

Edin Hodžić

**POLITICAL PARTICIPATION OF  
NATIONAL MINORITIES IN LOCAL  
GOVERNANCE IN BOSNIA AND HERZEGOVINA**

State of the Art, Prospects and Ways Forward



**ANALITIKA**  
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Author: Edin Hodžić

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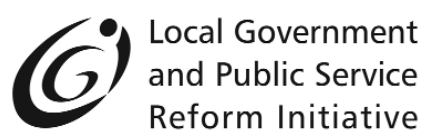
Address: Kaptol 5, 71000 Sarajevo, Bosnia and Herzegovina  
info@analitika.ba  
www.analitika.ba

Design: Adla Isanović

Layout: Samira Salihbegović

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# 1. Introduction

The issue of participation of members of national minorities, as part of the constitutional category of “Others”,<sup>1</sup> in the political and public life of Bosnia and Herzegovina (BiH) has been a recurring topic of concern of international organizations and institutions.<sup>2</sup> As these international actors eloquently show, ethnic power-sharing arrangements related to the elaborate mechanisms of collective political equality of the three dominant ethnic groups in the state (Serbs, Croats and Bosniaks - constitutionally termed as constituent peoples)<sup>3</sup> have been one of the main obstacles to equal participation of members of national minorities and other persons not belonging to constituent peoples in public affairs.<sup>4</sup>

Discrimination and exclusion of the heterogeneous constitutional category of “Others”<sup>5</sup> in BiH, including persons belonging to national minorities, indeed takes place in a variety of institutions and settings.<sup>6</sup> The most cited example of exclusion of minority ethno-cultural groups from public affairs is the ethnically exclusivist Constitution of BiH, which prevents, *inter alia*, persons belonging to minorities from being elected to the three-member Bosnian Presidency and delegated to the upper chamber of the Bosnian Parliament.<sup>7</sup> However, these explicit, constitutionally entrenched mechanisms of exclusion seem to have completely obscured the more complex and subtle ones operating at the level of laws and policies related to decision-making processes at the local, municipal level.

While such exclusion of “Others” is a matter of discrimination, the exclusion from political life of one category from this heterogeneous group – national minorities – is a violation of another important right – the right of persons belonging to minorities to participate in public affairs, in accordance with the more recent international minority rights instruments. Namely, during the last decade of the past century, new international group and minority rights instruments have been devised<sup>8</sup>, recognizing and affirming the identity and status of minorities in national

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1 According to the BiH Law on the Protection of Rights of Persons Belonging to National Minorities (2003) – hereinafter BiH Law on Minorities, 17 national minorities are recognized in BiH: Albanians, Czechs, Germans, Hungarians, Italians, Jews, Macedonians, Montenegrins, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks and Ukrainians.

2 See, e.g., Venice Commission 2005a; UN Committee on the Elimination of Racial Discrimination 2006; Advisory Committee on the Framework Convention for the Protection of National Minorities 2008a; ECtHR Sejdic and Finci decision 2009.

3 See Constitutional Court of Bosnia and Herzegovina 2000a.

4 See, e.g., Advisory Committee on the Framework Convention for the Protection of National Minorities 2004, para. 99.

5 On the specificities of the category of “Others”, see, e.g., Hodzic and Stojanovic 2011, pp. 54-55; see also Bogdanovic 2008.

6 See, e.g., Kulenovic et al. 2010.

7 Venice Commission 2005a; Bogdanovic 2008; Bieber 2004; Milicevic 2002; Hodzic and Stojanovic 2011.

8 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 (hereinafter UN Declaration on Minorities); Framework Convention for the Protection of National Minorities, 1995.

constitutional and political systems. A particularly important, even groundbreaking feature of these new international legal developments is the explicit recognition of the right of minorities to participate in public affairs. This new standard of political participation of minorities is formulated as them having a say in public “matters affecting them”.<sup>9</sup>

Based on these new standards, regional human rights institutions - most notably, the Advisory Committee (hereinafter AC) on the Framework Convention for the Protection of National Minorities (hereinafter FCNM) have interpreted the minority right to collective political participation as a rather “strong” right and started implementing it in unqualified terms, translating the minority cultural identity directly into the political plane. This is somewhat surprising, as even the more optimistic experts have initially been skeptical of the potential and reach of the FCNM<sup>10</sup>, not least because its status as a *framework* convention.<sup>11</sup> However, as some influential commentators have argued, the AC on the FCNM has proven to be very successful in ensuring collective political participation of minorities in accordance with the relevant provisions of this instrument.<sup>12</sup> State reports and the opinions of the AC issued under FCNM<sup>13</sup>, as well as various other policy documents of European institutions,<sup>14</sup> suggest that the concept of political participation of minorities already has deep roots in the pan-European polity.

Effective participation of minorities in public affairs is a broad concept. First, it can be interpreted as participation in a narrow sense: having representatives in elected bodies at different levels of governance, in the executive, or in advisory bodies, committees or public councils. Participation can also mean membership in “semi-state bodies, such as chambers of commerce and industry, in bodies representing agriculture and labor, in social insurance bodies, in trade unions, employers’ unions and tripartite bodies, and in boards of public broadcasting companies.” Additionally, participation in public affairs can include various forms of autonomy, ranging from territorial and federal arrangements to cultural autonomy.<sup>15</sup> The practice of the AC on the FCNM, however, has shown that the focus is mostly placed on representation of minorities in elected bodies and on various forms of consultation, whereas mechanisms of participation in the executive, public administration, judicial and other bodies are almost neglected.<sup>16</sup>

In its last Opinion on BiH, the AC on the FCNM has confirmed that this dual avenue of representation and consultation of minorities at different levels of governance has not been adequately entrenched in the political system and practice of BiH.<sup>17</sup> This research project

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9 Article 2(3) of the UN Declaration on Minorities (1992); Article 15 of the FCNM.

10 See, e.g., Gilbert 1996; Keller 1998.

11 On the specificities of framework conventions as regulatory tools in international law, see, for example, Matz-Luck 2009.

12 Henrard 2008, pp. 118-121.

13 See e.g. Verstichel 2003. See also Auerbach 2011.

14 See e.g. CSCE (now OSCE) 1990, para. 35; Advisory Committee on the FCNM 2008b; Parliamentary Assembly of the Council of Europe 2003, para. 11(v.); Venice Commission 2005b and Venice Commission 2008.

15 Verstichel 2010, p. 75.

16 Ibid., p. 76.

17 See AC on the FCNM 2008a.

examines precisely how this important emerging right plays out in the complex legal system of BiH and the equally complex decision-making practice in the country, focusing on the local level of governance. In other words, this study examines mechanisms of inclusion and exclusion of minorities in decision-making processes at the level of municipal governance.

It is important to note that even persons belonging to constituent peoples can also in certain (sub-national) contexts be in minority situations and as such be considered minorities for the purpose of international minority rights instruments.<sup>18</sup> However, according to the BiH Law on the Protection of Rights of Persons Belonging to National Minorities, a minority is defined as “part of the population-citizens of BiH who do not belong to any of the three constituent peoples, and is composed of persons of the same or similar ethnic origin, the same or similar tradition, custom, belief, language, culture and spirituality, and closely related history and other traits.”<sup>19</sup> This research project focuses on national minorities in the latter sense only.

The structure of the study is as follows: first, the conceptual and international legal framework is briefly elaborated. Following these introductory considerations, we examine both the legal framework and the practice of participation of persons belonging to minorities in decision-making at the local level in BiH. Although political representation and consultation mechanisms are treated separately, and in different chapters of the study, we are aware of the interconnections between the two mechanisms, which figurate prominently throughout the study.

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18 See AC on the FCNM 2004, para. 28; AC on the FCNM 2008a, para. 41. See also Venice Commission 2002, para. 16.

19 BiH Law on Minorities, Art. 3 (translation by the author).



## 2. Analytical and Methodological Framework

### 2.1. Central question and main issues

It is important to reiterate that this research project focuses only on national minorities as defined in the national legal order of BiH. As such, the category of minorities for the purposes of this research does not include constituent peoples in minority situations, despite the above-noted fact that the FCNM might be interpreted to extend its protection to them, too.

This study's aim was to answer the following research question: To what extent do the current legal and institutional mechanisms in BiH, as well as decision-making practices, enable effective participation of national minorities in decision-making processes at the local government level?

This question was broken down into a number of operational questions.

First of all, the study scrutinized the extent to which the legal, regulatory and administrative framework in BiH created a stimulating environment for minority participation in local decision-making processes, both in terms of political representation of minorities in elected bodies at the municipal level and in terms of consultative mechanisms at the same level of governance. Inevitably, we had to tackle higher government level (canton, entity, state) laws and regulations, local acts (e.g. statutes and decisions), and supporting institutions such as advisory bodies for minorities at different levels of government.<sup>20</sup> However, our perspective was always crucially determined by the focus of our study: Whenever we observed the structures of participation of minorities at the higher levels of government, we did so with regard to their influence on, and coordination with, the local, municipal government level as the exclusive subject of this study.

In order to be able to assess the legal, regulatory and administrative framework in BiH *de jure* and *de facto* against international standards, it was important to see to what extent and with what implications international and regional legal and policy documents on political participation of minorities were relevant for the local government level in the first place. In particular, it was necessary to see to what extent has the practice of implementation of the FCNM's Article 15 elucidated a specific requirement for minority participation in local public affairs.

Consequently, best comparative practices - in particular the practices of CoE member states with respect to minority political participation in local government - were studied, with a particular

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<sup>20</sup> With respect to advisory bodies at higher levels of government, the focus was exclusively on the nature of the consultations between these bodies and minority groups, political representatives, local advisory bodies, NGOs and local governments.

focus on the best and most effective comparative mechanisms of consultations with minorities in local public affairs.

First, the effectiveness of political representation at the local government level was studied, looking at both the nature of representation (substantial or descriptive), the communication channels used by local minority representatives to communicate with minorities, and the extent to which the stream of political representation and consultation mechanisms for minorities actually interacted. In other words, we analyzed whether there was a difference between the intensity and continuity of institutional dialogue with members of minorities in local governments where minorities had a political representative and in those where political representation of minorities was not ensured.

A further question concerned the effectiveness of current consultation mechanisms at the local government level in BiH. More specifically, the study looked at:

- what mechanisms of consultation with minorities were in place;
- what was the range of policy areas and topics of consultation and whether this range was in accordance with relevant Council of Europe and comparative standards;
- to what extent did such consultative infrastructure satisfy the needs of minority- inclusive local governance in light of best comparative practices;
- whether the criteria for including minority representatives in the process of consultation were non-discriminatory, and what the basis for inclusion or exclusion of minorities was (e.g. size of a group, strength of political mobilization);
- how functional and effective these mechanisms really were in everyday decision-making processes at the local government level, in the sense that they provided minorities with meaningful opportunities to influence policy outcomes.

The nature, activity and communication channels of both special, minority-specific mechanisms as well as mainstream mechanisms of participation at the local level were studied. Special mechanisms included administrative officers or departments within the local administrations that dealt with minority issues and advisory committees or councils for national minorities in the municipal councils/assemblies (in Federation of BiH and Republika Srpska, respectively), while mainstream mechanisms included those prescribed by entity local self-government laws or advocated by the international community, such as local communities (“mjesne zajednice”, hereinafter LCs), public hearings, citizen surveys, strategic planning consultations, consultations pertaining to project financing, citizen hours, etc. For mainstream participatory or consultative mechanisms, a special emphasis was placed on whether they were inclusive and open to national minorities and whether there was communication about them with minority groups.

## 2.2. Research Design and Methodology

In order to answer the questions posed in the analytical framework, a multi-level, qualitative research design was applied:

- *An analysis of the requirements of the FCNM and of comparative state practice* under the Convention in the field of political participation of minorities was conducted by reviewing all of the publically available communication between the AC on the FCNM and state parties. The analysis pertained to state adherence to Article 15 of the Convention, which concerns participation of national minorities in cultural, social and economic life and in public affairs. However, we limited the analysis to political participation only, in line with the purpose of this study. All of the 40 countries for which documents were available were reviewed, including: State Reports, AC Opinions on the Reports, States' Comments on the AC Opinions and the CoE Committee of Ministers' Resolutions for the reporting cycles available.<sup>21</sup>
- *Case studies*: In order to study in-depth the extent to which national minorities participate in local public life and interact with local authorities, as well as the potential influence of different factors on their participation, nine local government units were selected as case studies. In addition to secondary resources gathered on these municipalities (including relevant reports and local acts), primary research was conducted through interviews.<sup>22</sup> It is important to note that, in many cases, interviewers also gathered local government acts, documents and decisions from interlocutors where such acts relevant for minority participation were mentioned during interviews.
- *An analysis of relevant laws and documents* - including national, entity, cantonal and local government level - was conducted in order to answer question 1, i.e. to what extent the legal, administrative and regulatory framework contributes to the political participation of minorities.
- *A desk review* of relevant studies on political participation of minorities, with a particular focus on the European and South-East European context, was conducted in order to have a comparative perspective on best practices that could potentially influence recommendations for enhanced political participation of minorities in BiH. In addition, a desk review of relevant secondary sources on BiH, including international and local reports on minority participation in the country, was also conducted in order to inform the six questions posed by the study.

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21 A detailed insight into the analytical framework applied for the analysis of the FCNM requirements, as well as detailed results of the review of the AC's communication with 40 state parties to this Convention is available in a separate report written by Kiran Auerbach (2011).

22 A detailed description of case selection and the selection of interviewees is provided as an annex to this report.

# 3. Conceptual and International Legal Framework

## 3.1. Theoretical Considerations

A conceptual basis for introducing political participation of minorities as a new international legal and political category in minority rights discourse may be said to be related to at least two principal developments: the changed and changing notion of political representation and the increasing concern with substantive equality, which is understood to mean equality not only in law, but also in fact.<sup>23</sup> Second, such a change is part and parcel of a general paradigm shift in minority protection. As Ghai explains,

[i]n the past there was an excessive tendency to look at minority rights from the perspectives of the majority and of 'nation building', requiring common and exclusionary loyalties and the homogenization of public and private space. Now, it is arguable that the present approach is marked by the concern for finding a distinctive political and social role for minorities.<sup>24</sup>

Similarly, other authors see this shift as evolving from the notion of protection towards the paradigm of empowerment of minority identities. In this perspective, "[t]he aim of the right to participation is not explicitly protection of the identity of minorities but empowerment of minorities as actors to self-protect through democratic dialogue, democratic co-management and democratic co-decision making."<sup>25</sup>

The significance and magnitude of this paradigm shift can also be seen in the fact that in general literature on political participation, minorities are usually associated with disempowered, disadvantaged or vulnerable groups whose participation should especially be ensured in mechanisms of citizen participation by taking additional efforts or steps to such an end, i.e., overcoming language barriers (e.g. by communicating in the language of the minority), so that minority representatives can indeed participate or be consulted in local decision-making processes. Nonetheless, unlike the approaches to participation in the context of minority rights, general participation literature usually does not give the recommendation that minority-specific participation mechanisms should be established. The underlying idea is that the representativeness of participatory spaces or mechanisms is a key criterion of their effectiveness, and that all groups of a society should be involved. Otherwise, the participatory mechanism does not meet the overall criterion of (community) acceptance or legitimacy, and thus cannot be deemed meaningful.<sup>26</sup>

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23 FCNM Explanatory Report 1995, para. 80; AC on FCNM 2008b, paras. 14-15; Ghai 2001, p. 5; see generally Barnard and Hepple 2000.

