Sustainable Institutional Mechanisms for the Improvement of Minority Representation in the Parliament of Montenegro

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Public Policy Study

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Contents

1. Introduction

The issues of normative regulation and the affirmation of the rights of national minorities represent one of the key criteria for assessing the degree of democratization in a society. Additionally, they represent requirements for the country's integration into European and Euro-Atlantic structures. The essence of the protection of national minorities rests in non-discrimination and equality, as well as in defining a set of principles which guarantee the preservation of their national, religious, cultural and linguistic identities.

In accordance with the efforts of the international community to place the entire field of human rights under its supervision and that of certain international organizations, the status and protection of national minorities is currently outside the exclusive jurisdiction of the state. Namely, international and political obligations of states have gained in prominence, while the area of human rights and therefore the rights of national minorities, fall increasingly more under the jurisdiction of international organizations. Such organizations are: the European Union, the Council of Europe and the Organization for Security and Cooperation in Europe. Many countries today meet international standards in this area, especially those that aspire to become fully recognized members of international organizations. In this sense, many organizations such as the Council of Europe, the Organization for Security and Cooperation and even the NATO, which for the past two decades operates increasingly more as a political organization, require the respect for human and minority rights as the first necessary condition for the acquisition of the membership status. Furthermore, the operation and the effectiveness of the High Commissioner on National Minorities of the Organization for Security and Cooperation, the application of provisions of Framework Convention for the Protection of National Minorities of the Council of Europe, as well as the Copenhagen criteria for the admission of new member states into the European Union, have greatly contributed to the promotion of minority rights.

The harmonization of electoral legislation with the Constitution, in terms of the introduction of institutional mechanisms for the minority representation into the Montenegrin legal framework, gave way to the following dilemmas:

1) should the electoral system be comprehensively reformed or should the planned activities be implemented within the existing system;
2) should the Parliamentary seats be ensured for the minority representatives or for the minority political parties;
3) should the normative framework that was under scrutiny by the international organizations be improved, or should the implementation of future activities be focused solely on developing a model for ensuring the mechanisms for minority representation;
4) should the new electoral law be adopted or should the current one be amended;
5) should the constitutional requirements for the acquisition of electoral rights be amended
6) should the separate laws deal with the elections for national and local parliaments.

The lack of wider consensus on these issues has significantly reduced chances for successful harmonization of these processes and their overall implementation.

The aim of this study is to analyze the existing proposed models, as well as to propose new means for the adoption of institutional mechanisms for the adequate representation of minorities in the national Parliament. This was induced from the following clearly defined attitudes which are related to the following dilemmas:

1) The existing system needs to be improved in a comprehensive way. Regardless of whether the improvements will be introduced to the current system of party lists, or a new system established, the scope of changes should represent the change of the electoral system.
2) The electoral changes need to enable effective institutional mechanisms for the representation of minorities, but should in no way include the introduction of legal mechanisms for guaranteeing seats to parties that opt to represent minorities. Guaranteeing the seats to parties that represent minorities and not to minorities themselves would be detrimental to one of the key principles of democratic elections – competitiveness.
3) The decision makers should improve the existing legal framework, based on the recommendations of international and domestic organizations. The improvements of the existing system would ensure the harmonization of the existing legal framework with the international standards and good practices.
4) The scope of the proposed amendments, including the proposals by both the governing and oppositional parties is so wide that it jeopardizes a qualitative overview of the legal texts and gives way to inconsistencies and contradictory norms. This is the case with the current legal text.
5) Amendments of the Constitution, through the introduction of provisions are often not based on good practices and can jeopardize the political stability. Such provisions should not be adopted. The electoral right should be regulated in accordance with good practices.
6) It is necessary to adopt two legal documents that treat the issue of electoral system and enable differing treatment of national and local elections.

In accordance with the abovementioned attitudes, this study deals with the issue of improving the electoral framework of national, not local elections.
The study is structured into 6 chapters, dealing with different aspects of this problem and its consequences, as well as provides the possible scenarios based on which the issue can be resolved. The study examines two scenarios proposed by the political actors, as well as two additional scenarios that are developed by the Center for Monitoring team.

1.1. The political context

Since the end of World War II until the early 90s, according to the socialist organization of the former state, in which one party system was ruled by the Communist Party of Yugoslavia,the concept of minority rights had been reduced to a party monopoly within the decision making processes, where "brotherhood and unity" preceded the exercise of all other rights. The establishment of the multiparty system[1] served as a good basis for the protection of minority rights. In Montenegro, the multiparty system was introduced through the adoption of the Law on Election and the Recall of Deputies and Representatives and the Law on Election of the President and Members of Presidency of the Socialist Republic of Montenegro, on September 28th and October 3rd, 1990.[2] Simultaneously, the Assembly adopted a Decision on appointing the members of the Republican Electoral Commission, whose composition included representatives of several parties and political associations. Political pluralism in Montenegro was definitely introduced on December 9th, 1990, when elections were held, with 18 political organizations registered. Adoption of the 1992 Constitution was politically significant because it established a good basis for the protection of minority rights. Specific norms guaranteed the application of international standards in the area of exercising minority rights. These norms, however, were not sufficiently elaborate to substantially change the legislative system. Pursuant to the socio-political context of that period, it was difficult to realize such a normative framework in practice.

On the other hand, in the years of the establishment of multi-party system, members of minorities in Montenegro were of different orientation. Namely, while those who were engaged with the previous system remained in parties that arose from various youth organizations of the then Communist party, others have joined newly founded parties with pronounced nationalist agendas.

During the dissolution of SFRY, the territory of Montenegro hosted Albanian, Roma, as well as Croatian and Muslim/Bosniak minorities, who were constituent people in the former Yugoslavia. Aiming to improve their status, they have formed the Party of Democratic Action, which was a parliamentary party. However, the work of the party was hampered during the Milosevic era, which is why, during the late 90s the membership of the party significantly shrank and formed a number of smaller parties with no notable political influence.[3] On the other hand, the Albanian minority formed the Democratic Alliance in Montenegro, from which the Democratic union of Albanians was formed and later several smaller parties, politically dividing the electorate of the Albanian national minority. The Albanian minority, however, had a very important status in numerous civil parties, particularly in the former Liberal Alliance of

1 After the collapse of the socialist block, all of the republics have adopted electoral laws that introduced multiparty system, as follows: Slovenia on December 27th, 1989, adopted the Law on Multi-party Elections; Croatia on February 15th, 1990, adopted the Law on Election and Recall of Deputies and Representatives; Macedonia on September 21st, 1990, adopted the Electoral Law; Bosnia and Herzegovina on June 31st, 1990 and Serbia on September 28th, 1990.

