bodies. Certain types of quotas have been deemed illegal in some States; however, the benefits of such special measures are evident.

54. One system of power-sharing which is frequently regarded as enabling minority participation in Government is consociationalism, whereby all larger minorities are

entitled to participate in Government and to a proportion of positions in the public service. Under consociationalism, ethnic groups are recognized as political entities and, as such, are entitled to a large degree of self-government in matters deemed to be internal to them, and to a share in power when matters of common interest are being resolved at the national level. It is also possible to base power-sharing not explicitly on ethnicity but on political parties; such arrangements tend to encourage the political integration of ethnic groups. A major criticism of consociationalism is that it risks excluding and disempowering smaller minorities who are not included in such arrangements.

55. Consultative mechanisms can provide useful opportunities for minority participation as supplements when equal participation in elected bodies is insufficient because the minority community is too small to impact an election. Such consultative bodies can be ad hoc, set up to address a particular issue, or they can be formalized structures at the national, regional and local levels. They may be general, such as minority round tables, or related to specific matters, such as housing, land, education, language or culture. They may be part of the institutional structure of Government and there may be a legal requirement that they be consulted on particular matters. For such mechanisms to be effective, it is important that consultative bodies have a clear legal status, that the obligation to consult them is established in law and that their involvement in decision-making processes is of a regular, meaningful and permanent nature. Such bodies should be properly resourced and attention should be paid to the representativeness of their members, who should be chosen by the minority community through transparent procedures. It is important that the members appointed have the requisite qualifications to carry out the work and that they be truly representative, including of minority women. Finally, these structures must be commensurate with the needs of minority communities.

56. In some States, there is a strong demand from communities to have their traditional governance structures respected. Such structures may include systems whereby elders are consulted by community members and decide on important matters, whether they involve individual members or the community collectively. Communities may also have

recognized customary laws or a code of behaviour, and these may or may not be written. Whether written or unwritten, it is critically important that such traditional governance structures include women and other marginalized groups in decision-making positions and apply international human rights principles fully in all aspects of their activities. With this proviso, initiatives whereby traditionally recognized community leaders are incorporated into formal Government structures and legislatures are welcome and contribute to a better realization of the right to effective participation. Moreover, elders may play a role in conflict management, for instance by acting as arbiters in disputes between community members.

57. The minority right to effective participation can be advanced through forms of self-governance. In many cases, this entails some degree of group autonomy, which is non-territorial and gives the minority the right to administer and even legislate in certain fields, such as education, cultural affairs, application of personal laws and the preservation of customary law or practices, usually with exclusive jurisdiction.

58. Limited territorial autonomy allows minorities to exercise a wide range of participatory rights within a specific region in which the minority is concentrated. Since it is based on the spatial principle, the advantage of territorial autonomy is that it enables problems to be resolved without necessarily entrenching societal divisions. Indeed, territorial autonomy has been used to accommodate the demands of linguistic or cultural minorities. Territorial autonomy can enable the fair representation of minorities in regional legislatures and in the executive. Such arrangements should provide for the protection of minority languages, their use in public life, as well as education about and preservation of minority cultures, thus accommodating the demands of linguistic and cultural rights. The link with the central Government can be strengthened by regional representation at the centre. There are successful examples of how territorial autonomy has defused tensions, actually strengthened the sense of inclusion and provided the basis for the preservation of minority communities. However, if not carefully designed, autonomous arrangements may lead to a further fragmentation of the State. Moreover, arrangements should be made to ensure the rights of smaller “minorities within

minorities”, through power-sharing, cultural autonomy and devolution to local authorities.

59. Minorities may be given special procedural rights or vetoes in relation to decisions on matters of particular concern to the minority. For example, a minority may be able to veto proposed new legislation in specific areas, or a special majority may be required to pass it. Such special procedures may be confined to particular regions where the minority is concentrated. Where matters are of sufficient importance that stalemate cannot be permitted, there may be special arbitration procedures.<sup>36</sup>

60. Finally, at the international level, in addition to being involved in the implementation of bilateral treaties, it is crucial that persons belonging to minorities also be involved at all stages of the monitoring and implementation of international human rights instruments, and in particular those relevant for the protection of minority rights. It is also important that minority communities be consulted on and involved in supra-national integration processes.

## **VI. POSITIVE EXAMPLES AND APPROACHES TO THE EFFECTIVE POLITICAL PARTICIPATION OF MINORITIES**

61. The following are some examples of positive approaches towards ensuring the effective political participation of minorities. What follows are brief descriptions of a variety of models; space limitations do not allow for an analysis of the positive or indeed negative aspects of actual implementation.