24 Ghai 2001, p. 3.

25 Malloy 2010, p. 4.

26 See, for example, Rowe, Marsh and Frewer 2004; Rowe and Frewer 2000.

Being conceptualized in the perspective of empowerment of minorities, at its surface, the minority right to political participation seems to be in contradiction to the liberal understanding of democracy, where liberal neutrality of the state towards ethno-cultural identities is coupled with the exclusivity of the individualistic paradigm of rights.<sup>27</sup> It may also sound problematic that in the age of the “crisis of democracy” or “democratic deficit” and the overwhelming decline of interest of individual citizens to participate in political life in general<sup>28</sup>, particular emphasis is being placed on ensuring the political participation of minorities. This might seem even more curious if one has in mind that in international human rights law, the ultimately “democratic” nature of Article 25 of the International Covenant on Civil and Political Rights on political participation is famously ambiguous. Namely, this only international legally binding provision on political participation does not point to any particular institutional form or quality of political participation beyond its minimalist focus on “genuine and periodic elections.”<sup>29</sup> In addition, some commentators express the concern that separate political participation of minorities implicitly recognizes their exclusion from a society and that it “might end up being, in its own normative terms, self-defeating.”<sup>30</sup>

However, according to the dominant stance in international human rights law, the benefits of political participation of minorities overshadow its hidden dangers. According to the widely adopted analogy with women’s rights in this field, when it comes to the representation of their own positions and interests, persons belonging to those groups are in the best position to understand and present their specific views and perspectives on various political projects.<sup>31</sup> At the same time, the participation of persons belonging to minorities in the public sphere is also a matter of recognition and has a significant symbolic value that can encourage more intensive participation of minorities.<sup>32</sup> As such, minority political participation serves the purpose of protecting, affirming and promoting minority identity.<sup>33</sup>

In very practical terms, the presence of persons belonging to minorities in governing processes means that “discriminatory standards and practices can be more readily eliminated.”<sup>34</sup> In addition, the fact that international obligations related to the participation of minorities are addressed to both authoritarian and democratic states alike implies international consensus that “democracy is, by itself, not capable of protecting the interests of vulnerable minorities.”<sup>35</sup> Therefore, a minority rights perspective on democratic government sees it as an insufficient guarantee that the interests of ethno-cultural minorities will be included in the agenda of the elected democratic majority at any level of governance.

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27 McGarry 2010, pp. 67-70.

28 See, e.g., Norris 2010; DeBardeleben and Pammet 2009.

29 Steiner 1988.

30 Crowley 2001, p.100.

31 Henrard 2008; see generally Phillips, 1995.

32 See Phillips 1995.

33 Verstichel 2010, p 78.

34 Petrussevska 2009, p. 19.

35 Wheatley 2002, p. 225.

As for the form of democratic process as it pertains to social inclusion and exclusion from the perspective of minorities, four general models can be identified in democratic theory:

- *The simple representative democracy model*, whereby minorities are required to join the existing mainstream channels of participation and where political elites are dominant;
- *the deliberative model of democracy*, where there is communication between individuals, including persons belonging to minorities, and elites, but no special arrangements for minorities;
- *the model of representation of difference*, whereby special organizations and arrangements for minorities exist and participation occurs through those arrangements;
- and last, the *full associational model of democracy*, in which the emphasis rests on separate, often professional organizations and the direct participation of minorities.<sup>36</sup>

Each of the above models has its specific institutional arrangements of political inclusion: a simple representative democracy implies mechanisms of general elections and general and universal voting rights; the deliberative model presupposes a strong general civil society and a multitude of public mechanisms and sites for deliberation; representation of difference implies special representation arrangements for minorities in representative bodies (i.e. reserved seats, lower thresholds, support for minority political parties); and finally, the full associational model rests on separate institutional mechanisms for minorities even at the level of deliberation, whereby separate deliberative spaces are created where representatives of minorities define their views and positions, and communicate with the political institutions of the society as a whole.<sup>37</sup> Within this useful conceptual framework, political representation of minorities in its various forms can be seen as the representation of difference, whereas minority consultation mechanisms may be said to constitute a form of direct participation of minorities.

## **3.2. FCNM, International Standards and Advisory Committee Practice**

### **3.2.1. The Nature of the FCNM and the Importance of Article 15**

Although there is admittedly no internationally accepted definition of political participation<sup>38</sup>, effective participation of minorities is considered to be a part of a broader understanding of participation in public affairs. According to Max van der Stoep, former OSCE High Commissioner

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36 Tholen and de Vries 2004.

37 Ibid., p. 465.

38 For some efforts at elaborating on this concept, see UN Human Rights Committee 1996; Ghai 2001, p. 4.

for National Minorities, political participation implies the requirement that “minorities feel that they are active and equal members of the state.”<sup>39</sup> In the spirit of this programmatic credo, two principal mechanisms of minority participation in public affairs have been developed thus far: a) political representation of minorities in representative bodies and institutions; and b) mechanisms of consultation with members of minorities on policies of particular relevance for them.<sup>40</sup>

FCNM is the key international human rights instrument when it comes to a range of important minority rights, including the right to political participation. Moreover, the FCNM is the only legally binding international instrument devoted to minority rights. However, the AC has approached its implementation and the development of standards in an extremely careful and cautious manner, adopting an individualized approach while reflecting on state practices and policies in the field and engaging in dialogue with State Parties towards meeting the standards of the Convention.<sup>41</sup> This treaty seems to imply a gradual approach to its implementation: Meeting its standards for any given stage in the monitoring process does not necessarily mean that this achievement will be sufficient in order to fulfill the requirements of the Convention in the future.<sup>42</sup> The evolutionary dimension of the Convention is explicitly recognized: as circumstances and the relations between majorities and minorities in State Parties evolve, new issues will arise, requiring new models and approaches to minority political participation.<sup>43</sup>

In addition, this minority rights instrument is composed mostly of “programme-type provisions setting out objectives which the Parties undertake to pursue.”<sup>44</sup> As such, the provisions of the Convention are not directly applicable in the State Party. Rather, states are left with a considerable margin of appreciation with regard to the implementation of the Convention’s provisions, while “[t]he implementation of the principles set out in this framework Convention [is] done through national legislation and appropriate governmental policies.”<sup>45</sup> This is in line with the general concept of framework conventions in international law, whereby “the framework serves as legally binding guidance for national regulation that is adapted to the specific needs of the parties.”<sup>46</sup> Accordingly, “a measure that leads to effective participation in one State Party does not necessarily have the same impact in another context.”<sup>47</sup>

Despite its status as “the softest” version of “hard law”, reports and analyses indicate that the FCNM is very influential in the domestic legal orders of State Parties. For example, focusing on the case law of national courts, Francesco Palermo has proven that the provisions of the FCNM are often applied by courts, either directly, as a standard for review of the domestic

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39 Van der Stoep 2001, quoted in Henrard 2007, p. 35

40 See OSCE 1999; AC on the FCNM 2008b. Cf. Malloy et al. 2008, p. 73-74.

41 Cf. Marko 2010, pp. 225-230.

42 AC on the FCNM 2008b, para. 149.

43 Ibid., para. 150.

44 FCNM Explanatory Report 1995, para. 11.

45 Ibid, para. 13. See also Malloy et al. 2008, pp. 88-92.

46 See Matz-Luck 2009, p. 449.

47 AC on the FCNM 2008b, para. 148.

legislation or practice in question, or indirectly, by referring to the “‘spirit’ or normative ‘principles’ of the FCNM as additional textual elements for the interpretation of the domestic legal provisions under review (in some cases even if the FCNM had not been ratified, i.e. entered into force as part of the national legal system).”<sup>48</sup> In this sense, the Constitutional Court of Bosnia and Herzegovina also occasionally uses the FCNM as a point of reference, *inter alia*, in vital national interest cases.<sup>49</sup>

Article 15 of the FCNM, together with its articles 4 (on non-discrimination) and 5 (on the right to culture and identity), is considered to constitute “three corners of the triangle which together form the main foundations of the Framework Convention.”<sup>50</sup> Article 15, as the essence of the international legal framework of this study, reads as follows:

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

According to the AC on the FCNM, participation of minorities is conceptualized as having social and cultural components, in addition to participation in public affairs.<sup>51</sup> The connection is subtle, although sometimes under-elaborated: the focus of the AC in this context seems to have been, at least initially, on public affairs, while participation in economic, social and cultural life has been somewhat neglected, in particular in relation to participation in public affairs.<sup>52</sup> AC’s thematic commentary on Article 15, however, devotes significant attention to the economic, social and cultural dimensions of minority participation<sup>53</sup>, thus marking a shift towards a more serious consideration of these dimensions.<sup>54</sup>

### **3.2.2. Understanding the Political Participation of Minorities in Accordance with the FCNM**

Several issues are worth pointing out when elucidating the concept of political participation of minorities. First, it is important to understand the meaning of the term “matters affecting them” in the context of minority-inclusive governance. In accordance with a traditional understanding of minority protection, minority-relevant policies would be confined to language, culture and religion (Article 27 of the International Covenant on Civil and Political Rights). However, at the European standard-setting level, the focus seems to be on political participation in a broader

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48 Palermo 2008, as referred to in Marko 2010, pp. 226-227.

49 See, e.g., Constitutional Court of BiH 2000a, paras. 55 and 57; Constitutional Court of BiH 2000b, para. 63; Constitutional Court of BiH 2004, para. 32.

50 AC on the FCNM 2008b, par. 13.

51 See generally *Ibid*.

52 Marko 2010, pp. 249-250.

53 AC on the FCNM 2008b, paras. 23-68.

54 See generally Henrard 2010.



sense. In this perspective, political participation of minorities is, according to an authoritative interpretation of Article 15 of the FCNM, not even confined exclusively to policies specifically and directly affecting them as minorities, but also to those affecting them more generally, as “members of a society as a whole”. This way, it is to be ensured that minorities not only have a say on issues affecting them, but that the general direction in which the society is developing is also shaped by the views and perspectives of minorities.<sup>55</sup> As the Advisory Committee on the FCNM has affirmed, minorities should be involved in decision-making on nearly all issues. Moreover, the minority perspective should be *mainstreamed* into the structures of governance at various levels.<sup>56</sup>

Secondly, the bearer of the envisaged right in Article 15 deserves particular attention. While the Convention as a whole concerns individuals as members of minorities, “the enjoyment of certain rights, including the right to effective participation, has a collective dimension. This means that some rights can be effectively enjoyed only in community with other persons belonging to minorities.”<sup>57</sup> However, taking into account the formulation of Article 15, it is somewhat ambiguous if it envisages substantive or descriptive representation.<sup>58</sup> It is also unclear whether the two aspects of representation should coincide in each and every case. In other words, it is somewhat ambiguous if minority interests in the context of Article 15 should always be represented by persons belonging to minorities. The practice of the AC seems inconclusive in this regard, although the Committee has expressed a preference for the coincidence of descriptive and substantive representation of minorities on several occasions, for which it has also been convincingly criticized by some commentators.<sup>59</sup> Regardless of this conceptual uncertainty (or as a way of resolving it), in order for political representation of minorities to be effectively realized, “it is important that the minorities concerned agree on a common strategy and shared goals to be reached through the representation in the elected body at stake.”<sup>60</sup>

Article 15 of the FCNM itself mentions members of minorities, not representatives, which could lead to a conclusion that the instrument is concerned with the identity, not the minority-specific legitimacy of persons belonging to minorities who are actually included in political life. In other words, the Article seems to speak in terms of *members*, not necessarily *representatives*. However, the Commentary of the AC speaks of participation through “the presence of minority *representatives* in elected bodies.”<sup>61</sup> In addition, some commentators argue that what is essential in this form of participation is that the minority representatives “are authorized to represent a minority or minorities and that there is a link of accountability between the minority

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55 AC on the FCNM 2008b, para. 17

56 Ibid., para. 73.

57 Ibid., para. 6.

58 Pitkin (1967) defines descriptive representation as a matter of merely sharing identity with, or belonging to, a particular group, while substantive representation implies *acting* in the group's interest and on its behalf.

59 See Verstichel 2003.

60 AC on the FCNM 2008b, para. 92.

61 Ibid., para. 81.

representatives and the minority or minorities they represent.<sup>62</sup> Minority representatives in parliaments may not necessarily fit into this scenario of representation (given e.g. that they could be chosen regardless of their ethnic belonging and/or through mainstream parties), but this model is clearly relevant for consultative, advisory bodies for minorities.<sup>63</sup> In other words, what matters the most in this context is not mirror representation (although identity will probably feature prominently, too), but a relationship of accountability.<sup>64</sup> The fact that there is almost always a greater number of different minorities than there are minority seats in an elected or consultative body underlines the fact that accountability indeed matters the most in this sense.

A related question concerns the range of minority groups that actually need to be represented and consulted. It is repeatedly contended by the AC on the FCNM that State Parties to the Convention should adopt an *inclusive and flexible approach*: the more minority groups encompassed by the participation arrangements, the better.<sup>65</sup> The Committee has noted on various occasions that states need to adopt open-ended and flexible definitions of groups in this regard, which would also enable members of minorities residing without citizenship in the state in question to be included as well.<sup>66</sup> In particular, all minorities, including the numerically smaller ones, need to be represented in minority-specific consultative mechanisms.<sup>67</sup>

### 3.2.3. Effective Political Participation of Minorities?

According to Article 15 and the practice of implementation of the FCNM, participation of minorities should be effective. The concrete obligation, according to the instrument itself, is somewhat weaker, as it relates to “creating conditions” necessary for the effective participation of minorities. However, in the course of implementation of the FCNM, the concept of effective participation of minorities has acquired a rather strong meaning: it implies not only an obligation of an ongoing dialogue with minorities on minority-relevant policies, but also a requirement that such a dialogue needs to be constructive and, according to some authoritative analyses, that the opinions of minorities should be reflected in the actual outcome.<sup>68</sup> In this manner, the insistence on effective political participation of minorities also addresses the objection that consultations as a mechanism of participation in general are mere tokenism and window-dressing.<sup>69</sup> As such, the very conceptualization of political participation of minorities seems to have suffered a decisive step from weak participation, based on the practice of mere consulting

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62 Verstichel 2010, p. 79. See also AC on the FCNM 2008b, para. 92 (“Elected representatives ... should take due care to represent the concerns of all persons belonging to national minorities in the constituency.”).