2„Official Gazette of Montenegro" number.36/90

3 Publication of group of authors: "Political parties and right to political participation by minorities," Fridrih Ebert Stiftung, 2008.

Montenegro. Croatian national minority during the nineties was divided between members who supported the project of an independent state and those who supported the Liberal Alliance of Montenegro. Later, a significant number of Croatian national minorities joined the Socio-democratic party, while current Croatian Civic initiative was be established in 2002.

Since 1998, the government was formed by minority parties DUA, SDA and DS. This period is considered to be a significant milestone for the establishment of a coalition between major parties. This resulted in a change of power relations between minority and other parties, which was almost inconceivable during the early 90s, when members of minorities were on the margins of decision-making process in Montenegro. Until the split of the Democratic Party of Socialists in 1997, minorities in that party have not propagated the interests of minorities they were supposed to represent.[4] Further, they did not hold high offices at either the republic, or local levels. However, since the split of the Democratic Party of Socialists, the official policy has substantially changed through the establishment of the Ministry without Portfolio, which was headed by the representative of DUA. Later, the ministry will be reorganized into the Ministry for National and Ethnic groups, which presently the Ministry of Human and Minority rights. Since 1998, at the head of this ministry are representatives of the Democratic Union of Albanians and members of Bosniak minority from the ranks of SDP and the SDA.[5]

Due to the split of the ruling sets in 1997, the Agreement on the Minimum Principle for the Development of Democratic Structure in Montenegro was signed (September, 1st, 1997). This Agreement[6] was adopted on the eve of the presidential elections, held in October 1997 and served as a good basis for regulating the electoral legislation, defined a year later with the Law on Election of Deputies and Representatives. This law regulated the system of protection of only the Albanian rather than all minority communities in Montenegro. [7]

Even though the internal conflict of two federal units of the former Federal Republic of Yugoslavia sparked some progress in democratization of society as a whole, it was still not possible to speak about concrete developments in the area of individual protection of human and minority rights. This was more the case when bearing in mind that legal acts adopted at the federal level were not implemented in the territory of Montenegro. Such practice was in accordance with the principle of political representation in the federal legislature. Through the adoption of Constitutional Charter of Serbia and Montenegro, as well as the Charter on Human and Minority rights, a solid legal framework for the enjoyment of minority rights was established. However, it should be noted that the Law on Minority Rights, adopted at the level of federation, was outside the legal framework of Montenegro, while at the same time the legislative framework itself did not function properly.[8]

4 SDP and Liberal Alliance during the entire period had a remarkable number of minorities within its ranks, some with even the decisive position within the party.

5 Today, the members of minorities hold numerous public functions in state bodies.

6 The provisions of Agreement guaranteed to opposition holding of free and fair elections in the future, while on the other side, the Agreement represented a form of anti-Milosevic political alliance, before the presidential elections.

7 See more on page 10.

8 Primarily refers to the institution of the Court of the community, which had the jurisdiction of the judicial protec-

Concrete legal measures in the area of protection of minority rights were established through the adoption of the Law on Minority Rights and Freedoms[9] in Montenegro. The adoption of this law was significant for the overall prosperity of the society, especially when bearing in mind that Montenegro is a multinational, multi-denominational and multicultural state. Namely, in Montenegro no national or ethnic group holds a majority in the overall population, meaning that Montenegro is a civic state represented by all the people who live in it. Therefore, the provisions on the protection of rights and freedoms of minorities mirror the democratic development of Montenegro.

The Law on Minority Rights and Freedoms defines the minority as any group of Montenegrin citizens that are numerically smaller than the dominant population, who share common ethnic, religious or linguistic characteristics, who are historically linked to Montenegro and are motivated by the desire to express and preserve their national, ethnic, cultural, linguistic and religious identity. Many experts in the field of human and minority rights have agreed that the definition of minorities, according to this Law, is satisfying. In fact, a similar definition is also included in the Framework Convention for the Protection of National Minorities of the Council of Europe[10], which was ratified by the Parliament of Montenegro and came into effect on the 1st of September, 2001. On the other hand, the Constitution of Montenegro does not provide the definition of minorities, although the preamble of the Constitution provides general formulation of the commitment of the citizens of Montenegro to live in a country where the basic values are freedom, peace, tolerance, respect of human rights and freedoms, multiculturalism, democracy and the rule of law. The preamble further stipulates the commitment of the members the national minorities living in Montenegro: Montenegrins, Serbs, Bosnians, Albanians, Muslims, Croats and others, to be free and equal citizens and committed to the democratic and civil Montenegro.

The law protects the acquired rights of minorities. In addition to the rights provided by the generally accepted international rules and ratified international treaties, the Law provides full enjoyment of minority rights under the equal conditions with other groups. According to the provisions of the Law, minorities and their members have the right to establish institutions, societies, associations and NGOs in all areas of social life, while the government participates in their legal funding, in accordance with its capacities. Furthermore, the members of minorities are enabled, by the Law, to independently and freely declare themselves as members of a certain minority and to freely make decisions about their own personal and family names and of their children. They have the right to enter names in the registers and personal documents in their own language and script. The Law on Protection of Rights and Freedoms of the National minorities of former Yugoslavia[11], on the contrary, did not allow any registration of persons belonging to

tion of rights guaranteed by the Small Charter, while the safeguards did not have efficient and effective legal and factual effect.

9 The Law on Minority Rights and Freedoms (Official Gazette 31/06), adopted on 10.05.2006

10

11 The Law on Protection of Rights and Freedoms of the National Minorities of the former Yugoslavia (Official Gazette of FRY 11/02) adopted on 27/02/2002.

national minorities, which against their will, obliged them to declare their nationality.

When it comes to the use of their language and script, the members of minorities have the right to use their language in local governments where they constitute a majority or a significant portion of the population. The Framework Convention for the Protection of National Minorities of the Council of Europe uses the qualifier "traditionally or in a larger number" as a parameter of the population on which will be determined the basis for entitlement of minorities to use their own language. However, this Convention provides minimum standards that the state must respect. The Law on National Minorities provides that the percentage of one national minority, related to the total of the population of the local government, should be 15 percent so that their language and script can be put to official use, which means that the Montenegrin legislature in this case has opted for the prescribed minimum. On the other hand, it is not precise what number of minorities represents "a significant portion of the population", rendering it a discrete right of the competent authorities to decide on, whereas that kind of power can be abused.