62. A large multi-ethnic federal State has instituted constitutional arrangements which provide for reserved seats for scheduled castes and tribes, in proportion to their share of the population, both in the national lower house of parliament and at the sub-national level. The effect of the provision has been to ensure representation of these

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<sup>36</sup> Frowein and Bank, p. 10; Reynolds 2007, p. 21; Ghai, pp. 13-14.

communities, which are otherwise politically and economically marginalized. This is particularly important for the groups that do not form a majority anywhere. Since more than 20 per cent of the seats are held by these communities, all major parties have an interest in promoting candidates belonging to them.

63. A large, territorially dispersed multi-ethnic State has addressed the issue of participation by increasing the autonomy of regions and removing many anti-minority discriminatory provisions.

64. A large multi-ethnic State experienced a recent transition to democratic elections. It adopted a list proportional representation system (i.e. using lists of candidates). This was undertaken in recognition of the need to foster inclusiveness and reconciliation, as an integral part of power-sharing mechanisms under the new constitution. The leading party sought a broad voter base, as did other parties, deliberately placing candidates from different minorities high on its lists of candidates. The result has been an unprecedented ethnic diversity in the parliament.

65. A small country which has recently experienced violent conflict between two major groups has set aside reserved seats in the upper and lower houses of the parliament for a small, historically marginalized minority. While it is too early to assess the success of this measure, the mere fact of recognition is a major first step forward in a region where the minority has been historically severely discriminated against.

66. A transnational, regional elders' council has been established for pastoralist communities. The council builds on the elders' role in mediating between different groups and draws on positive aspects of traditional governance structures.

67. In some States, candidates belonging to minority communities have been elected president by winning popular support in national elections.

68. The renewal of a voting rights law in a large federal State with a history of profound marginalization of minorities included requirements that states with a history of voter discrimination gain federal approval for voting law changes, that states with a high percentage of voters whose native language is not the official language provide language assistance to voters and that states provide voters with limited official language proficiency assistance at all stages of the election process. Moreover, the law banned the use of literacy, understanding or good character tests as voting requirements, authorized the courts to appoint federal examiners to register voters and prohibited elections held only in the official language in jurisdictions where more than 5 per cent of the voting-age population are a linguistic minority.

69. In a large multi-ethnic State, quotas have been set requiring that 20 per cent of new positions in federal Government agencies be filled by minority candidates. Moreover, as part of its inclusion policy, the Government has created a secretariat for the promotion of racial equality which was subsequently given ministerial status. The secretariat has a significant number of staff and has been undertaking a range of racial inclusion initiatives, while the minister has been effective at influencing other ministries to take on projects to promote the inclusion of minorities.

70. As part of its constitutional redesign, one State has introduced the concept of “plurinationalism” which recognizes the country as a pluri-ethnic nation with different peoples, cultures and world views. Recognition of this diversity must be reflected in all public policies, including with respect to education, health, housing and local Government, among others. Collective rights are to be recognized in all relevant instruments establishing forms of administrative and self-government institutions. A system of self-government has been established for nations and peoples in their own territories, but it does not extend property rights over non-renewable subsoil resources. Although these resources are the property of the State, communities have the right to be consulted regarding their extraction and to be fully informed of the impact that mining, oil production and other activities will have on their lives.

71. A State has the legal requirement that the proportion of appointments of civil servants to public institutions must reflect the proportion of the respective language groups in the population in a region. In regions where two languages are represented in the administration, public servants must speak both.

72. Regional autonomy was granted to a linguistic minority following the settlement of a dispute concerning which country its area belonged to. The population now has its own legislative and executive bodies, which hold a wide array of powers of self-government. The autonomous region also has representation in the national parliament, and the regional legislature can introduce bills at the national level.

73. The constitution of a State with a significant proportion of minorities guarantees one seat for each minority group whose candidates do not obtain enough votes to enter parliament. This has resulted in minority representation in both chambers of parliament. Under a unique measure, groups too small to meet the threshold to form a political party can opt to create minority non-governmental organizations which can also field candidates for election.

74. As part of the peace settlement in a State which had experienced conflict between its two major population groups, special voting arrangements have been put in place, i.e. legislation impacting on minorities has to be passed with a double or qualified majority in the parliament, the normal parliamentary majority as well as a majority among parliamentarians belonging to a minority. Moreover, a district was created to enable the election of a representative of a small minority community.

## **VII. CONCLUDING REMARKS**

75. Effective participation in decision-making processes, particularly in those which have an impact on minorities, is a precondition for the full and equal enjoyment of the human rights of persons belonging to them. There are at least two key lessons to be drawn. The first is the truly essential nature of the right to effective participation: the

fulfilment of so many other fundamental human rights is both dependent on and a prerequisite for its fulfilment. The second lesson is that the effectiveness of the political participation of minorities must constantly be measured and at all levels of society, in order to ensure that it is real and meaningful.

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