63 Cf. Verstichel 2010, p. 80.

64 Ibid., p. 82.

65 Verstichel 2003; see also Auerbach 2011, pp. 13-15.

66 AC on the FCNM 2008b, paras. 100-101.

67 Ibid., para. 109.

68 Cf. Ibid., paras. 18-19; see Henrard 2007, p. 38; see also Henrard 2008.

69 See Arnstein 1969.

and informing, to strong participation, implying “partnership or ceding control.”<sup>70</sup> In this sense, Article 15 of the FCNM, just like the Convention as a whole, is authoritatively interpreted as implying “for the State Parties the obligation of result: they shall ensure that the conditions for effective participation are in place, but the most appropriate means to reach this aim are left to their margin of appreciation.”<sup>71</sup> Moreover, “the qualifier ‘effective’ in the right of persons belonging to minorities to effective participation in public affairs refers to the fact that the ‘presence’ of minority representatives in decision-making processes should be translated into ‘influence’ on the outcome of the decision-making.”<sup>72</sup>

Despite this insistence on influence in the course of decision-making, the presence of minority representatives in relevant political institutions will not necessarily make a difference in itself. In this sense, it has to be noted that political participation of minorities can encompass a variety of arrangements, ranging from individual voting rights to equal representation of groups.<sup>73</sup> In particular, political representation of minorities is provided for in various ways in different State Parties to the FCNM: from integration of minority candidates into mainstream parties, to guaranteed seats in national and/or local parliaments (as in Slovenia, Croatia, Kosovo or Bosnia and Herzegovina).<sup>74</sup> However, minorities are by definition non-dominant groups, and as such they will always be outvoted by the majority. Therefore, it is the practice of consultation of minorities on draft legislative and political projects that is of particular importance in this context. This is why expert opinions often emphasize that even where political representation of minority groups is institutionally secured, this is only the beginning of their political participation, and not the end.<sup>75</sup>

### 3.2.4. The Specificities of Consultation Mechanisms

A useful typology of consultative mechanisms distinguishes between four broad types of such arrangements applied in various European countries:

- mechanisms of co-decision (where minority consultative councils either have original decision-making powers or their opinions must be heard before certain decisions can be taken);
- mechanisms of consultation (encompassing a variety of institutional options – from one to multi-minority bodies, from specialized to general ones, from those composed exclusively of persons belonging to minorities to those involving governmental officials as well, or to those composed exclusively of government officials; from those organized around particular high-ranking governmental officials - e.g., the president or the prime

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70 Loizos and Clayton 1997, quoted in Brett 2003, p 5.

71 AC on the FCNM 2008b, para. 10.

72 Verstichel 2010, p. 75.

73 Marko, quoted in Malloy et al. 2008, p. 73.

74 See Venice Commission 2008; AC on the FCNM 2008b, para. 72. See Auerbach 2011, pp. 27-28.

75 Reynolds 2007, p. 26; cf. Eide 2001, paras. 38-50.

minister - to various contact points for communication with minorities within different state institutions or organs, e.g., various ministries);

- mechanisms of coordination (that are not considered consultative mechanisms *per se*, but rather take the form of inter-ministerial working parties charged with mainstreaming minority issues into governmental policies); and
- mechanisms of minority self-governance (various councils and similar bodies established to organize and mobilize specific minorities and enable them to self-govern in matters of cultural autonomy).<sup>76</sup>

In the perspective of the AC on the FCNM, consultations can take many forms. The Committee also appreciates *ad hoc* consultations in the form of various round tables, thematic discussions or similar contacts with minorities. Channels of such communication can also vary from “consultative mechanisms to special parliamentary arrangements.”<sup>77</sup> However, there is a clear preference of the Committee for an institutionalized approach, whereby a model of coordinating or an advisory council for national minorities is a favored one. It is important to note that establishing such councils does not constitute the end of consultation, as the Committee maintains that the government should aim to consult minority organizations and other minority actors outside of such bodies, *inter alia*, to be able to reach those minorities whose leadership is not that politically active.<sup>78</sup> Special parliamentary committees concerned with minority issues have also proven to be useful in enabling the effective participation of minorities. According to the AC on the FCNM, such committees need not to work in isolation from other parliamentary bodies, as coordination and communication between such committees and across party lines can help realize the goal of mainstreaming minority issues into relevant policies.<sup>79</sup>

What is important is that the AC on the FCNM has emphasized that there should not be a trade-off between the two avenues of political participation of minorities and that full and effective participation of minorities can in principle not be achieved using one mechanism only.<sup>80</sup> At the same time, although they alone cannot ensure *effective* participation of persons belonging to minorities, consultation mechanisms are “particularly important in countries where there are no arrangements to enable participation of persons belonging to national minorities in parliament and other elected bodies.”<sup>81</sup> Moreover, in such situations, “alternative channels, such as specific arrangements to facilitate minority representation, need to be considered in order to enhance their representation.”<sup>82</sup> This logic clearly applies to all levels of governance.<sup>83</sup>

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76 Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) 2006, paras. 9-25.

77 AC on the FCNM 2008b, paras. 70, 113-114.

78 See Verstichel 2003, pp. 190-191; Weller 2010.

79 AC on the FCNM 2008b, paras. 95-96.

80 See *Ibid.*, paras. 71 and 106.

81 *Ibid.*, para. 106.

82 *Ibid.*, para 87.

83 *Cf.* Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) 2006, para. 29.

It is also emphasized that the states need to strongly promote the existence and the work of consultative bodies, so that persons belonging to minorities are aware of bodies' mandates and main functions.<sup>84</sup> Such bodies also need to be organized on the principles of permanency and regularity of meetings.<sup>85</sup>

### 3.2.5. Political Participation of Minorities at Various Levels of Governance

The practice of implementation of the FCNM seems to be inconclusive with regard to organizing minority inclusive governance in highly decentralized and federal systems. In other words, it is not always clear if consultation mechanisms need to be provided for simultaneously at all levels of organization of a polity, i.e., at all levels at which the relevant decisions are made.<sup>86</sup> For this study, it is of crucial importance to determine if local governance is also covered by Article 15 of the FCNM and under what conditions.

At a first glance, the level of the town or municipality<sup>87</sup> does not seem to be the most adequate for minority-inclusive governance in the traditional sense, as identity-related competences (education or culture) are usually reserved for higher levels of government. In BiH, for example, municipalities have a rather limited decision-making role in this context.<sup>88</sup> However, one needs to recall the most recent trends when it comes to standard-setting at the European level, according to which minorities need to participate in decision-making in a broader sense that goes beyond issues that are explicitly identity-related.

On the other hand, some commentators argue that the effectiveness of minority participation in decision-making processes may well depend on the level of governance. This perspective is more optimistic when it comes to the participation of minorities at the municipal level: whereas it is probably hard to achieve and, even more so, to guarantee anything more than symbolic representation of minorities at state level, effective participation of minorities at regional and local levels of governance can be much more promising in terms of actual outcomes.<sup>89</sup> Others go a step further, arguing that “[t]he level where members of national minorities require the

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84 AC on the FCNM 2008b, para. 117.

85 *Ibid.*, para.118.

86 Auerbach 2011, ch. 3.

87 In this report, the terms municipality and local government unit are used interchangeably; according to self-government laws of the two Entities (Federation of BiH and Republika Srpska), towns and municipalities in BiH are considered „units of local self-government.“

88 It is important to emphasize that, according to the 2006 Law on the Principles of Local Self-Government in FBiH (Article 8), the competences of municipalities include “ensuring and protecting human rights and fundamental freedoms in accordance with the Constitution;” moreover, competences include establishing, funding and improving elementary education institutions, as well as those in the fields of culture and sports. Cf. the 2004 RS Law on Local Self-Government, Arts. 12-26.

89 Palermo and Woelk 2003, p. 229.

most protection is arguably the local level.” This is so because they are often located in peripheral areas and border regions, far from the center, and because the high degree of decentralization in the European context places a central responsibility for monitoring and addressing minority issues in the hands of local authorities.<sup>90</sup> Similarly, some influential commentators have suggested that participation of minorities should be provided for at all levels where decisions are made, including regional and local levels.<sup>91</sup>

According to the explanatory report to the FCNM, measures in this field should indeed be directed at “effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels.”<sup>92</sup> The AC Commentary on Article 15 also encourages establishing regional and local consultative mechanisms in addition to the ones at the national level, “especially in areas of competencies where decision-making powers have been decentralized.”<sup>93</sup> Additionally, “...State Parties are encouraged to ensure that sub-national authorities respect the obligations arising from the Framework Convention. Specific awareness-raising at the local and regional level is often needed to ensure this outcome.”<sup>94</sup> A confirmation of the position that minority-inclusive governance is broadly interpreted as to extend to the local level as well also came from the AC on the FCNM in the context of BiH: the Committee has explicitly welcomed the fact that the municipality of Tuzla has set up a Council of National Minorities.<sup>95</sup>

The AC Commentary also states that “State Parties are encouraged to strengthen the participation of persons belonging to national minorities...in local elected councils.”<sup>96</sup> In the context of consultative mechanisms and based on the state practices under the FCNM, it has been argued, for example, that one central consultative body does not suffice for the purposes of ensuring effective participation of minorities. Judging from the more recent practice of implementation of the FCNM, there is an increasing emphasis on a “multi-layered and multi-dimensional provision for consultation.”<sup>97</sup> Indeed, “[g]ood practice of minority consultation would suggest that provision should be made at all levels, depending, of course, on the demographic and geographic distribution of the relevant minority within the state.”<sup>98</sup>

In addition to the stream of representation, state parties have implemented varied consultative arrangements for minorities at different levels of governance. Although consultation mechanisms at the national level arguably enjoy greatest attention of the AC on the FCNM<sup>99</sup>,

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90 Malloy et al. 2008, p. 25.

91 Eide 2001, paras. 38 and 48; Reynolds 2007, p. 26.

92 FCNM Explanatory Report 1995, para. 80.

93 AC on the FCNM 2008b, para. 115.

94 Ibid., para. 132.

95 AC on the FCNM 2008a, para. 206.

97 Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) 2006, para. 8.

98 Ibid., para 23.

99 Cf. Auerbach 2011, p. 42.

some countries exhibit specific consultative structures at the level of local governance as well. For example, Croatia's Constitutional Law on the Rights of National Minorities (2002) provides that in any municipality where there are more than 200 persons belonging to a particular minority, or where one minority constitutes more than 1.5 percent of the population, any such minority can establish a local minority council<sup>100</sup> with a further possibility of establishing coordination among several minority councils, both within one local government unit and among more units.<sup>101</sup> In Serbia, national minority councils are established for different minorities, while their representatives are delegated to the National Council for National Minorities.<sup>102</sup> It is important to note that the local dimension of participation is also included, as government institutions at all levels of governance, including local authorities, are obliged to consult national minority councils when deciding on issues specifically affecting minorities.<sup>103</sup>

Finally, it is important to note that the proliferation of mechanisms for political participation of minorities can lead to the fragmentation and the overlapping of work of various institutions and thus be counterproductive. In this sense, the AC on the FCNM emphasizes the importance of coordination and mainstreaming of minority issues among and within governance structures. For this purpose, it encourages the establishment of specialized governmental bodies, which are to serve as a point of contact between the different mechanisms between government and minorities, and as mainstreaming mechanisms for minority issues.<sup>104</sup>

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100 Constitutional Law on the Rights of National Minorities (2002), Article 24(1).

101 Ibid., Article 33.

102 Law on the Protection of Rights and Freedoms of National Minorities (2002), Arts. 18 and 19; see also Law on National Councils of National Minorities (2009)

103 Law on the Protection of Rights and Freedoms of National Minorities (2002), Article 19.

104 See Auerbach 2011, pp. 33-35.

## 4. The Nature of Obligations Stemming from the FCNM and Legal Framework in BiH

In Bosnia and Herzegovina, the FCNM has constitutional status, as it is annexed to the Dayton Constitution of Bosnia and Herzegovina (1995) as one of the 15 “Additional Human Rights Agreements to be Applied in Bosnia and Herzegovina.”<sup>105</sup> Hence, it acquired a legal standing in BiH in 1995 already, although it was not before 2000 that the Convention was ratified by BiH.

The constitutions of the BiH Entities (Federation of Bosnia and Herzegovina – hereinafter FBiH and Republika Srpska – hereinafter RS) similarly refer to general minority rights. The Constitution of Republika Srpska thus lists the protection of the rights of “ethnic groups and other minorities” as one of the foundations of the constitutional order of this Entity.<sup>106</sup> The Constitution of FBiH contains an even stronger provision providing that the implementation of the highest standard of human rights recognized in, *inter alia*, the UN Declaration on Minorities<sup>107</sup> and the FCNM<sup>108</sup> is to be ensured in this BiH Entity. Moreover, and important for our purposes, the FBiH Constitution establishes that municipalities, in exercising their competences, “undertake all the necessary measures towards ensuring the protection of human rights and fundamental freedoms ... listed in the annexed instruments.”<sup>109</sup> This provision, therefore, also establishes the obligation of local authorities to ensure the implementation of the rights recognized in the FCNM and the UN Declaration. In sum, minority rights, including the minority right to political participation, are constitutionally guaranteed rights in BiH and, as such, would have to be implemented at all levels of governance.

In Bosnia and Herzegovina, legislation implementing the relevant provisions of the FCNM has been introduced in 2003 with the adoption of the Law on the Protection of the Rights of National Minorities at the state level (hereinafter: BiH Law on Minorities), as well as entity laws adopted in 2004 and 2008 in RS<sup>110</sup> and FBiH<sup>111</sup>, respectively. In addition, the Tuzla canton in FBiH has also enacted a law on minorities<sup>112</sup>, whereas in another canton – Sarajevo – a law regulating this area is currently at the stage of public discussion.<sup>113</sup>

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105 See Annex 1 to the Constitution of Bosnia and Herzegovina, 1995.

106 Article 5 of the Constitution of Republika Srpska (1992).

107 Annex to the FBiH Constitution (1994) in connection with the provision of Article 2 (Part 2 A).

108 Annex to the FBiH Constitution (1994), as amended by the Amendment XXIV.

109 Part VI, Article 1 of the FBiH Constitution (1994).

110 Law on the Protection of Rights of Persons Belonging to National Minorities in RS (2004) – hereinafter RS Law on Minorities.

111 Law on the Protection of Rights of Persons Belonging to National Minorities in FBiH (2008) – hereinafter FBiH Law on Minorities.

112 The Tuzla Canton Law on the Protection of Rights of Persons Belonging to National Minorities 2009 (hereinafter: Tuzla Canton Law on Minorities).

113 See Draft Law on the Protection of Rights of Persons Belonging to National Minorities in Sarajevo Canton 2011.



# 5. Representation of Minorities in Bosnia and Herzegovina

## 5.1. Legal Framework

When it comes to representation of minorities, the 2003 BiH Law on Minorities stipulates that persons belonging to minorities “have the right to be represented in state institutions and public service at all levels in accordance with their share in population based on the last census.”<sup>114</sup> The details related to the mechanisms and criteria for implementing this provision of the Law are left to be regulated by the BiH election legislation and the statutes and appropriate rules and regulations at the entity, cantonal and municipal levels.<sup>115</sup> However, it was not until the amendments to the 2001 Election Law, enacted in 2004, that the provision on reserved seats in municipal councils for the representatives of minorities has been introduced. The allocation of seats was to be implemented according to the numerical threshold of 3 percent based on the 1991 population census: *at least* one seat was to be reserved in those municipalities in which members of minorities constitute up to 3 percent of the population, while in those municipalities where more than 3 percent of persons belonging to minorities reside, *at least two seats* were to be guaranteed.<sup>116</sup> This in principle meant that each municipality with a significant number of persons belonging to minorities was obliged to guarantee at least one seat for a minority representative in its council or assembly.<sup>117</sup> However, having in mind that the law came into force after the deadline for the registration of candidates for the 2004 local elections, this new provision could not be implemented in practice.<sup>118</sup>

The amendments to the Election Law of 2008 introduced a different, more general provision that seems to be, at first glance, less favorable to minorities. According to the new solution, at least one seat is to be reserved for members of minorities in those municipalities where minorities make up more than 3 percent of the population.<sup>119</sup> However, as the analysis in the next section will show, this solution is not necessarily less beneficial to minority representation: the law merely establishes the percentage of minorities beyond which the imperative of their representation should not be ignored. In turn, the Law leaves considerable discretion to individual municipalities to establish their own rules pertaining to minority representation.