The Framework Convention provides that the Contracting States are obliged to guarantee to each member of a national minority the right to be informed immediately, in their own language which he/she understands, about the reasons for one's arrest and the nature and causes of accusation brought up against him/her, as well as prescribes the ability to defend oneself in that language with the free assistance of an interpreter. This right is not provided by the Montenegrin Law. Official use of language implies that the minority language is used in all public areas and institutions. This means that the language of national minorities should be used in the sessions of the Municipal Assembly, in issuing of public documents, in keeping official records, in administrative and judicial processes, on the ballot and other election materials as well as in the work of a representative body. In areas where minority people are majority or significant portion of that population, names of the streets, squares, companies, names of local governments and all bodies who exercise public powers of acting and authorizations should be written in the language and script of a minority.

However, the Constitution of Montenegro stipulates that persons belonging to national minorities have the right to use the official language only at the local level, and local governments where the minorities are majority of the population. However, in local government in which a substantial part of the population consists of national minorities the use of minority languages is not guaranteed, instead such decision is made in local governments and within each municipality. According to the provisions of the Constitution, members of national minorities don't have the right to refer in their own language to the Republic authorities or to receive a reply in that language. Also, the right to address the Assembly in their own language and to get materials in that language is not prescribed to the MP of minorities.

The law also guarantees the freedom of information to minorities, which means that minorities can establish the media, as well as prescribes the freedom of expression, research, data collection, publishing and receiving information, and free access to all sources of information and protection of persona. The media is required to provide the program

contents and the appropriate number of hours to broadcast news, informative, cultural and educational, sports and entertainment programming in minority languages. These contents must be transmitted over public services at least once a month. In addition, the Government may introduce incentives for other radio and television programs to broadcast the above programming. Members of minorities have the right to education in their own language and adequate representation of their language in general and vocational education. The parameters based on which such representation is determined are the number of students and financial capacities of Montenegro. Classes are conducted entirely in the minority language, while they are obliged to learn the official language and script. The right of national minorities to be informed in native language is also guaranteed by the Constitution of Montenegro[12]. The Constitution provides that national and ethnic minorities have the right to freely use their language and script, prescribes the right to education and the right to information in their language. Finally, according to the Law on Minority Rights and Freedoms, relevant authorities and public services established by Montenegro are obliged to provide a certain number of hours for broadcasting in the language of national minorities.

Further, the minorities are guaranteed the right to use national symbols as well as to mark important dates, events and persons from their tradition and history.

Besides the right to represent their interests, minorities have the right to participate in the exercise of power. Namely, the law requires that minorities which constitute one to five percent of the total population of Montenegro to be represented in the Parliament of Montenegro with one parliamentary seat. Those who, according to the results of the last census of the population, constitute over five percent are guaranteed three seats. Thereat the linguistic and ethnic particularities, as well as the acquired rights of Albanians in Montenegro need to be taken into account. Minorities, which at the local level constitute one to five percent of the population, are entitled to one representative at the Assembly of the local government, while those who make more than five percent achieve their rights in accordance with the electoral legislation. The Law on Minority Rights and Freedoms guarantees the proportional representation of minorities in public services, state and local governments, which is ensured by the human resource bodies, in cooperation with the minority councils. Statutes, decisions and other legal acts adopted by local governments must be written and published in both the official and minority language and minority languages and scripts.

Minorities have the right to establish and maintain relationships with cross-border native countries and their compatriots, under the condition that this right cannot be exercised contrary to the interests of Montenegro. There is an opportunity for the state to provide tax and other reliefs or exemption from customs duty, in cases of financial or other material assistance provided from abroad to minority associations, institutions and NGOs.

An integral aspect of this law is the right of minority members to establish councils, which represents an important model for the representation and protection of national minorities'

12 The Constitution of the Republic of Montenegro in 1992, guarantees the right to education in native language to all national minorities.

interests. Namely, the Article 26 of the Law on Minority Rights and Freedoms stipulates that minorities and their members have the right to participate and propose decisions made by the government bodies, when they are important for the accomplishment of minorities' rights. According to the law, this is done through three models; the adoption of the strategy on minority policies; the establishment of minority councils and the Fund for minorities. According to the Article 7, the Law on Minority Rights and Freedoms, the Montenegrin government is obliged to adopt the Strategy on Minority policies, with the aim of defining measures for the implementation of this law, the improvement of the living standard of minorities, as well as the higher degrees of Roma integration in the social and political life. These measures altogether aim to secure the enjoyment of national and/or ethnic specificities to members of such groups. The establishment of minority councils represents an important indicator of minority group organization and successful exercise of their rights.

Article 35 defines the jurisdiction of minority councils:

- Representing minorities;
- Submitting proposals to state authorities, local self-governments and public services aimed at the improvement and development of minorities' rights and their members;
- Submitting initiatives to the President, with the aim of canceling the adoption of a law that jeopardizes the minorities' rights and their members;
- Participating in the planning and the establishment of educational institutions;
- Providing opinions on thematic programmes that accentuate the minority specificity;
- Designating a particular number of students for enrollment at the University of Montenegro;
- Initiating the amendment of regulation and other acts, which regulate the rights of minority representatives;
- Performing other jobs in accordance with this act.

Additionally, the Council participates in resolving the issues concerning the rights of minorities and their members, which are typically discussed by the state and public service authorities. Namely, the state and other authorities, within the 30 days from the date of initiation or request, pursuant to the paragraph 1 of this article inform the Council about the implemented measures.

The protection of minority rights is provided by state bodies, i.e. the local self-government and courts. The Government is obliged to submit an annual report about the development and minority rights protection to the Parliament. The law also defines two prohibitions in dealing with minority groups. The first purports to prohibiting measures that would contribute to changes in the structure of population in areas where minority groups live. The second relates to the prohibition of discrimination on any basis and particularly that of race, color, gender, national belonging, social origin, birth or similar status, religious denominations, political or other convictions, state of assets, culture, language, age and mental or physical integrity.

Shortly after the adoption of the Law on Minority Rights and Freedoms, the ConstitutionalCourt of Montenegro on July, 11, 2006, announced the unconstitutionality of

articles 23 and 24 of this law[13]. The provisions guaranteed seats to minorities,[14] in the following manner: to minority groups that constitute 1 to 5 percent of the entire Montenegrin population, according to the last census results, the law guarantees one seat, while to those minority groups that in the total Montenegrin stitutional order and acted in accordance with the election rights protection and principles guaranteed by the Constitution and existing regulatory rules.

The Constitution guarantees the legal possibility for the exercise of guaranteed seats, by prescribing guarantees for an authentic representation in the Parliament of Montenegro and prescribing guarantees for an authentic representation in the Parliament of Montenegrof the population, according to the principle of affirmative action. The Law on Election of Councilors and Representatives from 1998, currently enforced, established the electoral model which facilitated the conditions for winning seats in favor of one minority group. This was also defined by a special Decision of the Montenegrin Parliament on the number of electoral seats by which this exclusive electoral right is exercised (the provision of the Law that establishes that the election of five of the total number of deputies is performed at the specific pooling places, as specified by the aforementioned Decision). In this way the acquisition of parliamentary seats for the Albanian minority is facilitated, proportionate to the share of the Albanian minority in the population. However, at the elections held in 1998, 2001, 2002 and 2006, Albanian minority parties (DUA, DSCG and AA) won only two seats because they received the support from 2 percent of voters, which is almost three times less than the number of Albanians in the Montenegrin electorate. The explanation for these proceedings lies in the fact that the Albanian electorate voted in accordance with their political, not national orientation. In the 2009 elections, the Albanian minority parties won 4 seats (DUA, FORCA, AK and AL).

The aforementioned provisions established the system of protection for only one, not all minorities in Montenegro. Although the provisions were criticized by the OSCE/ODIHR, which minorities in Montenegro. Although the provisions were criticized by the OSCE/ODIHR,. The overall process of resolving this issue was marked with a very pronounced politicization among parties.

Following chronologically, the key documents that regulate the protection of minority rights, as well as key events from the past two decades that were critical in the promotion of rights, as well as key events from the past two decades that were critical in the promotionegro renewed its statehood. In this referendum, a large portion of the minority population opted for Montenegrin independence. Shortly after, in 2007, the Parliament of Montenegro adopted the Constitution. The Article 9 of the Constitution stipulates: "the ratified and published international agreements and generally accepted rules of international law shall make an integral part of the

13 Decision of Constitutional Court of Montenegro, number 53/06, 11 July 2006 ("Official Gazette of Montenegro" nr. 15/06)

14 The opponents of this Constitutional court decision explicated its inadequacy by referring to principles of supremacy of international standards and the principle of affirmative action: the principle of supremacy of international standards is utilized when particular issue from the domain of minority rights is governed differently from the internal law. The principle of "affirmative action" was established with the aim of achieving the effective equality of ethnic minorities with the majority population.

internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation." According to the Article 12, the rights and freedoms are exercised based on the Constitution and ratified international agreements. The fifth chapter of the Constitution defines a set of special-minority rights that include the protection of identity and the prohibition of forced assimilation as the key principles that guarantee the protection of minority rights in Montenegro. The Article 79 of the Constitution guarantees the following rights and freedoms that minority members can exercise individually or collectively with others:

- the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities;
- religious particularities;

  holidays;
- the right to use their language and alphabet in private, public and official use;
- the right to education in their language, alphabet in public institutions and to include in the curricula, the history and culture persons belonging to minority nations and other minority national communities;
- the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in the language of minority nations and other minority national communities;
- the right to establish educational, cultural and religious associations, with the material support of the state;
- the right to write and use their own name and surname also in their own language and alphabet on official documents;
- the right, in the areas with significant share in total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in the language of minority nations and other minority national communities;
- the right to authentic representation in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government units in which they represent a significant share in the population, according to the principle of affirmative action;
- the right to proportionate representation in public services, state authorities and local self-government bodies;
- the right to information in their own language;
- the right to establish and maintain contacts with the citizens and associations outside of Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs;
- the right to establish councils for the protection and improvement of special rights.

The Article 80 of the Constitution prohibits the forceful assimilation of the persons belonging to minority nations and other minority communities. The Article also prescribes the obligation of the state to protect minorities from all forms of forceful assimilation.

The Constitution guarantees specific rights and freedoms that the members of minorities

can exercise individually or collectively with others: the right to authentic representation in the Parliament of Montenegro and in parliaments of local self-governments where they constitute a significant portion of the population, in accordance with the principle of affirmative action, as well as the right to proportional representation in public office, state authority and local municipalities. The Constitution also prescribes a more significant role of the Constitutional Court[15], based on which the necessary conditions for the full implementation of the minority standards in Montenegro have been met.

2. The analysis of the current situation

2.1. The electoral pattern – a method of seat distribution; the analysis of the normative and institutional frameworks; basic elements of the electoral system in Montenegro

The Montenegrin legislator remained fully committed to the use of the proportional system. Although some modifications of the electoral system were introduced, during the entire time the proportional system of the party lists has been used, which is not the case for the neighboring countries. Since the introduction of the multiparty system in Montenegro in 1989, the parliamentary elections were held eight times (1990, 1992, 1996, 1998, 2001, 2001, 2006 and 2009). Although the system of party lists was used, the changes that were introduced, favored dominantly the position of the ruling coalition.

Some changes of the electoral system can be identified as a shift from: "predominantly proportional" (1990), through the combined application of the majority and proportional models, (1992), then the "pure proportional" (1992), to a kind of "mixed system" (1996), i.e. the compilation of positive elements of the majority and negative effects of the proportional models, and finally the comeback to "full proportionality" with the introduction, on a one-time basis, of the institute of affirmative action for one of the minority peoples in Montenegro (1996, 1998 and 2002). [16]

Table 1.

15 Law on the Constitutional Court of Montenegro ("Official Gazette of Montenegro, number 64/08 from 27.10.2008)

16 16 Pavićević, V., Olivera Komar and Zlatko Vujović: „Elections and Electoral legislation in Montenegro 1990 – 2004", CEMI, Podgorica, 2005, page 59.

Elections	The size of the Parliament	Electoral system	Number of electoral units	Size of electoral unit	Census	Type of the electoral list	Preferential voting	Electoral formula
1990	125	System of party lists	20	1 – 29	4%	Closed blocked	No	D'Ont
1992	85	System of party lists	1	85	4%	Closed blocked	No	D'Ont
1996	71	System of party lists	14	1 – 17	4%	Closed modified blocked	No	D'Ont
1998	73	System of party lists	1	1	3%	Closed modified blocked	No	D'Ont
2001	77	System of party lists	1	1	3%	Closed modified blocked	No	D'Ont
2002	75	System of party lists	1	1	3%	Closed modified blocked	No	D'Ont
2006	81	System of party lists	1	1	3%	Closed modified blocked	No	D'Ont
2009	81	System of party lists	1	1	3%	Closed modified blocked	No	D'Ont

In order to better familiarize with key effects that this system has been producing in Montenegro, we will use three independent variables: (1) the electoral pattern – a method of seat distribution, (2) the number and size of electoral units and (3) way of voting – the type of the electoral list.

2.1.1. *The electoral pattern – a method of seat distribution*

As it can be seen from the table 2, Montenegro has, at all elections, distributed seats according to the d'Hondt formula, which utilizes the method of the least common denominator. In order to prevent fragmentation of the parliament, a prohibitive clause was introduced that varied from the then 4% to the current 3%. Prohibitive clause was introduced in 1990 at the national and local levels. This level was maintained until 1998, when the then adopted law reduced the common denominator to 3%. In turn, the height of the prohibitive clause caused the high degree of "vote dispersion", i.e. a significant number of voters voted for parties that

have not passed the prescribed threshold.