It is of crucial importance to note that the concept of representation stipulated by the law is clearly a substantive one, emphasizing the above-noted crucial relationship of accountability.<sup>120</sup>

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114 BiH Law on Minorities, Article 19.

115 Article 20 of the BiH Law on Minorities. See also Article 16 of the RS Law on Minorities.

116 Article 37 of the Law on Amendments to the Election Law of BiH (2004).

117 Legislative bodies at the local level are called councils in FBiH and assemblies in RS.

118 AC on the FCNM 2004, para. 104. See also Hadzimesic 2008.

119 Election Law of BiH (unofficial, consolidated text), Article 13.14, para. 2.

120 See footnotes 62-64, *supra*, and accompanying text.

Namely, according to the BiH Law on Minorities, “the representatives of national minorities in the governing structures are the representatives of *all national minorities* and are obliged to protect the interests of all national minorities.”<sup>121</sup>

The practice of political representation of minorities at the local level is a relatively recent phenomenon in BiH. As already noted, it only started with the most recent municipal elections of 2008. The legal guarantee of one reserved seat for minorities in municipal councils in those municipalities where minorities constitute more than 3 percent of the population according to the 1991 census was not respected in all such municipalities, which is a clear breach of the legal obligation introduced by the 2008 amendments to the Election Law. Namely, the data from the 1991 census indicate that there are very few municipalities in BiH satisfying this numerical threshold.<sup>122</sup> However, even some of them - such as Sarajevo Centar or Bileca<sup>123</sup> - did not reserve a seat for minorities in the local council/assembly.

The Central Election Commission of BiH did instruct municipalities that their statutes should be harmonized with the election law so that the registration of minority candidates would be enabled in a timely manner, wherever applicable.<sup>124</sup> Nonetheless, the details as to where indeed this legal provision was applicable seem to have been left unspecified.<sup>125</sup>

On a more positive note, it should be emphasized that many local governments in BiH where minorities do not necessarily comprise 3 or more percent of the population in line with the 1991 census - 32 in total<sup>126</sup> - decided to use their discretionary right and provide for one or even two reserved seats for minority representatives in local councils/assemblies. There is, however, a clear lack of balance in the numerical sense: while many of such municipalities had a rather small percentage of minority population according to the 1991 census<sup>127</sup>, some of those with a significant percentage of persons belonging to minorities failed to provide for such a reservation.<sup>128</sup>

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121 BiH Law on Minorities, Article 20, para. 3. See also RS Law on Minorities, Article 16.

122 According to a calculation by Crnjanski-Vlajcic and Fetahagic (2009, p. 15), only five municipalities in BiH (Sarajevo Centar, Sarajevo Novi Grad, Bileca, Prnjavor and Trebinje) meet this threshold.

123 Ibid.

124 AC on the FCNM 2008a, para. 196.

125 This is particularly problematic having in mind the unclear status of a considerable number of persons who declared themselves as Yugoslavs in many municipalities throughout BiH. See the data presented on the website of the Federation of BiH Office of Statistics, available at <http://www.fzs.ba/popis.htm> (accessed in July 2011).

126 Crnjanski-Vlajcic and Fetahagic 2009, p. 14.

127 Examples include Trnovo (0.2 percent), Donji Vakuf (0.3 percent) and Gradačac (0.51 percent). See Crnjanski-Vlajcic and Fetahagic 2009, p. 15.

128 For example, Sarajevo Centar (5.59 percent), Bosanski Brod/Brod (2.94 percent), and Kresevo (2.98 percent). Although these numbers are illustrative enough, one needs to note that the actual percentages of minority population are probably somewhat smaller, having in mind that the 1991 census category of “Others” also includes persons who failed to declare their ethnic identity or whose ethnic origin is unknown. See the data on ethnic structure of municipalities according to the 1991 census, available at <http://www.fzs.ba/Dem/Popis/nacionalni%20sastav%20stanovnistva%20po%20opstinama.pdf> (accessed in July 2011).

Although some authors and commentators criticized this perceived lack of consistency<sup>129</sup>, such an approach is not necessarily wrong. Namely, there is no international standard, let alone a national one, that would define a number of persons belonging to minorities significant enough when it comes to their guaranteed political representation. Moreover, the numerical criterion, although it enjoys a considerable reputation in academic and expert circles, is not exclusive. Other criteria are also often suggested in minority rights discourse, such as the level of political mobilization and organization of a minority population, or a significantly strong demand.<sup>130</sup> Finally, in the context of BiH, municipalities lacked coordination and platforms for comparisons, as there is no coordination body tasked with a certain quality control of numerical thresholds and usage of discretion rights in this regard across municipalities. In sum, to diagnose inconsistency in this area, some standards and coordination are necessary. In the absence of such standards and coordination, it comes as a natural consequence that the practice of municipalities across BiH was expectedly and justifiably different with regard to guaranteed minority seats.

In addition, one needs to ask if 32 local government units (out of the total of 144 in BiH<sup>131</sup>) are even enough when it comes to minority representation. Namely, one needs to note that the dominant approach at the European level - representation of minorities through mainstream parties alone, in the absence of reserved seats<sup>132</sup> - is not a particularly feasible avenue for minority representation in BiH. This is so having in mind that most political parties in BiH are either explicitly or implicitly devoted to protecting the interests of one of the three constituent peoples.<sup>133</sup> In such circumstances, reserved seats for minorities are not only a useful mechanism for minority mobilization, but also an incentive for mainstream parties to offer candidates from the ranks of minorities in the first place. One should then ask the question of what should be the criteria and goals of minority political participation at the local level in the specific context of BiH. If truly multicultural governance is one of the goals, then extending the practice of reserved seats even beyond the 32 local government units in BiH seems to be a step in the right direction.

However, this is a different question, although closely related to the primary focus of our study, and will not as such be thoroughly explored in this present work. Instead, we shall first address the question of how elections for minority seats were implemented in the municipalities addressed.

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129 See e.g. Crnjanski-Vlajcic and Fetahagic 2009.

130 For example, although in a different context, the European Charter for Regional or Minority Languages (1992) combines the criteria of significant numbers and the needs and wishes of a minority population. Similarly, the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998) also includes the criteria of significant numbers and sufficient demand. However, none of these instruments gives an indication as to what constitutes a significant number of persons belonging to minorities for the purposes of enjoying specific minority rights. On a more general level, Keller (1998, p. 42) explains that the need for specific measures in the sphere of minority rights will always depend "on the size and circumstances of the minority concerned." According to Keller, the latter include patterns of discrimination, vulnerability of a minority culture and the commitment of a minority group itself to preserving its distinctive identity.

131 There are 61 municipalities and two towns (East Sarajevo and Banja Luka) in Republika Srpska, and 78 municipalities and two towns (Sarajevo and Mostar) in the Federation of Bosnia and Herzegovina, while Brcko District is constitutionally recognized as a separate unit of local governance independent of both BiH Entities.

132 Venice Commission 2000; Venice Commission 2005b.

133 See Hodzic and Stojanovic 2011, pp. 95-96.

## 5.2. The 2008 Elections for Minority Seats

The Election Law amendments of 2008 essentially introduced “separate electoral systems on the same ballot” for local elections.<sup>134</sup> In the current system of minority political representation at the local level, a voter has one vote and can choose between voting in general ballots under the proportional representation system, or voting for separate lists of minority candidates under the ‘first-past-the-post’ system, according to which a candidate with the highest number of votes gets elected.<sup>135</sup> The Venice Commission has emphasized that the system raises doubts as to the equality of suffrage and the different weight of vote depending on the choice of a voter to participate in one or the other electoral system.<sup>136</sup> This phrasing is consistent with the Commission’s more general opinion on special voting arrangements for minorities, where this advisory body expressed the stance that dual voting rights and similar drastic departures from the equal suffrage rule should be implemented with caution and only if other options for the participation of minorities are not feasible.<sup>137</sup> However, such a system is not unique to Bosnia and Herzegovina. Similar arrangements exist in the region (e.g., in Croatia) and in other countries of Central and Eastern Europe.<sup>138</sup>

In the 2008 local elections, a range of actors used the possibilities envisaged under the Election Law to propose their candidates for minority lists: political parties, minority organizations and independent candidates. This provision of the Law seems to place minority candidates in unequal positions depending on the vehicle they chose to use for the purpose of appearing as candidates on minority lists. First, independent candidates need to provide at least 40 signatures supporting their candidacy, which is not a requirement for party or minority organization candidates.<sup>139</sup> In addition, as one of our interlocutors pointed out, minority organization and independent candidates are less likely to succeed even compared with minor mainstream parties, which often have more members and voters compared with the number of persons belonging to minorities themselves. This can be supported by the fact that only 10 out of the 35 elected minority representatives in municipal councils/assemblies throughout BiH did not come from political parties.<sup>140</sup> Consequently, such a system raises the problem of double representation - the representation of party interests and the representation of minority interests - that, according to many of our interlocutors and some previous studies on this issue<sup>141</sup>, obviously goes at the expense of minorities. Indeed, it is somewhat illogical that when party and minority interests collide, a minority representative from the party in question would be required (by law!) to violate party discipline, which is not so easy to expect, not least in the BiH context.<sup>142</sup>

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134 Venice Commission and the OSCE/ODIHR 2008, para 14.

135 BiH Election Law, Article 13.14, para. 11 and 12.

136 Venice Commission and the OSCE/ODIHR 2008, para. 14.

137 Venice Commission 2008, paras 48, 71 and 72.

138 See e.g. Bochsler 2010.

139 BiH Election Law, Article 13.14, para. 4 (b).

140 Crnjanski-Vlajcic and Fetahagic 2009, pp. 13-14.

141 Corni 2009; Crnjanski-Vlajcic and Fetahagic 2009.

142 On factors influencing party discipline in general, see e.g. Depauw and Martin, 2009. Admittedly, this might be changing in recent years. For example, gradual changes in Latin American countries towards greater responsibility of MPs to their constituencies, rather than to party leaders, have been noted. See e.g. Carey 2003. For some information on BiH practice in this field, see Kotlo 2006, pp. 169-171.

This conceptual and practical tension between political representation of minorities through mainstream and minority parties or organizations is not unique to BiH.<sup>143</sup> However, one can note that an integrative approach to minority participation using mainstream political parties as the vehicle faces significant challenges in BiH. Namely, as noted already, most political parties, and certainly the more significant ones, either explicitly or implicitly define themselves as ethnic parties of one of the three constituent peoples. In such circumstances, representation of separate interests of minorities is difficult, if not entirely unfeasible. According to the European Court of Human Rights, it is “hardly conceivable that a party standing for the furtherance of the interests of one ethnic group or religious denomination would be able to ensure the fair and proper representation of members of other ethnic groups or adherents of other faiths.”<sup>144</sup>

The solution of representing minorities through minority organizations has also been subject to criticism in the context of BiH. As one study puts it, if they were to nominate a candidate for local elections, “these organizations would take on a political character, something that organizations of persons belonging to national minorities as citizens associations should not be.”<sup>145</sup> Indeed, as confirmed in the numerous interviews conducted in the course of this study, minority organizations are mostly concerned with issues of culture or, in the case of many Roma organizations – improvement of the socio-economic rights of Roma people and the protection from discrimination in various arenas, such as employment or education. Both the critics of this avenue of representation of minorities and the organizations’ representatives, however, neglect the fact that one of the most powerful justifications for minority political participation is precisely that it contributes to addressing their cultural and other identity interests and concerns.

On the other hand, as already noted, including minority representatives into local councils/assemblies through mainstream parties and taking the provision of the election law on substantive representation of minority interests seriously could mean introducing more multiethnic agendas in those parties and a step towards mainstreaming minority issues into the majority policies.<sup>146</sup> Additionally, if there could ever be such a possibility, it is in any case more probable at the local level, where decision-making relates more to everyday life problems, and less to symbolic and real struggles between ethnic groups, as is mostly the case at the level of the two Entities and the state.

However, despite these important conceptual discussions, it is clear that the intention of the legislator, when stipulating that minority representatives in local councils/assemblies should

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143 For example, faced with the dissatisfaction of the AC over the fact that national minority parties were not able to benefit from threshold exemptions in parliamentary elections, Poland replied that the members of minorities “are given top places on electoral lists” of mainstream political parties and that this “may be an indication that the issues of national and ethnic minorities have been incorporated in the political programmes of these parties.” See Auerbach 2011, p. 27.

144 European Court of Human Rights 2006.

145 Corni 2009, p. 22.

146 Cf. AC on the FCNM 2008a, para. 198 („The Advisory Committee also expects that the majority parties [in BiH] will not abuse the possibility of putting forward national minority candidates...”).

represent all minorities and pursue their interests, was obviously outcome-oriented: regardless of the avenue through which the successful minority list candidate was elected (either through mainstream political parties, minority NGOs or individually, as an independent candidate), he or she is a representative of all national minorities and is obliged to protect their interests.

Let us now examine how this provision is implemented in practice in those municipalities that we have explored. This mechanism of political participation of minorities is examined both separately and in relation to the minority consultation mechanisms.

### 5.3. The Practice of Political Representation of Minorities

As a matter of reminder, all but two (Sarajevo Center and Bijeljina) of the nine local government units covered by this research project had at least one minority representative in the municipal council/assembly (Brcko being the only local government unit with two minority representatives in its District assembly). Out of seven such local government units, only two (Doboj and Prnjavor) had elected minority representatives from the ranks of minority organizations. In the remaining five local councils/assemblies, the minority representatives came from mainstream political parties.

Most interlocutors confirmed that the guaranteed political representation of minorities at the local level is a recent phenomenon and that it is still not fully entrenched in the practice of political life in BiH. For example, public education campaigns and promotion of both the concept and the practice of voting for separate minority lists have been inadequate to date.<sup>147</sup> According to our interviewees, many people believed that they had dual voting rights (as in Slovenia, for example) and thus voted both for mainstream and minority lists, thereby rendering their ballots void.<sup>148</sup>

In all municipalities, regardless of the actual situation, we have noted among the interlocutors a perception of the ultimate importance of having a minority representative in a municipal council/assembly: from the perspective of minority organizations, and frequently in the view of local authorities, influence on decision-making seems to be related to having a representative in the local council/assembly who would voice the concerns and positions of minorities. This is not unexpected, as this aspect of minority political participation figures prominently in public discussions on this matter. Studies and expert opinions, for example, are prevalently focused on analyzing the concept and practice of reserved seats for minorities in local councils/assemblies.<sup>149</sup> Having in mind the complexity of possible avenues of consultation and the often perceived futility

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147 Cf. also Human Rights Office 2008, pp. 27-34.

148 This was a particular problem in Banja Luka, for example. See *Ibid.*, p 29.

149 Crnjanski-Vlajcic and Fetahagic 2009; see also Corni 2009.

of the efforts of persons belonging to minorities in this context (as elaborated in the next chapter of this report), the lack of interest of both the minority and local government actors in consultation as a separate aspect of minority political participation is unsurprising.

Nonetheless, we have noted an overwhelming perception of uncertainty when it comes to statistics and their translation into minority seats in the municipal councils. Many interlocutors mention that no municipality in BiH has more than 3 percent of persons belonging to minorities residing in its territory. Some believe that the category of Yugoslavs from the 1991 census is also taken into consideration by many municipalities to make the percentages of minorities higher.<sup>150</sup> Some interlocutors, especially OSCE officers that deal with minority issues at the local level noted that there is a fear that even the present provision of the Election Law on separate lists for minority representatives will be abolished and that mainstream elections will remain the only channel for minority participation.

Where minority representatives in local councils/assemblies do exist, they sometimes act as a basis for gathering persons belonging to minorities for the purpose of using general consultation mechanisms to promote minority interests. This is particularly the case in two municipalities (Doboj and Prnjavor) where minority representatives come from the ranks of minority organizations, and not political parties. Moreover, the issue of influence on agenda-setting within local governments in such cases is sometimes understood by the local government officers and minority actors alike as the task of a representative of minorities in the municipal councils/assemblies, and less so as an activity that could be performed through consultation and other channels of communication with municipal authorities. An illustration of the importance and the potential of national minority representatives within the municipal council/assembly is the case of Doboj: according to our interlocutors, the agreement on cooperation between the mayor and the Council of National Minorities in Doboj, as a creative mechanism of communication of persons belonging to minorities and their organizations with local authorities, has been introduced in large part due to the active engagement of the minority representative in the municipal assembly.

As previous studies have also noted, the background of a minority representative clearly matters: the work of those not associated with political parties is assessed positively by minority representatives and independent observers alike, while political party candidates are commonly seen as “soldiers of their respective parties,” with no genuine interest or effort invested in the representation of minority positions and perspectives.<sup>151</sup> Apart from the actual experience, there is a general perception among our interlocutors that the situation with political participation in general is better where representatives in the municipal councils/assemblies come from minority organizations and not from political parties. One can note the overwhelming lack of confidence

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150 In reality, according to the 1991 census, at least five municipalities in BiH had more than 3 percent of persons belonging to minorities, not including the category of Yugoslavs. See *supra* note 122.

151 See Crnjanski-Vlajcic and Fetahagic, 2009. A study focusing on three BiH municipalities (Prijedor, Tuzla and Banja Luka) has also confirmed this. See Corni 2009.

in the very possibility that minority interests could be pursued through mainstream political parties. Nonetheless, although this present study does not have a basis solid enough to bring into question this notion that seems to be the dominant dogma when it comes to minority participation in BiH, one should note that this is, at least partly, also a self-fulfilling prophecy. The very fact that a representative comes from the ranks of a mainstream party seems to have a discouraging effect on minorities in terms of establishing a relationship of accountability in the municipalities we have studied. This is, ultimately, also a matter of recognition, which goes in both directions: frequently, minorities are not interested in being represented by persons enjoying party, rather than minority-specific legitimacy, in the first place. Although reportedly not too interested in political affairs as part of their general activities, our research has indicated that minority organizations in BiH might have already articulated a genuinely political stance: they want to be represented, at least in part, independently from political parties.

As both a conceptual matter and practical matter, political participation of minorities in BiH at the local level is usually seen as, and often even equated with, political representation. As one minority representative stated, he acts as “sort of a bridge between the municipality and minorities”. Indeed, this was also confirmed by the representatives of local executive authorities: relevant municipal organs (for example, those dealing with social affairs and relations with civil society, economic development and other issues) often stated that they communicate and coordinate with minority representatives and deem their role very important in informing their own work.

Nonetheless, it is sometimes unclear as to who do the minority representatives represent. Although the majority of those interviewed expressed their understanding that they represent all national minorities on the territory of the municipality, we also noted some creative answers, such as the understanding that they represent all citizens of the municipality, including constituent peoples. On the other hand, minority organizations have a mixed impression regarding the performance of minority members of municipal councils/assemblies when it comes to representing minority interests. In particular, apart from the general understanding that minority representatives coming from political parties actually do not represent any minority, organizations of minorities other than those that the elected representative in question belongs to often expressed a perception of bias on the part of such a representative and argued that he or she affirms the interest of his or her own minority only. Such an opinion was sometimes also voiced by independent experts for a couple of municipalities. Dobož and Prnjavor are widely seen as exceptions, as minority representatives there, according to almost all of our interlocutors, effectively represent all minorities.

Another important problem in the practice of representation of national minorities is the difficulty (both objective and subjective) for a minority representative to identify and represent minority interests and the variety of minority views on specific local policies. This is so having in mind that the coordination of minority organizations and its formalization has taken place in two of the analyzed municipalities only, where the regional Council of Minorities of the Dobož Region and the Council of Minorities of the Municipality of Prnjavor were established as coordination



mechanisms of national minority NGOs. In these municipalities, regular meetings involving political representatives and minority organizations leadership are held, where they discuss issues and define platforms and positions which are then voiced in the municipal council/assembly by the minority representative in question. This is also in line with better coordination of minority organizations in Republika Srpska in general, as compared with the FBiH, having in mind the existence, role and activities of the RS Association of National Minorities. As a rule, these two municipalities seem to have a better record when it comes to effective political participation at the local level in general, as confirmed by the OSCE representatives, minority actors, local authorities and independent observers alike.

Indeed, in such circumstances, it is easier for minority representatives to fulfill their Election Law obligation of representing all minorities and their interests. Many interlocutors point towards the divisions and different positions between and even within minority communities, which makes it impossible to translate such diversity, often involving highly conflicting positions and demands, into a meaningful minority voice. However, it is important to note that the purpose of minority political participation is not necessarily to enable minorities to speak with one voice. Although coordination of minority voices and positions along the lines of what has been established in Prnjavor and Doboje is generally encouraged by the AC on the FCNM<sup>152</sup>, at the same time, the imperative is to reflect the whole range of minority actors and the variety of their opinions in the decision-making processes.<sup>153</sup> Nonetheless, one could reasonably ask how one political representative, who does not work full-time, especially in the absence of minority-specific consultative mechanisms (that are elaborated on below), can reasonably perform such an all-encompassing coordination function.

On a positive note, in terms of their position within the local council/assembly, minority representatives mostly express the view that they work on equal grounds with their colleagues. This is so regardless of whether they are affiliated with a political party or not. They also confirmed that they do have options to influence decision-making through various working bodies of the municipal council/assembly, including those related to minority issues in a broader sense, such as commissions on cultural heritage, human rights, etc. Some respondents confirmed that they are members of up to two such commissions and that they do not feel like second-rank representatives in this regard. This finding is encouraging and it serves as additional evidence that the political representation of minorities is slowly taking root at the local level in BiH.

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152 See AC on the FCNM 2008b, para. 92.

153 See *Ibid.*, paras. 100-101 and 109.

# 6. Consultative Mechanisms and Practices

## 6.1. Mainstream Consultation Mechanisms

In Bosnia and Herzegovina, mechanisms of direct citizen participation in decision-making processes at the local level are prescribed by the Law on the Principles of Local Self-Government in FBiH<sup>154</sup> and the Law on Local Self-Government of RS<sup>155</sup>. According to the RS law, these mechanisms are referenda, citizen assemblies, citizen initiatives, local communities (*mjesne zajednice*), citizen panels, proposal schemes, citizen hours in local assemblies, and other forms that are not explicitly forbidden by law.<sup>156</sup> In FBiH, these mechanisms are, in addition to the local communities, referenda, community citizen assemblies, initiatives and other forms of direct declaration.<sup>157</sup> It is important to note that municipalities are given the option of defining participatory mechanisms in their municipal statutes in a more detailed manner.

Local communities (LCs), traditional mechanisms of citizen participation that were especially popular in the former Yugoslavia, are mandatory in FBiH, while they are to be formed in RS on a voluntary basis.<sup>158</sup> In FBiH, the local communities have the status of a legal person, which is not the case in RS. The FBiH law also gives local governments the option of transferring some of their competences to the LCs, while ensuring the necessary means of financing.<sup>159</sup>

In general, the existing legal framework for citizen participation does not prevent participatory practices at the local level. Nonetheless, it is too broad to really ensure that participation actually happens. Unfortunately, local statutes are usually not much more detailed than the framework itself, and no instructions currently exist that would guide the local governments on how to effectively organize different participatory processes at the local government level.<sup>160</sup>

In addition to mechanisms prescribed by the laws, certain local governments have also adopted special decisions that are relevant for direct citizen engagement, such as a decision on the procedures of public hearings, a decision on the implementation of a survey in local communities in order to give priorities to projects, as well as the decision on the procedure of selecting NGO projects with criteria.<sup>161</sup> In addition, the international community in BiH has devoted significant

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154 Law on the Principles of Local Self-Government in FBiH 2006.

155 RS Law on Local Self-Government 2004.

156 Ibid, Art. 99.

157 Law on the Principles of Local Self-Government in FBiH 2006, Arts. 43-45.

158 RS Law on Local Self-Government 2004, Art. 106; Law on the Principles of Local Self-Government in FBiH 2006, Art. 24

159 Law on the Principles of Local Self-Government in FBiH 2006, Arts. 27 and 30.

160 See Misić-Mihajlović and Jusić 2010.

161 Ibid., pp. 198-199. See also CEECN 2006.

efforts to introducing participatory mechanisms and processes at the local government level through a myriad of technical assistance projects. These, *inter alia*, include strategic planning processes (e.g. local development or environmental strategies) that usually establish special planning committees<sup>162</sup> or partnership groups gathering a wide range of stakeholders, capital investment planning, participatory budgeting, etc.

Minority-specific consultative bodies are indeed a separate phenomenon, partly due to the understanding that general consultative mechanisms are not sufficient to provide for effective political participation of minorities. However, as the next section will show, mainstream consultation mechanisms do have relevance, both as a backdrop for understanding the specificities of consultation of minorities at the local level in BiH, and as a concept and practice that has a strong influence on the very perception of the need for minority-specific consultation mechanisms in the specific context of BiH.

## 6.2. Advisory Bodies at the State, Entity and Cantonal level

The respective minority protection laws at different levels of government – state, entity and Tuzla canton laws<sup>163</sup> - have established Councils for National Minorities (hereafter: Minority Councils) as advisory bodies to the respective legislative bodies tasked with the protection of national minorities. In addition to the Councils, a Roma Advisory Committee to the Council of Ministers was formed in 2002 at the state level.<sup>164</sup>

It has to be noted that these bodies at all levels of government took a very long time to form upon the adoption of laws, despite a timeframe specified by the laws.<sup>165</sup> The RS Minority Council began meeting in 2007, the BiH Minority Council was established in April 2008 and

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162 Such processes have sometimes tended to include national minorities specifically. For example, municipalities participating in OSCE's UGOVOR project (2004-2008) established Municipal Development Planning Committees (MDPC), which lead strategic planning processes in the municipalities and were made up of different governmental and non-governmental stakeholders. According to the MDPC Terms of Reference, this body had to have at least one minority group representative (OSCE BiH, n.d.). UNDP's Rights-Based Municipal Development Programme, as part of which local government development strategies were also prepared in a participatory manner, advocated that „minority groups, vulnerable and the more marginalized also have a voice and say in shaping the development of municipalities in BiH” (UNDP 2006).

163 Although all cantons had an obligation to adopt relevant laws, Tuzla canton is the only one to date that has done this.

164 The committee is made up of a variety of stakeholders, including nine representatives of select ministries at the state and entity level and nine representatives of Roma community.

165 However, the laws were not adopted at the same time: the BiH law was adopted in 2003 (and amended in 2005), the RS law in 2004 and the FBiH law only in 2008. The Tuzla Canton Law on Minorities was adopted in 2009.

the FBiH Minority Council had its first meeting in December 2009.<sup>166</sup> The Tuzla Minority Council was only recently established, in May 2010<sup>167</sup>, and is, according to several of our interlocutors, still inoperative.

The work of these bodies is regulated by the laws on the protection of rights of national minorities at the state level, at the level of Entities and cantons, as well as by special rulebooks and statutes of these bodies.

In accordance with the BiH Law on Minorities, the BiH Minorities' Council is established to "issue opinions, advice and proposals to the BiH Parliamentary Assembly on all issues pertaining to the rights, position and interests of national minorities in BiH."<sup>168</sup> The Council's rulebook further elaborates that the goals of the Council are "respect and protection, preservation and development of ethnic, cultural, linguistic and religious identity of every member of national minorities in BiH who is a BiH citizen."<sup>169</sup> Moreover, according to the rulebook, the Council "supports the work of registered citizen associations of members of national minorities in BiH."<sup>170</sup> This provision is particularly important from the perspective of this present study, as many minority organizations are essentially local in character.<sup>171</sup>

Entity and Tuzla canton laws on the rights of national minorities contain similar provisions on advisory bodies at the level of the respective parliaments. All three advisory bodies have essentially similar functions: to give opinions, advice and proposals to the parliament in question - but sometimes also to other organs - in the areas that pertain to the realization of minority rights.<sup>172</sup> The Tuzla Canton law, importantly, contains an explicit provision that the Minority Council in this canton is to give opinions, proposals and recommendations to the government and the assembly of the Canton on issues that are of importance for the situation and realization

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166 Human Rights Office and ToPeer 2010b, p. 5. The draft decision of approval of the statute and draft decision of approval of the rulebook on the work of the National Minority Council, as proposed by the Committee for the protection of human rights and freedoms of the House of Representatives of the FBiH Parliament were not adopted in 2010 by the FBiH Parliament's House of Peoples as the necessary majority was missing (FBiH Parliament 2010). According to a newspaper interview with the president of the FBiH Minority Council Sanja Bogdanović, the status of this advisory body has thus not been solved, although the Council adopted the statute and rulebook that is yet to be approved by both chambers. According to Bogdanović, the council operates without working facilities, a civil servant that would logistically support the Council has not been appointed by the FBiH Parliament, and its budget has not been approved. During an entire year of the Council's operation, its representatives could not have a reception with the presidents of the parliamentary chambers, their deputies, secretaries, or even the administrative committees, although the Council had sent them written requests a number of times. (See <http://www.san.ba/index.php?id=16094>, visited on 22 May 2011).

167 Human Rights Office and ToPeer 2010b, p. 55.

168 BiH Law on Minorities, Article 22.

169 BiH Minority Council Rulebook 2006, art. 4.

170 Ibid, Art. 5.

171 See information on organizations of national minorities in BiH, at [http://www.nacionalnemanjinebih.org/index.php?option=com\\_content&view=article&id=24&Itemid=38](http://www.nacionalnemanjinebih.org/index.php?option=com_content&view=article&id=24&Itemid=38) (visited in June 2011).