Table 2. *The influence of the prohibitive clause on vote dispersion –Elections for Montenegrin Parliament*

The time of elections	*Prohibitive clause*	*The percentage of „dispersed" votes*
1990.	4%	11.2
1992.	4%	20.8
1996.	4%	20.3
1998.	3%	5.8
2001.	3%	6.7
2002.	3%	5.3
2006.	3%	2.5
2009.	3%	12

The percentage of "dispersed" votes varied from the maximum of 20.8% during the elections in 1992, to the minimum of 2.5% during the parliamentary elections in 2006. On the other hand, during the last elections, the percentage of dispersed votes increased to 12%, due to the fact that no larger oppositional coalitions were established. Namely, three largest oppositional parties have candidates independently, causing their former coalition partners to lose their parliamentary status.

2.1.2 Stable majority and fragmented Parliament

By observing the table, one notices that the trend of vote dispersion stopped in 2006, but then resumed in 2009. Significant role in reducing the elimination effect, which is produced by the existence of a census, was played by the numerous pre-election coalitions. In the 2006 elections, only 4 electoral lists, with a total support of 2.5%, have not won the parliamentary status. Coalition forming in those elections had for its result a fragmented parliament, in which as many as 9 political parties, out of 16, had only one representative in the Parliament. The actual strength of most of these parties was ultimately insignificant; therefore coalition forming was the only way, i.e. with the support of other parties' voters, for them to win the parliamentary status. However, during the last election, three strongest oppositional parties changed their electoral strategies and abandoned their coalitions. Such a decision resulted in an increased percentage of dispersed votes, resulting in the reduction of oppositional parties to only three

(excluding the members who are elected from the pooling stations, based on the principle of positive discrimination). The ruling coalition was consisted of four political parties, two being its major constituents – the DPS and SDP, and the two minority parties, the BP and the CCI, which were after the elections joined by the Albanian DUA. Besides the three major opposition parties, there are three Albanian opposition parties, each with a single mandate, the DSM, the Albanian Alternative and FORCA. The current parliamentary session is composed by four parties with significant support of voters (DPS, SPP, SDP and NOVA), while previously the strongest opposition party during the 2006 elections, lost support and thus got excluded from the circle of parties that enjoy significant support of voters. The joint participation of all oppositional parties in the local elections, enabled the MfC (Movement for Changes) a higher influence on the political process, more than it allowed a higher representation in the parliament, ultimately limiting the chance of improving the election results. The ratio of support remained stagnant due to the forming of a comprehensive coalition at the local level, in a situation where the SPP, by negotiating the process of coalition forming, ensured a strong leadership position in relation to the other two opposition parties.

Table 3. Parliamentary elections in 2009 – Summary of electoral results according to numbers and percentage of won mandates.

The name of political party	*acronym*	*Number f mandates*	*Percent of mandates*
Democratic Party of Socialists	DPS	35	43,20
Social Democratic Party	SDP	9	11,11
Bosniac Party	BP	3	3,7
Croatian Citizen`s Initiative	CCI	1	1,23
Serbian Peoples' Party	SNP	16	19,75
New Serbian Democracy	NOVA	8	9,87
Movement for Changes	MfC	5	6,17
Democratic Union in Montenegro	DUM	1	1,23
Albanian Alternative	AA	1	1,23
FORCA	FORCA	1	1,23
		81	

Table 4. The ratio of parliamentary and effective (actual) parties – Parliamentary Elections

Elections year	*Number of parties that won seats*	*Actual number of parties*
1990	*11*	*2.1*
1992	*4*	*2.8*
1996	*6*	*2.3*
1998	*7*	*3.1*
2001	*8*	*3.9*
2002	*9*	*3.9*
2006	*16*	*4.8*
2009	*11*	*3.8*

Regardless of the fact that electoral results do represent a mechanism of effective influence on the decision making process in the parliament, we can still claim that there is no system in which the number of registered parties corresponds to the number of effective, active parties. The party system of a country consists only of the active parties. Calculating the number of effective parties is a matter dealt with by many authors.[17] Despite its fragmentation, the Montenegrin Parliament is composed by a stable majority, and when Blondel's typology is applied, it can be concluded that Montenegro has a multiparty political system with the dominant party.

The highly fragmented character of the Parliament complicates the process of negotiations and reaching of wider agreement that is necessary for the adoption of regulations. The lack of identity and familiarization necessary for acquisition of support from voters, leads

17"If we take into consideration the solution of Giovani Sartori, when determining the number of parties that make up the party system, we don't take into account the parties that have not won mandates in parliament, while the relative strength of parties should be measured according to the number of mandates won. The same author believes that the party system is made of those parties that have enough leverage to form a coalition or otherwise impose their own conditions. Accordingly, he thinks that parties able to form a coalition are those which participated in governing coalitions or the ones that are considered as possible coalition partners by "the dominant parties". Other parties are those able to blackmail i.e. those that are mostly or totally unacceptable as coalition partners, but can't be ignored due to their size" (Vujović, Komar,2006: 194)."Depending on the size and the number of parties we identify several types of party systems. Jean Blondel "identifies two-party system where seat allocation in Parliament corresponds to the relation 55 – 45, a system of two and a half parties: 45 – 40 – 15, multi-party system with a dominant party: 45 – 20 - 15 – 10 – 10 and multi-party system without a dominant party: 25 – 25 – 25- 15 – 10." (Vujović, Komar, 2006:194).

smaller parties to intensify their rhetoric and resort to radical attitudes in order to attract more attention than the more competitive parties.

Such system and the effects that it creates has led to a continuous weakening of the main opposition parties within the former "unionist bloc", at the expense of smaller parties that ensured their status through coalition-forming, while harsh rhetoric was used for identity building. Such a process was not identified among the parties of "sovereign block", since the two major parties of that block continuously govern together since the 1998.

Continued existence of the party system with a number of parliamentary parties, and with little effective ones, causes instability and the creation of high tensions even with insignificant issues. In order to prevent the radicalization of political scene it is necessary to create an electoral system that would eliminate a large number of parties that have parliamentary status due to the donation of seats on electoral lists from parties with the support of voters.

2.1.3 The number and size of constituencies

In the first elections after the restoration of parliamentarism in the 1990, the country was divided into electorates whose boundaries coincided with the municipal, so that each municipality represented a separate constituency. A similar principle was applied to local elections, in such a way that the municipalities were divided into constituencies where the number of voters was almost the same. The number of mandates distributed in municipalities depended on the participation of the voters of the municipality in the total electorate body of Montenegro.