172 RS Law on Minorities, Art. 18 and FBiH Law on Minorities, Art. 18; Tuzla Canton Law on Minorities 2009, Art. 14.

of rights of persons belonging to national minorities not only in the whole canton, but also in individual towns or municipalities.<sup>173</sup>

The FBiH law also details the criteria for membership in the National Minority Council of FBiH, stipulating that every 1000 members of a minority organization entitle it to have one representative in the Council. The maximum number of representatives per minority is five, with the exception of Roma, who can have a maximum of seven representatives.<sup>174</sup> In Republika Srpska, the selection of candidates is more centralized, as the 15 members of the Minority Council of Republika Srpska are selected in the National Assembly of RS, and from the list of candidates proposed by the RS Association of National Minorities<sup>175</sup>, an NGO body gathering different minority organizations representatives from across RS. In the case of Tuzla Canton, the Council's delegates are selected independently from the government structures, by and through minority organizations, and in accordance with the formula according to which, depending on its numerical strength, an organization can have anywhere between one and three delegates in the Council.<sup>176</sup>

All four advisory bodies on minority issues in BiH at higher levels of governance consist of persons representing minority NGOs only and do not include government representatives or other actors. However, the laws typically envisage the *ad hoc* participation of their representatives in various parliamentary committees, such as those related to constitutional issues or human rights.<sup>177</sup>

It should also be noted that, apart from these advisory bodies as consultation mechanisms for issues affecting all minorities, the specific situation of Roma people has also been reflected in the institutional structure of minority-inclusive governance in BiH. The Advisory Committee for Roma to the Council of Ministers at state level is responsible for considering materials and acts under its area of competence, and issuing recommendations and giving opinions on issues that pertain to national minorities in BiH, especially the Roma, by majority vote.<sup>178</sup> According to Article 6 of the Rulebook, the Committee is to cooperate with all responsible organs of government, institutions, public broadcasters and other public bodies at the state, entity and Brčko district level, directly or via the Ministry of Human Rights and Refugees BiH.

However, all of these consultative bodies face serious obstacles both in terms of their basic functioning and in relation to coordinating and advising on minority issues in the highly complex and often disconnected structures of governance in BiH. In addition, serious concern and

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173 Tuzla Canton Law on Minorities, Art. 16.

174 FBiH Law on Minorities, Article 17.

175 RS Law on Minorities, Art. 17.

176 Tuzla Canton Law on Minorities, Art. 15.

177 The following provisions envisage the participation of representatives of advisory bodies in different parliamentary committees: BiH Law on Minorities, Art. 22 (including 2005 Amendments, art. 12), FBiH Law on Minorities, Art. 18, RS Law on Minorities, Art. 18, Tuzla Canton Law on Minorities, Arts. 18-19.

178 Roma Committee Rulebook 2005, Art. 3

suspicion has been voiced that the selection process of representatives in these consultative bodies is overtly politicized, thus ignoring the views of minority organizations (echoing the similar, already elaborated problems in the context of the election for guaranteed seats for minority representatives in municipal councils/assemblies).<sup>179</sup>

According to the AC on the FCNM's second opinion on BiH, "the Advisory Committee for Roma, a joint body comprising representatives of the Roma and of the relevant ministries, established in 2003, has continued its work and, in particular, made a significant contribution to the preparation of the Action Plans for Roma in the areas of housing, health care and employment."<sup>180</sup> Nevertheless, the AC notes that while the Committee continues to function with the support of the Ministry for Human Rights and Refugees of BiH, "the financial and human resources allocated to it are not sufficient for it to fulfill, in particular, its task of instigating, coordinating, monitoring and evaluating the implementation of the various action plans to improve the situation of Roma. Cooperation with other levels of authority, especially the Cantons, appears to be sporadic and this committee's influence on the activities of local authorities is fairly limited in practice."<sup>181</sup> The AC invites authorities to increase financial and human resources that are at the disposal of the Roma Committee, so that it can effectively coordinate and monitor Action plan implementation.<sup>182</sup>

In its second opinion, the Advisory Committee on the FCNM has welcomed the establishment of the respective national minority councils.<sup>183</sup> According to this opinion, the RS Council, for example, "has already submitted a number of proposals to the authorities and to the Assembly of the Republika Srpska, which have resulted in an increase in the budget earmarked for national minority activities in 2008."<sup>184</sup>

However, according to information that the AC had received during its visit to BiH, problems had arisen in the process of appointing national minority representatives to the state-level Council: "The authorities reportedly chose to appoint certain representatives among the names put forward by the organizations of national minorities without taking into consideration the predominant viewpoints within the minorities concerned. Moreover, only ten out of the 17 recognized national minorities have been able to appoint their representatives in the Council."<sup>185</sup> If we recall the FCNM standard, all minorities, including the smaller ones, need to be represented in a consultative body.<sup>186</sup> It is possible that there may be fewer than 17 minorities in BiH, a concern that has also been expressed by some of our interlocutors and that may also

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179 Cf. AC on the FCNM 2008a, para. 209.

180 Ibid., para 208.

181 Ibid., para. 210.

182 Ibid., para. 212.

183 The opinion was issued before the FBiH Council was established.

184 AC on the FCNM 2008a, para. 205.

185 Ibid., para. 209.

186 See *supra* notes 65-67, and accompanying text.

be revealed by the next census. However, this may also be an indication of unjustifiably silencing of some minority voices in the appointment process.<sup>187</sup> In any event, as the AC reiterates, “transparency in the process of establishing advisory bodies of national minorities is essential to inspire trust and guarantee the effective functioning of these bodies.”<sup>188</sup> In this sense, “authorities should ensure that the process of appointing council members is conducted in a transparent manner and that clear, precise rules of procedure are established.”<sup>189</sup>

With respect to advisory councils, the AC urges authorities in its recommendations to take all necessary measures – including allocation of financial and human resources – so that the newly elected state council is able to play its role fully and effectively.<sup>190</sup> Indeed, research conducted on the work of national minority councils at the state and entity levels shows<sup>191</sup> that these bodies are burdened by a number of challenges that stand in the way of their effectiveness. With respect to obstacles for the effective functioning of the councils, council representatives who participated in the research indicated a number of problems they faced in their work, including<sup>192</sup>:

- a lack of administrative and technical support to the Councils, such as designated office space, professional technical secretary or expert advisers;
- Councils’ insufficiently defined role as “consultative bodies only” that can realize their goals and initiatives only *via* other institutions and government organs;
- inefficient communication with the legislature;
- lack of media interest in the Councils’ work;
- lacking cooperation between Councils and with similar bodies in the region;
- inadequate level of knowledge and skills of Council representatives on government operations, lobbying techniques, public relations, etc.<sup>193</sup>
- lack of the precise data on the number of persons belonging to minorities (because of a lack of state census) or minority organizations;
- lack of interest by minority organizations in Councils’ work.

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187 Cf. AC on the FCNM 2008a, para. 209.

188 Ibid.

189 Ibid., para. 214.

190 AC on the FCNM 2008a, para. 211.

191 Human Rights Office and ToPeer 2010b.

192 However, asked about factors of support, the FBiH Council pointed towards human rights committees of both parliament chambers or cooperation with national minority organizations and other citizen associations and the existence of key documents (Statute and Rulebook); at the same time, the RS and BiH Councils singled out working facilities, certain financial means (BiH Council), expert and administrative assistance, improvement in cooperation with media outlets, and an increasing motivation and teamwork between representatives (for the BiH Council especially) (ibid., pp. 9-10). In addition, with respect to actors that they should work together with, representatives outlined the importance of building relationships between Councils, with parliamentary working bodies, with local national minority organizations and with related bodies in the countries of the region (ibid., p. 10).

193 Representatives pointed out the importance of capacity and knowledge building, especially when it comes to national minority legislation and legal procedures in general, policy-making and techniques of lobbying, as well as best practice in the region (ibid., p. 10).

The results of the research also pointed out that the councils rarely sent initiatives to different government organs (both from the Council representatives' and surveyed parliamentarians' perspectives) and that, moreover, their respective minority organizations rarely communicated initiatives to the Councils themselves.<sup>194</sup> With respect to cooperation with different institutions, 32% of the representatives found that the most-quality cooperation was realized with the local community, rather than with institutions at higher levels of government.<sup>195</sup> A majority said they informed organizations they were a member of about the activities of their Council.<sup>196</sup> Authors of the study give a number of recommendations to increase the effectiveness of Councils' operation, both in terms of improving the Councils' work, capacity and knowledge building, and in terms of cooperation between Councils, with government organs, with minority organizations and with relevant bodies from the region.<sup>197</sup>

## 6.3. Consultative Mechanisms from the Local Perspective

### 6.3.1. Background and Context

The above overview of the status of relevant international instruments in the BiH legislation on minority rights at different levels of governance makes it clear that, apart from the state and entity level, similar consultative mechanisms can and indeed should be established at lower levels of governance, including municipalities. Also, it is important to note in the context of this present study that the BiH Law on Minorities introduces the obligation of the Entities, cantons, towns and municipalities in BiH to use their own laws and regulations to specify in more detail the rights and obligations stemming not only from the state law on minorities, but also from international instruments dealing with issues of relevance to minorities.<sup>198</sup> Moreover, as the 2005 amendments to the state Law on National Minorities have stipulated, competent authorities at all levels, including municipalities, can implement temporary affirmative action programs in the employment sector, as well as "undertake other appropriate measures for achieving faster and greater equality of members of national minorities."<sup>199</sup>

Although no minority consultative body resembling those at the higher levels of government exists at the level of local government units in BiH, the architecture of consultative mechanisms related to minorities is dispersed throughout several other institutions at the local level. First,

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194 Ibid, pp. 21-22, 33.

195 Ibid., p. 20.

196 Ibid., p. 21.

197 For more details, see *ibid.*, pp. 41-42.

198 BiH Law on Minorities, Article 7.

199 Law on Amendments to the Law on the Protection of Rights of Persons Belonging to National Minorities of BiH 2005, Article 8.



local councils/assemblies in the municipalities of Banja Luka and Tuzla have established commissions for national minorities as their permanent working bodies. In addition, in local governments' executive organs, various departments include minority issues within the scope of their work, such as the Department for health and social protection, NGOs, national minorities and the issues of return of refugees in Bijeljina, Department for local economic development in Prnjavor, Department for refugees and displaced persons, returnees and national minorities in Banja Luka or the Department for development, entrepreneurship and other activities in Tuzla. In addition, as already noted in methodology section, one municipality encompassed by this study, Zenica, also has a Roma officer in the local executive.

However, most of our interviewees confirm that all these bodies are ineffective in reaching minorities and enabling a substantial input from persons belonging to minorities in order to inform their work and to influence local decision-making. In the following sections we describe some of the aspects of, and factors affecting, the ineffectiveness of consultation of minorities at the local level.

### **6.3.2. The Problem of Discourse and Overall Approach**

The results of our research at the local level show that minorities are more often than not understood as one of the social categories (like pensioners or students) or vulnerable groups to be consulted in terms of assessing their needs in the course of various activities, such as planning. This is probably, at least in part, caused by the manner in which the strategic planning programs are advocated by different international development agencies in BiH, where minorities are often identified as one of the vulnerable groups to be included.<sup>200</sup> This is why, for example, persons belonging to minorities take part in focus groups and similar techniques used when formulating policies in specific sectors (e.g. in housing or social protection).

Similarly, the very decision to attach the Roma Office in Zenica to the municipal Center for Social Work, rather than to place it in the local executive, is telling of the idea behind, and the main function of this mechanism and its weak consultative role in decision-making in particular, as reported to us in the course of our interviews.

### **6.3.3. The Problem of Composition of the Consultative Bodies**

Unlike the consultative bodies at the higher levels of governance, the relevant organs at the municipal level tasked with consultation with minorities rarely include persons belonging to minorities outside of the ranks of political parties. For example, our interlocutors from the ranks of

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200 See the text in note 162, *supra*.

minority organizations are highly critical of the work and effectiveness of the Tuzla commission for national minorities within the municipal council, including its composition, as this body is entirely composed of persons coming from political parties.<sup>201</sup> Indeed, although its competences are excessive and as such open a space for meaningful and creative work in the field<sup>202</sup>, our interlocutors have confirmed that the potential of this permanent working body within the municipal council has not been realized. The same goes for Banja Luka, where the National Minority Council within the Assembly of the City of Banja Luka seems to have even more excessive competences,<sup>203</sup> but similarly does not include members from the ranks of minority organizations,<sup>204</sup> although a provision of the assembly Rulebook envisages such a mixed composition of the Council.<sup>205</sup> In both municipalities, the proposals have been put forward to change this practice by introducing a rule whereby the representatives of minority organizations will make up more than 50 percent of members of the minority commissions and some of our interlocutors were optimistic that this negative practice will be changed before the next local elections in 2012.

#### **6.3.4. The Dominance of the Mainstream Consultation Mechanisms and a Generalized Approach to Consultation**

In general, it may be said that minority consultation in the municipalities studied is mostly understood as inherent in, and implemented through, mainstream consultation mechanisms, such as budget hearings, discussions on draft legislation, needs assessments of various service users etc.

This general finding needs to be placed in context. Namely, general participation mechanisms in BiH are rather weak, under-elaborated and rarely used. Research shows that citizen participation is weak in practice. According to the most recent citizen participation research

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201 See also Decision on the appointment of the president and members of the Commission for the Protection of the Rights of National Minorities of Tuzla Municipal Council, 2008.

202 According to Article 53 of the Rulebook of the Tuzla Municipal Council (2005), the Commission “considers all issues regarding the protection of the rights of national minorities as stipulated in the international conventions, Constitutions of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, and Tuzla Canton ... suggests measures necessary for the protection of those rights to the Municipal Council ... collects data and present the Council with analysis, information and reports on the situation in the field of protection of the rights of national minorities in the territory of the municipality of Tuzla.”

203 According to Article 98 of the Assembly Rulebook (2006), the Council “monitors the implementation of the Framework Convention for the Protection of National Minorities ... monitors the implementation of legal provisions on the protection of national minorities in the fields of education, information, culture, economic and social rights, as well as participation in the institutions of local governance; cooperates with the national minorities’ organizations established on the city’s territory.”

204 See Document no. 07-013-606/08 on the appointment of members of the Council of National Minorities of Banja Luka City Assembly.

205 Assembly Rulebook 2006, Art. 99. (the Council is to be composed of a president, deputy and five members, both representatives in the city council and from the ranks of national minorities).

conducted by the Centers for Civic Initiatives (CCI)<sup>206</sup>, while a majority of surveyed citizens are interested in the work and functioning of their municipality (63.6%), a majority of citizens have had little experience in participating via different participatory mechanisms.<sup>207</sup> Only 40.1% of citizens surveyed were aware of participation bearing an effect, and only 19,3% were fully or for the most part confident in the work of their local governments. Out of those that do participate, most said they participate through LCs (31.5%), which makes them the most frequently used citizen participation mechanism.<sup>208</sup> These discouraging findings have been confirmed, perhaps in an even more pessimistic tone, during the interviews we conducted.