The Montenegrin legislator, when comparing legal frameworks of all eight election cycles, usually opted for Montenegro to be one constituency. Two election cycles were an exception. These were elections held in 1990 and 1996. During the second parliamentary and first extraordinary elections, Montenegro was converted into a single constituency, and already during the next election there has been a radical change that had resulted in the conversion of Montenegro into 14 constituencies. The changes implemented in 1996, after the elections, aimed to further strengthen the position of the ruling DPS, in relation to the newly formed coalition "National unity", which was met with considerably stronger support from voters as opposed to the individual performances of parties that formed it.

During the following elections, the second extraordinary elections held in 1998, the legislator returned to previous solution of Montenegro being a single constituency. The change of the electoral system was preceded by the dissolution of the ruling party, and the establishment of "anti-Milosevic block" by DPS, led by Milo Djukanovic and the democratic opposition parties, whose support was the reason why the leader of the DPS triumphed in the presidential elections in 1997.

2.1.4 The way of voting - the type of electoral lists.

The simplest electoral lists can be defined as a census of those persons that serve as

candidates for political parties or citizens. Among several typologies of electoral lists, the Montenegrin typologis closest to the Anglo-Saxon electoral theory – a division that distinguishes: (1) closed blocked[18], (2) closed unblocked[19] and (3) open[20] electoral lists.

In addition to this typology in Anglo-Saxon theory, some authors divide electoral lists in the following manner: (1) closed, (2) open and (3) free, where closed correspond to the closed blocked, open to closed unblocked and free to open lists.

The first step after calculating how many seats each of the lists won is determining which candidates will be awarded the seats. The type of the list determines which candidates will be awarded the won seats.

In Montenegro, the so-called, modified closed electoral list is in use, where the half of the candidates are awarded their seats according to the sequence in the list, while the second part of the list is subject to change, which can be carried out by a political party even after the elections. As a result, the voters do not know for whom they voted.

The first time this type of closed electoral list was used during the Montenegrin Parliamentary elections in 1996, whereas this solution was "patented" for the SRY Parliamentary elections. Specifically, the Article 90 of the Law on Election of Federal Deputies in the Council of Citizens of the Federal Assembly[21], states that the applicants of the electoral list have a right to distribute 2/3 of the won mandates to their candidates, regardless of the sequence identified on the electoral list. In Montenegro, the legislator has adopted this solution, thereat modifying it slightly, so that the applicants of the electoral lists distribute ½ of the mandates, instead of 2/3. The purpose of such legislative norm is to strengthen the control of party leadership over deputies, and has for its consequence a strong depersonalization of the parliament. In other words, voters simply do not have a concrete impact on the choice of deputies from the list of candidates. The still existing solution has been criticized by the OSCE on several occasions, the first time being in their analysis in 2002. This norm calls into question whether the voters themselves choose their representatives. "The Montenegrin electoral system can be characterized, according to the decision of Federal Constitutional Court of Germany adopted during the middle of previous century, as indirect, and not as direct, proportional system". According to the views of that court, the direct elections are characterized by the process of mandate distribution without the interference of "third parties". If, however, the mandate distribution is influenced by "third

18 The closed blocked list – "The application of closed or tied list the voter chooses a complete list, without the possibility of influencing its content or it sequence. Such lists are usually already prepared by the corresponding party leaderships" (Pavićević, 1997: 59). Such inability adversely affects the relation between the voter and the candidate.

19 Closed unblocked list enables the voter to introduce changes to the list. Such changes encompass the ability to influence the sequence or even remove or add new candidates from the list. Belgium example is an interesting one: the voters can give their votes to the electoral list or to the candidate from within the list. (Vujović: 2008: 134).

20 "The open electoral list provides to a voter a possibility to determine one's own candidate list, with as many voters that can be elected in the electoral unit. In preparing the list, the voter determines the rank of the candidate, therefore giving him/her one's vote.

21 Official Gazette of SRY, "number 57", from September, 24, 1993.

party", the elections are considered as indirect."[22]

2.2. The current model of minority representation and the effects of its use

According to the last census, from 2003, in Montenegro no national community constitutes an absolute majority (Montenegrin 40.4%, Serbs 30.01%, Bosniaks 9.41%, Albanians 7.09%, Muslims 4.27%, Croatians 1.05%, Roma 0.43% and others 1.25%).

The agreement between the democratic opposition parties and the DPS, led by Mr. Milo Djukanovic, stipulated the support from the former to Mr. Djukanovic at the presidential elections, together with the minority Albanian parties. In return, the "system of positive discrimination" was established, which would guarantee to the Albanian community an election of their representatives in the Montenegrin Parliament. Such decision was followed by changes in the electoral law and the introduction of the so-called "polling places designated by a special decision of the Parliament of RM" [23], where representatives of the Albanian nationality were elected. Parties that won seats at the special polling stations did not need to achieve a census at the level of single constituency, i.e. Montenegro, while the parties which participate in the distribution of seats at other polling stations needed to achieve census at the national level.

In order to improve the representation of ethnic Albanians, during these elections the decision has been made, by which 5 seats, out of 78, were distributed at the polling places designated by a special decision of the Parliament of RM, where Albanians constitute the majority of the electorate.

This solution was retained during the elections held in 2001, and in 2002, where during the elections in 2002 the number of seats was reduced to 4, and already during the next elections in 2006, the number was returned to 5 seats.

Other minority communities were not included in the system of positive discrimination, resulting in strong demands, especially by Muslims/Bosniaks, to correct the existing system. The exclusion of other minorities from the system of positive discrimination was a subject to strong criticism by OSCE and other organizations that monitor elections.

3. Comparative experiences in the representation of minorities

3.1. International recommendations for minority representation (Lund recommendations)

22 Pavićević, V., Komar, O. Vujović, Z. – Elections and electoral laws in Montenegro, 1990 – 2004, CEMI, Podgorica, 2005, page 46.

23 The Law on Election of Councilors and Representatives, Article 118

International recommendations, especially Lund recommendations on the effective participation of national minorities in public life, which were drafted by experts of the Commission for National Minorities of the OSCE, introduced provisions on the political representation of minorities. Therefore, this document is seen as the first that defined the list of mechanisms for the participation of minorities in the work of public institutions of the state. These are based not only on international standards and recommendations, but take into account the significant experience of European countries in the field of representation of national minorities. This ensures that the political participation of national minorities is not only a right but also an instrument of protection of minority rights, as well as that the protection of minority rights cannot be complete without their inclusion in the political processes and without the simultaneous existence of an adequate framework to protect their rights. This is further confirmed by the statement that inadequate protection of minorities stems from insufficient political representation.

Lund Recommendations on the effective participation of national minorities in public life are divided into four sections: general principles, participation in decision making, self-government and ways of ensuring efficient participation in public life, making a total of twenty-four recommendations. Especially accentuated are the recommendations for participation of minorities in the work of state bodies and recommendations for participation in the work of local self-governing units.