Having in mind the overwhelming ineffectiveness of the mainstream participation mechanisms, it is not surprising that minorities face difficulties in benefiting from those mechanisms. It is also not surprising that, as one of our interlocutors pointed out, minority organizations are consulted twice a year at most, and usually in relation to the municipal budget cycle. Most of the persons interviewed have confirmed that their opinion on or experience with consultation at the local level is mostly negative.

Our research has confirmed that LCs where minorities are territorially concentrated in significant numbers can be and sometimes are used as mechanisms of communication with municipal authorities. Some of our interlocutors have, for example, confirmed that some local communities in Kakanj, Zenica and Tuzla, where Roma people are in a relative majority are among the most active ones. In general, however, and contrary to the results of some general surveys on this matter<sup>209</sup>, LCs are not considered a particularly successful avenue for participation from the perspective of persons belonging to minorities, due to a number of reasons. There is, for example, a general perception that minorities in LCs have insufficient numerical strength or that LCs as participatory mechanisms are ineffective. In particular, LCs have a lesser participatory potential in RS, because of their above-noted optional status in this BiH entity.

When it comes to municipal authorities, they often point towards the general participation mechanisms and emphasize that these mechanisms, combined with minority representatives in the municipal councils/assemblies, obviate the need for separate and specific consultation mechanisms for minorities at the local level. Some members of national minorities also confirm

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206 The CCI citizen participation survey has been conducted on an annual basis in Banja Luka, Bijeljina, Gradiska, Teslic, Trebinje, Zenica, Capljina, Mostar, Prozor, Dobo, Sarajevo, Tuzla, Srebrenica and Bihac for the past five years. For 2011, out of those surveyed, 0.8% identified themselves as „Others“.

207 CCI BiH 2011, pp. 15-16.

208 Ibid. Despite their legacy as traditional mechanisms of engagement, LCs are today bogged down by a number of problems, not limited to a lack of or instable sources of financing, a lack of competences, non-transparent appointment of local community representatives, low capacities, etc. (Bajrović and Stojanović 2008, pp. 29–39). This can decrease citizen trust in these mechanisms: According to a 2009 World Bank study, a lower number of those surveyed than in the past believes that LCs are local institutions that should be trusted (World Bank 2009, p. 34). However, it is interesting that 81% of those surveyed that have participated through local communities described local community council sessions as the most useful means of participation (ibid).

209 See World Bank 2009, p. 34.

this and cite examples where they participated in public discussions on various draft policy documents and influenced decisions through such mechanisms. The examples of Prnjavor and Dobož, considered by many to be examples of good practice, illustrate this problem. Namely, in the circumstances of such a close cooperation between minority organizations and minority representatives, the latter seem to, *de facto*, become consultation mechanisms at the same time. Paraphrasing one of our interlocutors, they function not as a bridge, but as the bridge between minorities and local authorities.

However encouraging, this development also has its downsides. Firstly, the capacities of one representative to assume the role of the channel for effective political participation of minorities are obviously doubtful. In such circumstances, shortcuts for consultation are often necessary, so representing the interests of minority organizations often becomes synonymous with representing minorities as a whole. This would not be consistent with the FCNM that, according to the AC, requires as broad a range of interlocutors as possible. Moreover, as our interlocutors, including representatives of minority organizations, have confirmed, minority activism is very weak and participation in joint activities, apart from cultural events and celebrations, rarely goes beyond the organizations' leadership. This particular fact makes the practice of using minority organizations as a proxy for this kind of minority consultation highly doubtful.

Nonetheless, even in this case, consultation with minorities more often than not depends on the individual initiative of the elected representative in the municipal council/assembly or minority actors themselves. No institutionalized procedures for communication with minorities in any of the municipalities we focused on have been introduced. Despite this general trend, there is some evidence that the situation might be changing, as the example of a written agreement between the mayor and minority NGOs in Dobož indicates.

Another negative consequence of a generalized approach to consultation with minority actors at the local level is that minority NGOs are rarely treated differently from other non-governmental organizations. This is somewhat surprising, as we have noted some innovative practices of consultation at the municipal level with religious communities, for example, as is the case of specialized meetings or forums with religious leaders in Sarajevo Center municipality. This is, however, not the case with minority organizations and other minority actors. Even in terms of funding allocation, they are not always treated as a separate category of NGOs.<sup>210</sup> In recent years, some municipalities have reserved parts of their budgets for minority organizations specifically. A monitoring report by the Human Rights Office (2008) gives a range of examples of municipalities that have either designated budgetary resources for national minority organizations (e.g. Banja Luka, Prijedor, Gradiska, Dobož, Bijeljina, besides higher-level ministries such as the RS Ministry of Education and Culture or the RS Ministry of

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210 As one of our interlocutors – a representative of a minority organization from Kakanj - illustratively pointed out: “organizations dealing with people and representing people and those concerned with the problems of bees, beekeeping, or agriculture are two different worlds in my view,” and should be treated accordingly.

Administration and Local Self-Government), have supported national minorities through budgetary means directed at different problem areas (e.g. housing or schooling, especially in the case of the Roma population), or have simply supported minority organizations as part of support grants given to different NGOs in the municipality. However, despite these positive developments, significant problems are also reported: allocation criteria for funding are often not transparent; moreover, funds available for minority organizations are mostly directed at realizing the cultural rights of persons belonging to minorities in a given municipality.<sup>211</sup>

### **6.3.5. A Limited Range of Issues and Interlocutors**

Consultation of minorities is often understood exclusively in financial terms – as a matter of budgetary considerations and allocation of resources. The practice of participation of members of minorities in the development of specific sectoral policies is very rare. Examples include participation of Roma representatives in the development of various housing programs. However, even in this domain significant problems were reported to us. A lack of clearly defined criteria for appointing members of minorities to the various minority-relevant commissions and similar *ad hoc* bodies (such as those on Roma education) in the executive at different levels of government can, and indeed sometimes has, lead to the selection of less qualified candidates or the ones with insufficient support of minority organizations.

Closely related is the understanding of “matters affecting them” when it comes to consultation with minorities. Most interviewees expressed an understanding of such matters as being related to the functioning of minority organizations and cultural clubs, and hence directly related to financial matters. This is not surprising, as most minority organizations in BiH are those concerned with culture, historical documentation efforts and the celebration of specific holidays. On the other hand, some expressed the view that these issues are exclusively those that most directly affect minorities, such as the implementation of Roma action plans, general development plans or budgets. Issues beyond these categories and especially those involving general co-decision making at the municipal level have never emerged during our interviews.

In terms of the range of minority interlocutors, the interviewed representatives of local authorities as a rule identify minority organizations; only in one instance did we find that consultations encompassed routes and interlocutors beyond the officially registered minority NGOs, and extended to the general minority population in the local government unit. Such an approach does not reflect the relevant FCNM standards elaborated in Chapter 3 of this report.

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211 See Corni 2009, p. 19.

### **6.3.6. Lack of Mobilization and Coordination of Minority Actors at the Local Level**

Where consultation is deemed inadequate, minorities are often seen as influencing such a development (both by local administration and by some interlocutors from minority organizations) because of a lack of political mobilization, a lack of awareness of their rights and a lack of interest in political participation. Minority representatives and representatives of international organizations working at the local level often expressed the stance that the poor quality of participation of minorities in general, and their consultation in particular, can in large part be attributed to the minorities themselves. With a degree of simplification, some have criticized minority organizations that they are too focused on one aspect of life only. Roma organizations in this perspective are seen as oriented almost exclusively towards socio-economic status and “humanitarian issues”, while the activities of other minority organizations are confined to cultural programs and projects. In both cases, insignificant attention is being paid to broader issues of participation and decision-making in the relevant areas. As many of our interlocutors confirmed, political participation as such is not crucial part of most of the organizations' activities, although some do perform certain policy functions, such as monitoring of implementation of the BiH Action Plan for Roma. What is important is that we were rarely able to identify even the traces of awareness of a duty of the state to ensure the conditions for effective participation of minorities in decision-making.

In the same vein, some of the interviewees have emphasized a poor coordination and divisions between, and often even (more so) within one minority group. Moreover, as some of our interlocutors have asserted, in some local contexts divisions within the minority community are so serious that an articulated minority position on policies affecting them is impossible to reach. Indeed, one has to reiterate the fact that, among the local government units studied, regular and formalized coordination platforms for various minority NGOs have been established in Prnjavor and Dobož only. In other local contexts, although there are examples of minority alliances (such as the coordination of Roma organizations in municipalities of Sarajevo Center or Kakanj) which have reportedly had some success in joint projects, minority organizations participate in broader coalitions mostly with general NGOs, while their communication and coordination with other minority NGOs towards articulating minority voices, which could then be translated into a co-decision making mechanism, is generally absent.

An additional element of this vision of minority organizations as uncertain and unreliable interlocutors in the eyes of the local executive is the objection that minority organizations are unstable: every year a number of them stop working, while others emerge. This is, however, a general characteristic of NGOs in BiH and can not serve as a justification for inadequate communication with minorities on policy issues.

The situation in RS seems to be better at first glance, taking into account the existence of the Association of National Minorities, based in Banja Luka. However, according to some of our interlocutors, even the picture in RS in this regard is far from an ideal one: reforms of the Association directed towards, *inter alia*, better reflecting the local dimension of minority

organizing, are reportedly yet to be undertaken. For now, representatives of some local organizations have informed us that their communication with the RS Association of National Minorities is not satisfactory. Most interviewees in FBiH have expressed their regret that a comparable association of all national minorities in this entity does not exist. At the same time a representative of the FBiH Minority Council has reported cooperation mostly with organizations that deal with general human rights issues. This may be due to a problem of financial resources that the Council may have, as well as the difficulty of reaching minority organizations at the local level; however, such a situation can also mean that the country as a whole is still in a standard-setting phase and that meaningful coordination of minority organizations for the purpose of political participation of minorities is still not seen as an imperative. We were informed that the procedure of forming an association of minority organizations, however, is underway in the Tuzla Canton.

### **6.3.7. Lack of Information on the Multitude of Potential Avenues for Consultation**

Some of our interviewees have confirmed that members of minorities often have no information on the right to participate in public affairs, as well as the avenues designated for this purpose, not even (and especially) at the local level. The whole system of governance of minority issues is so divided and decentralized that members of minorities often do not know where to find the relevant information on how, where and when to participate and relevant decisions to consider. In other words, relevant information is not organized in such a manner as to be easily available to minority organizations in BiH's multitude of levels of governance, and in the numerous institutions and departments at the same level of governance.

Even the Roma Office in the municipality of Zenica does not appear to be a promising mechanism so far when it comes to enabling a better flow of information between the municipality and the minority in question. However, some of our interlocutors believe that an improved mechanism of this sort, a designated one-stop-shop for minority participation at the local level (and its connection with consultative mechanisms at the same and higher levels of governance) would be useful. These interviewees also expressed regret that such an information and coordination office does not exist within the local government's administration.

### **6.3.8. Ineffectiveness of Minority-Specific Consultation Mechanisms as Seen from the Local Perspective**

The awareness of, and the need for, specific consultative mechanisms for minorities at the local level of government was rarely expressed in the course of our interviews.

In the same vein, it is rather surprising that members of minorities seem to be more aware of the consultation mechanisms at higher level of governance (especially the BiH Minority Council) than the possibilities for involvement in decision-making processes at the local level. Moreover, a number of our interlocutors have emphasized that the situation with consultation mechanisms and practices is much better at higher levels of government compared with the local level. Indeed, even when mechanisms of relevance to minority participation at the local level are in place (like the municipal council/assembly commissions on minority issues in Banja Luka and Tuzla), they have not institutionalized transparent methods of consultation and involvement of minorities.

At the same time, our interviews have shown that minority consultative bodies at the entity and state level do not have adequate mechanisms in place to communicate with minority actors at the local level and to help them voice their concerns and positions to their respective local authorities. This is not surprising: such vertical communication has not been explicitly made part of the competences of these bodies, which are mostly concerned with advising on decisions and policies at the level of government that they were formed at in the first place.<sup>212</sup> In addition, some interlocutors confirmed the above-noted problems of resources and inadequate capacities of entity level advisory bodies, which prevented them from taking the local dimension of consultation more seriously. Others blamed minorities and their organizations for inactivity, as these consultative bodies are in principle open to different sorts of inquiries and initiatives. In RS, this vertical communication between different minority participation mechanisms seems to function in a better way, as municipalities and regions have their representatives in the RS Association of National Minorities, as well as the RS Minority Council.

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212 Relevant laws do not seem to explicitly prevent the Councils from communicating with the lower levels of government (see Article 18 of the FBiH Law on Minorities – stating that the FBiH Council is to “oversee the situation with, and implementation of, regulations, define its position on, and issues proposals and recommendations to governmental institutions in the Federation...”; cf. Article 16 of the Tuzla Law on Minorities; Article 18 of the RS Law on Minorities). However, having in mind the above-noted problems and a lack of resources that these advisory bodies face, such an all-encompassing consultative role currently does not appear to be a realistic possibility.



## 7. Conclusions and Main Concerns

Despite the steps undertaken by the state towards enabling effective political participation of minorities, including the introduction of reserved minority seats at the local level and the establishment of consultative bodies at the level of the state and the entities and some of the lower levels of governance, minorities in BiH still do not have adequate options for meaningful participation.

Although in theory political participation of minorities both reflects and marks a paradigm shift in the area of minority rights from the discourse of protection to that of empowerment of minorities and co-decision making, this paradigm shift has still not taken place in BiH. Minorities are still treated mostly as one of the vulnerable groups in accordance with concepts and ideas related to general political participation of citizens or in the context of the general discourse of social inclusion/exclusion. The political participation of minorities is still understood by many relevant actors as related to the ethics of care and protection, financial needs and budgetary considerations, and not as a matter of co-decision making in sectors of particular relevance to minorities and in broader aspects of political life. In such a perspective, political participation of minorities is seen mostly as an *ad hoc* problem-solving mechanism rather than continuous dialogue that would enable persons belonging to minorities to voice their concerns and positions in decision-making and at the same time also inform the general directions of development of a society.

The elements of the system of minority participation and some participative tools for persons belonging to minorities dispersed throughout the various levels and different institutions of governance indicate that participation of minorities is taking root in BiH legal and political system and practice. However, when seen from the perspective of local governance, mechanisms of participation of minorities are weak and mostly ineffective in representing minority voices within the local political community.

One of the dominant problems is the overwhelming perception of the crucial importance for minorities to have a political representative in the local council/assembly. Moreover, it could be said that the issue of political participation of minorities at the local level is equated with political representation, while the stream of consultation remains neglected, not only in terms of the legal framework and practice but also as a matter of general public and policy discourse on political participation of minorities in BiH. At the same time, even the practice of political representation of minorities is mostly ineffective, as it is trapped between two currently irreconcilable essentialisms: the insistence on mainstreaming of political participation of minorities within the dominant political parties on one hand, and the widely shared stance within the minority community in BiH that political representatives of minorities need to come exclusively from the ranks of minority organizations on the other.

Where minority political representatives come from minority organizations, the quality of political participation of minorities in general is indeed widely seen as more successful and effective,

which could also be a self-fulfilling prophecy. The problem is, however, that in such circumstances the concentration of political participation in the stream of representation seems to be much higher, obviating the need for separate consultative mechanisms of any sort. In addition, options for reconciling the two positions on political representation of minorities and thereby improving the situation in the overwhelming majority of municipalities where minority political representatives come from political parties have not been seriously discussed or attempted.