The first article of the Lund recommendations: effective participation of national minorities in public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to improve this participation, governments often need to establish special arrangements for minorities. The aim of these recommendations is to facilitate the inclusion of minorities within the country and enable minorities to maintain their own identity and characteristics, thereby enhancing good governance and integrity of the state. [24]

Under general principles it is stated that the effective participation of national minorities in public life is an essential component of democratic society, which is why national authorities are encouraged to facilitate the inclusion of minorities in political decision-making processes and maintain their identity and characteristics. It is further stated that states must respect internationally recognized human rights and the rule of law as a precondition of full development of civil society, in order to establish adequate bodies and activities in accordance with these recommendations. Finally, the state should use public media in promoting intercultural understanding and exercise of minority rights.

In the first chapter, which deals with participation in the decision-making process, states are encouraged to provide a special representation of minorities in legislative bodies, Government, ministries and other organs of state administration, as well as to publish government regulations in minority languages. Regarding the recommendations ensuring the greater representation of ethnic minorities at the state level, this document highlights a few

24 Article 1. Lund reccomendation

models applicable to this end:

- special representation of national minorities, which implies the existence of a number of seats in the national representative body, or in parliamentary committees, as well as other forms of guaranteed participation in the legislative process,
- guaranteed number of seats in the Government, Supreme or Constitutional Court, lower courts, as well as in advisory bodies related to members of national minorities,
- establishing mechanisms within the framework of governmental bodies, which improve and contribute to fulfillment of national minorities' interests,
- introduction of special measure, related to publishing rules of public services in the language of national minorities.[25]

Within this segment of recommendations, it is important to note the suggestion that states need to guarantee the right to persons belonging to national minorities, to vote and run for public offices without discrimination. Thereat, recommendations are provided for facilitating the representation and strengthening of their influence in the following cases:

- Provide adequate and sufficient representation of national minorities in cases where electoral units were established in which they shall elect one representative;
- Application of a proportional electoral system is advised, under which the number of mandates that each party wins is determined in relation to the percentage of votes it receives in the elections;
- Introduction of various forms of preferential voting is advised, which will enable voters to rank candidates of their choice, which allows for a better representation of minorities in government and political decision-making;
- To this aim, the lowering of the threshold for minority parties is advised
- It is recommended to geographically define constituencies in ways that facilitate just representation of national minorities. [26]

States are advised to apply identical measures at the local level in order to improve the participation of national minorities in local government. In this sense, the work of advisory and consultative bodies within the state institutions would greatly contribute to open communication and dialogue between government authorities and national minorities.

In accordance with the Lund recommendations, another form of participation of national minorities in public life is granting self-governments.[27] Also, the effective participation of minorities in public life may require non-territorial and territorial agreements on self-government, or their combination. Functions that are typically performed by the central government include: defense, foreign affairs, immigration and customs, macroeconomic policy and monetary issues. Other functions may be performed by minorities or territorial governments, independently or together with the central government, though the functions may be distributed asymmetrically, depending on different situations of minorities within the same

25 Lund recommendations, chapter II, part A, article 6.

26 Lund Recommendations, Chapter II, part A, Article 6.

27 Lund Recommendations, Chapter II, Self-Government, Article 14.

country. According to recommendations, non-territorial forms of governance are useful for the preservation and development of identity and culture of national minorities. Such solutions are most appropriate for use in education, culture, use of minority language, religion and other issues key to the identity or way of life of national minorities. On the other hand, within the territorial solutions, it is advised that local authorities take a number of functions to efficiently answer the demands of minorities, in the field of education, culture, use of minority languages, environmental protection, local planning, natural resources, economic development, health and social services. From the functions performed by the central government, we distinguish between functions that are shared with central and regional authorities and which include taxes, the organization of the judiciary, tourism and sport.

Forms of promotion of minority participation in decision-making processes at the state level and at the local level can be determined by law or in another appropriate manner. In this sense, the Lund recommendations foresee clear guarantees in the form of constitutional and legal solutions.

- Solutions that are adopted through constitutional provisions require a higher degree of social and parliamentary support for the adoption or amendment;
- In order to amend solutions that regulate self-government, established in accordance with the law, support of a qualified majority in the Parliament or in the body represented by national minorities, or both, is required,
- Monitoring and control of solutions that regulate self-governance and participation of minorities in decision-making can contribute to the process of changing these solutions according to experiences and circumstances.
- Temporary or incremental solutions that would allow assessment and development of new forms of participation can be considered. Such solutions can be established by law or in an informal way, during specific time periods, so that they can be extended, changed or terminated depending on the degree of implementation. [28]

Furthermore, according to the Lund recommendations, the existence of an independent and impartial judiciary is very important, especially in cases when consultations, agreements or similar mechanisms do not resolve eventual disputes, so that they can be resolved through the courts, i.e. through judicial supervision over the activities of the legislative or administrative authority. Lund recommendations define further mechanisms for resolving disputes, such as negotiations, fact-findings, mediation, arbitration, ombudsman for national minorities and forming of special commissions.

3.2. Models of minority representation

Political participation of minorities is a very important segment of minority rights. The practice confirms the view that the minority rights are not implemented entirely without

28 Lund Recommendations, Chapter IV, part A, Articles 22 and 23.

the political representation of minorities. "Political participation can be seen as a part of the rights of minorities, being it a way of securing other minority rights, and as a useful tool for the advancement of democratic governance in the country." [29]

There are several models of minority representation, which can be differentiated into four core models.[30] The first model of minorities' representation can be defined as representation through different forms of minority associations that may have a formal role in advocating the interests of minorities. Second way of representation of minorities is achieved through special *institutions,* whose primary jurisdiction is the promotion of the rights and interests of minorities. Minority interests can also be represented through *parties* or *institutions* that represent a broader constituency rather than a particular minority. However, it often happens that within the political party programs, as well as in the work of institutions, the interests of minority groups are ignored. Finally, minorities, especially the numerous ones, have their *representatives* in *national representative bodies*. In instances where this is not the case, national minorities are fully withdrawn from the political scene because of the paucity of its members or the inability to cross the threshold. It is a particular issue of how different forms of electoral systems and behavior of minority representatives in Parliament, in relation to actions of the majority parties, can influence the parliamentary representation of minorities.

In many countries today, the parliamentary representation of minorities is combined with the establishment of bodies and institutions comprised by members of national minorities, primarily the so-called National Councils. The establishment of these bodies is of a particular importance for the promotion and respect of minority rights, considering the fact that inadequate protection of minorities often stems from the lack of political representation of minority groups.