Faced with the ineffectiveness of the general consultation mechanisms for all citizens and inadequate communication with minority-specific consultative bodies at higher levels of government, persons belonging to minorities do not have institutionalized options for continuous participation in decision-making at the local level. Consultation of minorities is, as a rule, *ad hoc* and confined to several limited issues, such as distribution of funds to various minority NGOs. Although we did not observe patterns of marginalization of any minority organizations in particular, one can observe that the consultation of minorities is mostly confined to minority NGOs and that it rarely extends to the less organized minority groups, which goes against the all-encompassing participatory spirit of the FCNM.

When seen from the perspective of the local government level, the whole minority consultation system can best be described by the words of one of our interlocutors: “This is more of a system of lobbying, advocating and pushing for a certain action through certain persons, which depends on personal contacts and connections within the municipality”.<sup>213</sup> Indeed, where any kind of consultation of minorities exists, it is a complex combination of general participation mechanisms (such as LCs), active work of minority organizations and associations, specific departments within local executive, and an intermediary function of a minority political representative in the municipal council/assembly. As such, the consultation of minorities at the local level can be seen as a chaotic web of lobbying and problem solving rather than an institutionalized and meaningful mechanism of political participation, dialogue and co-decision making.

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213 OSCE representative, Banja Luka.

## 8. Recommendations

1. Specific discourse of minority political participation based on empowerment and co-decision making, rather than on social vulnerability and protection, needs to be widely promoted in the public sphere and at all levels of governance.

2. Awareness-raising campaigns and promotional activities related to the practice of political representation of minorities (including the realization of the passive voting right and how to vote for minority representatives) need to be organized and consistently implemented before the next local election.

3. Ways of enabling meaningful political representation of minorities at the local level through political parties, minority organizations and independent individual candidates should be elaborated and explored. This is necessary in order to avoid the sense of mistrust and competition between minority organizations and political parties, between minorities and majorities. This potential pluralism of minority candidates and representatives needs to be taken advantage of for the benefit of minorities in each local government unit. However, this is only possible if the legal obligation of elected minority representatives to represent all minorities and advance their interests is respected.

4. Closely related to the previous issue – elected minority representatives need to be provided with the necessary logistical and other resources to be responsive to and advance the interests of minorities. At the same time, minority actors also need to be sensitized to the possibility of being represented by elected minority members of local councils/assemblies of various backgrounds and encouraged to use this important channel of participation at the local level.

5. Laws and regulations on the rights of minorities in line with those that exist in Tuzla canton need to be adopted in other cantons of FBiH as well. Such a development would be particularly relevant for regulating and institutionalizing minority consultation mechanisms and their coordination from local government units up to the FBiH Minority Council.

6. Mechanisms of consultation of local authorities with minorities need to be promoted and institutionalized. In accordance with the FCNM standards, this is particularly relevant for those municipalities with a significant minority population that did not provide for reserved seat(s) for minority representatives. These consultative avenues can involve general consultation mechanisms adjusted to the specific position of minorities in the decision-making processes (for example forums on minority issues of some sort) or the development of minority-specific ones.

7. More specifically, local authorities need to be provided with instructions or protocols formulated at the higher levels of government, that would serve as guidelines on how to effectively organize participatory processes at the local government level. In developing those protocols, state authorities need to be aware of the specificities of the legal status of minorities in terms of consultations and adjust these mechanisms accordingly. In this sense, forums on religious issues

as participatory mechanisms for consultation with religious groups that are organized in some local government units in BiH can serve as a source of inspiration.

8. A range of issues on which minority actors are consulted need to be extended beyond mere budgetary considerations and encompass decision-making more generally. At the same time, the range of minority actors being consulted needs to be extended beyond minority organizations to also encompass those minorities that may not be as organized or as politically active.

9. Local authorities need to develop points of contacts with minorities in the executive that would also be responsible for the coordination between all departments and municipal bodies that may take part in minority consultation.

10. Minority organizations need to develop internal capacities and mechanisms for participating in decision-making processes, including the local level.

11. In addition, minority organizations need to coordinate among themselves to reach local authorities more easily. Such coordination would be beneficial for the effectiveness of both the representation and the consultation of minorities. Activities of local organizing of minorities in Dobož and Prnjavor are examples of good practice in BiH in this regard.

12. More specifically, an association of national minority organizations needs to be established to support the work of the FBiH Minority Council and to facilitate the vertical cooperation between local authorities, local minority actors and minority councils at higher levels of governance.

13. The practice of organizing minority-relevant commissions as forums for consultation with minorities within municipal assemblies/councils needs to be further extended.

At the same time, the dominant approach in this context should be changed, to introduce more minority representatives, and more pluralism within the membership of these bodies – not only in terms of various ethnic groups, but also in terms of various institutional settings, ranging from government representatives and party candidates to individual persons belonging to minorities.

14. Consultative bodies at higher levels of government need to develop procedures and mechanisms to communicate with minority organizations and persons belonging to minorities at the local level. At the same time, consultative bodies need to have the necessary competences, resources and capacities to be able to use their position to also act as a vehicle for voicing the concerns and opinions of minorities towards institutions of local governance. This would be particularly relevant for the still large majority of municipalities where mechanisms of minority consultation have not been institutionalized.

15. A body (or, alternatively, state and entity bodies) tasked with coordinating and promoting minority political participation institutions, procedures and policies and mainstreaming minority issues at various levels of governance needs to be identified and provided with the necessary competences to perform this coordinating function.

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# About the Author

**Edin Hodžić** (Sarajevo, 1977) graduated from the Faculty of Law at the University of Sarajevo and obtained his Master's Degree in International Human Rights Law from the University of Oxford. He is currently a Ph.D. candidate at the Institute of Comparative Law of McGill University's Faculty of Law. He is also a member of the McGill Centre for Human Rights and Legal Pluralism. From 2002 to 2005, Edin worked as Project Coordinator at Mediacentar Sarajevo, following which he took up the post of Analyst at the Prosecutor's Office of Bosnia and Herzegovina, where he worked until mid-2007. From 2008 to 2010, he was Editor-in-Chief of The Pulse of Democracy, an online publication of the Open Society Fund Bosnia and Herzegovina. He is currently Head of Public Law Program at Analitika – Center for Social Research. His research interests lie in the fields of constitutionalism and international human rights law, with a particular focus on the theory and practice of collective and minority rights and transitional justice. He has worked on a number of research projects and published several papers in the field of law.

# Annex: Case Selection and Interviews

## 1. Case Selection

The cases selected were municipalities Center (Sarajevo), Kakanj, Zenica and Tuzla in F BiH, Bijeljina, Doboј, Prnjavor and the city of Banja Luka in RS, and Brčko District as a distinct unit of local self-governance.

A most similar case selection approach was applied in order to select municipalities.

Given that in most similar system designs, the tendency is to look for differences in contexts that are roughly similar with respect to as many features as possible, except for the variables of theoretical interest,<sup>214</sup> municipalities were chosen that had a significant population share of citizens declared as members of different national minorities.

Unfortunately, the most recent official data available are those from the 1991 census,<sup>215</sup> and no official estimates on the number of national minorities per municipality have been conducted in BiH since then.<sup>216</sup> In order to get a better insight into the current population size of national minorities as well, as a very rough proxy, we chose the number of persons that had voted for national minority representatives in the most recent local elections in 2008<sup>217</sup>. We are aware that this proxy is problematic for at least three reasons: not all of the municipalities that have had a significant population of national minorities in 1991 have introduced national minority seats in the municipal council/assembly (there are currently 32 municipalities out of the 141 municipalities and Brčko District that have minority representatives in their council/assembly); there was no significant public campaign conducted prior to the 2008 local elections to raise the awareness of members of national minorities about the possibility of voting for a national minority candidate; finally, both persons belonging to minorities and the rest of the electorate could alternatively vote for separate minority lists in the local elections. Another important aspect to mention is the fact that some 30 municipalities were formed during or after the war. Due to this reason, we also chose to select municipalities that have had a significant population share of national minorities prior to the war – but that do not have minority seats in local councils/assemblies.

In order to have a substantial number of cases, yet take into account objective logistical and time constraints, we opted for nine case studies. To choose the final nine, a comprehensive list of municipalities was created, later narrowed down in line with criteria that will be described below.

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214 This allows the research to ignore a large number of variables under the assumption that they are equal.

215 The 1991 census is the last census conducted in BiH, and the only official source of data on the number of national minorities in BiH.

216 The 1992-1995 war had a significant effect on internal and external population movement.

217 For 2008 local election data, see Central Election Commission of BiH 2011.

The initial list included municipalities that before the war had a relatively significant share of minorities. Although “significant” can be a rather subjective term, the threshold of “below 3%” national minority share of the population size mentioned in amendments to the Electoral Law in 2004 with respect to introducing at least one minority seat in local councils/assemblies was used as a point of reference here. We initially took this criterion to mean as close to 3 percent as possible. However, we substantially relaxed this point of reference as the majority of municipalities in 1991 had a population share of national minorities well below 3%. In fact, judging by the 1991 census, only Trebinje, Prnjavor and Bileća had a national minority population share of 3% or above.<sup>218</sup> Also, the number of persons that voted for national minority candidates in the 2008 local elections is well below 1% of the total persons that voted in the election.

For an initially broad pool of municipalities, we opted for at least 0.5% as a national minority population share according to the 1991 census as a threshold, inevitably a subjective criterion. We picked the same threshold for the share of persons that voted for national minority representatives out of the total number of persons that voted in the 2008 election in a respective municipality. An additional criterion for the 2008 election was that the number of votes be at least a 100, as to ensure that there was a community of national minorities in the municipality (given that population sizes of the municipalities have varied significantly since 1991) significant enough to carry out the research and to be able to identify interlocutors.

We also looked at municipalities that did not have national minority representatives in the local councils /assemblies, but that had high national minority population shares in 1991. Given that we only had nine cases to investigate, we opted for at least one case in FBiH and one in RS that had a significant national minority share before the war, but did not have national representatives in the councils/assemblies after the war. We simply chose the ones that had the highest population shares on the list – Center (Sarajevo) in FBiH and Bijeljina in RS.<sup>219</sup>

The selection of municipalities was, in the group that had national minority representative votes and a national minority share in 1991, narrowed down to 13, in line with the 0.5% threshold.

Given that, as mentioned above, a most similar approach takes into account differences of interest for the particular study, different legal and institutional frameworks as a point of difference and a potential factor that influences minority participation at the local level was taken into account here. Thus, we decided to pick District Brcko as a separate unit of local government, and to pick the rest of the cases from FBiH and RS (four cases each). Due to different legal and institutional frameworks at the cantonal level as well, we wanted to select municipalities from different cantons within FBiH.

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218 See FBiH Federal Office of Statistics 2011.

219 Bileca was dismissed as a case because it is a small-size municipality that has also seen great migration after the war; there was an objective possibility that there wouldn't be enough persons to interview on the subject.

Other special points of difference of interest for this study were institutional mechanisms in place. We wanted to study a spectrum of these mechanisms and how they interrelate and influence political participation of minorities, both taken in isolation and in relation to other mechanisms. Such mechanisms included reserved national minority seats in local councils or assemblies, special advisory bodies to the local council or assembly (local national minority committees or councils) and national minority clerks or officials/departments within the local administrations. Unfortunately, data gathered from secondary sources was very piecemeal to recognize other points of difference (e.g. assess the existence of civil society groups), but information gathered was used and complemented with targeted phone-calls to municipalities, asking them whether they had an advisory committee or another special body for national minorities.

We thus narrowed down the selection of municipalities (besides Centar Sarajevo and Bijeljina) on the basis of existence of such bodies: an office of the national minority representative in the municipal assembly in Doboje, a Roma administrative clerk in Zenica (FBiH), both a national minority commission in the local assembly and an office for national minorities in Banja Luka (RS), a commission in Tuzla (FBiH). The remaining two cases were chosen according to the case selection criteria - a high share of national minorities before the war (1991) and currently (using 2008 elections as a proxy), looking at both the number of votes itself and a number of votes as a share of the total number of votes: thus, the final two cases selected were Kakanj (FBiH) and Prnjavor (RS).<sup>220</sup>

## 2. Interviews

After the cases were chosen and a semi-structured interview guide was prepared in line with the analytical framework, the research team identified relevant interlocutors or key stakeholders, consisting of: local government representatives, minority representatives in local councils/assemblies, representatives of minority organizations, international organizations and national and independent experts. The different actors for the most part answered the same set of questions (although some questions were specifically tailored to the interlocutor) as to get an insight into how different groups perceived different aspects of minority participation studied.<sup>221</sup>

Although some of our interlocutors were difficult to classify, as they belonged to more than one group, the table below offers a breakdown of interviews by the type of interlocutor<sup>222</sup>:

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220 Novo Sarajevo was excluded as a case because of its proximity to Centar Sarajevo, which was already selected as a case: the two municipalities are a part of the city of Sarajevo. The other remaining municipality in FBiH was Kalesija, near Tuzla; comparatively, Kakanj had a much higher number and share of votes for national minorities in 2008, and was thus chosen instead. In RS, Prnjavor was primarily chosen because it was the municipality with the largest share of national minorities before the war.

221 A detailed Interview Guide is available upon request.

222 If a certain person belonged to two or more groups, they were only counted once. The numbers in the table represent the total number of persons interviewed.

<b>Interlocutor group</b>	<b>Number</b>
Representatives of minority NGOs <sup>223</sup>	23
Local government representatives	11
National minority representatives in local councils/assemblies	8
Expert representatives of international/national organizations in the field of minority rights	15
<b>TOTAL</b>	<b>57</b>

It is important to note that many of the interlocutors that were representatives of local or national minority NGOs or served as independent experts were also representatives of advisory bodies for national minorities at different levels of government: in fact, seven of the interlocutors were, at the time when the research was conducted, also members (or presidents) of minority advisory councils at entity or state levels.

Stakeholders were selected as interlocutors as a result of the relevance of their position (e.g. elected minority representatives), but also by using the snow-ball method, by which stakeholders identified were asked whom they would recommend as additional interlocutors in case it was difficult to gather information on potential interviewees (usually for smaller communities for which information was not readily available). Moreover, in municipalities with a large number of minority organizations (e.g. Tuzla or Banja Luka), interviewees were primarily chosen based on recommendations and on their availability and readiness to participate in the interview. We are aware of the potential limitations of such an approach, as some important interlocutors may have been left out, but time and financial constraints, as well as the difficulty of contacting different interlocutors locally, were important considerations in opting for a snow-ball method. Nonetheless, we believe that the number and spectrum of our interviewees is illustrative enough for their input to be, in addition to the relevant legislation and available secondary sources, a valuable basis for our findings and recommendations.

Interviews were conducted face-to-face in all of the municipalities chosen and, in exceptional circumstances, where an important interlocutor couldn't meet with the interviewer, via telephone.

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223 There were a few (2) NGOs that acted beyond the confines of their municipality, on a regional or national level. One of the nationally-active minority NGOs was not actually located in any of the municipalities studied, but was recommended as an important interlocutor.



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