Apart from these four models of representation of minorities, it is useful to look up at the models of protection of national minorities, which are being implemented in the European countries. In fact, there are many different models that are adaptive to the national legislative framework of each country. That is why there is almost no unique model or approach in the area of exercising the rights of national minorities in Europe, so we are talking about different approaches to this issue, from the model of protection of linguistic minority in Finland, through the protection of the Austrians in the South Tyrol and the protection of national minorities in Slovakia.

When we talk about European countries it is significant to look at the classification model[31] of representation of national minorities. The first model includes the countries that represent the constitutional principle of a single nation and in that way its' citizens are not granted the recognition of belonging to any category of national minorities. Such is the example

29 Bebler Florian, "Elections and national minorities", CEMI, Podgorica, p. 81

30 Classification of the model of minority representation, as suggested by Prof. dr. Florian Bebler

31 Classification of the model of representation of national minorities in the Europe, used by the models defined by the professor Dr. Sinisa Tatalovic.

of France whose official attitude is that in its territory national minorities don't exist.[32] The second group includes the countries that do not recognize the category of national minority, and thus do not divide ethnic communities into the majority and minority, but the citizens of these countries differ by the languages they use. Such is the case of Finland, where people are divided by those who speak Swedish and those who use the Finnish language, or for example, Switzerland, which distinguishes the Swiss who speak German, Italian, Romansh and other languages. This group also includes the South Tyrolean model by which its population is divided into German and Italian speaking population. Te main flaw of this model in most cases is that it does not guarantee any proportional representation in the governmental institutions of countries in which it is applied, given that this model does not formally define minority and majority. The third group consists of countries that recognize categories of majority and national minority, and accordingly they have clearly defined provisions on the rights of national minorities, provisions on the protection of their national, cultural, religious and linguistic identity, in which the obligations stemming from international agreements and conventions have precedence over the provisions of the national law. Most of the countries of "new democracies" as well as some Western European countries belong to this group, such as Austria, Denmark and Germany.

Although different models that ensure adequate representation of minorities, we would like to point to the classification of four models of positive discrimination, provided by Prof. Pavicevic. The first represents a comprehensive application of positive discrimination, so that it includes all parties that represent national minorities. Second model include the reduction or removal of census. Third and fourth models include (a) the establishment of electorates – particular units reserved only for voters from minority communities (New Zealand, Cyprus and Zimbabwe), and (b) establishing conditions so that the voters give votes to balanced candidate lists (Lebanon). [33]

3.3. The Western Balkans experience in minority representation

Western Balkans region is characterized by different concepts of minority groups' representation in political and public life. What is common for all countries from this region is the fact that following the establishment of multiparty system in the last decade of 20th century, inclusion of national minorities in both the political system and the decision making process in almost all countries was a true challenge that was often utilized for political goals, such as ensuring support from the minority representatives. However, today all countries from the region aim to fulfill the criteria and international standards in the area of human rights protection, as well as improve the exercise of minorities' rights. This is due to the fact that

32 Regarless of this constitutional decision, France has the ethnic problems in Corsica and in the three Basque provinces.

33 Pavicevic, V., Darmanovic, S., Komar, O., Vujovic, Z. – Elections and electoral legislation in Montenegro 104. 1990 – 2007, CEMI, Podgorica, 2007.

the fulfillment of such standards represents a necessary condition for joining the international organizations such as the Council of Europe, OEBS and particularly the European Union and NATO. In the following text, we will provide a short resume of how the minority representation has been regulated in some of countries from the Western Balkans region.

3.3.1 Minority representation in Bosnia and Herzegovina

The legal framework of the rights protection and the system of minority representation in Bosnia are established by: The Law on the Protection of Rights of National Minorities in Bosnia and Herzegovina, The Law on the Protection of National Minorities in Republic Srpska, The Law on the Protection of Rights of Minorities in the Federation of Bosnia and Herzegovina, the Frame Convention of the Protection of National Minorities from 1994, the European Charter on Regional or Minority Languages from 1992, the Law on Local Self-governments, the Law on Local Self-government of Tuzla-Podrinj canton and the Electoral Law of Bosnia and Herzegovina. "Fair minority representation in the Parliament and the government is regulated by the Constitution at the national level both in Republic of Srpska and the Federation. In Republic of Srpska two non-dominant groups, Muslims and Croatians were not represented in the Parliament before the constitutional changes from 2002, although they had their representatives in the parliamentary bodies.[34]

The statutes of local self-governmental units standardize the right of representation of national minority members in town assemblies, namely the municipalities, proportionally to their share in population according to the last census in Bosnia and Herzegovina, which is prescribed by the provisions of the Electoral Law of Bosnia and Herzegovina. Consequently, according to the results of last local elections in 2008, in the assemblies of local self-governments, i.e. the municipalities, the mandates held by one deputy from national minorities have been verified. In this way, the right of participation of national minorities in the legislative bodies at the local level has been fulfilled. However, it is considered that this right is satisfied only from the formal-legal view. Namely, many critique were offered in regard of the electoral process itself, as well as due to the fact that minority representatives do not participate in the local government. It is considered that the Electoral law did not solve the question of candidateship in an adequate way because it did not afford enough room for minority members to participate in the decision making process, while minority members from political parties were granted advantages, once they reached the low threshold of the census, which granted them the seats in local assemblies. According to the provision of the Electoral law of Bosnia and Herzegovina, to addition to political parties, registered civil societies from national minorities and groups containing at least 40 members who have the right to vote, can exercise the right to participate at the elections and can receive seats that are otherwise guaranteed for national minorities. Practice shows that, during the elections, representatives of political parties have much more success than the independent candidates. For example, out of 35 deputies that were elected

34 Bieber Florian: "Elections and national minorities", the Monitoring Center CEMI, Podgorica, p. 93.

from the lines of national minorities at the 2008 elections, only 4 came from the associations of national minorities, while the rest were political party candidates.

Although the system of national minorities' rights protection in Bosnia and Herzegovina was a subject of much criticism, it still needs to be noted that a lot of attention has been given towards establishing mechanism for further improvement and protection of their rights. This has been particularly achieved through the work in councils for national minorities, as well as other bodies dealing with the exercise of national minorities' rights.

3.3.2 Representation of national minorities in Serbia

In Serbia the rights of national minorities are defined by: the Constitution of Serbia, ratified international conventions are being implemented as part of the domestic legislation, the Law on protection of rights and freedoms of national minorities from 2002, as well as other laws, thence by the Provision on the Council of Republic of Serbia for National Minorities, the Statute of AP Vojvodina, as well as town and municipalities statutes and the corresponding decisions.

Regarding the ethnic structure of Serbia, according to the census results from 2002, in Serbia (without Kosovo) live 13.47% of citizens who belong to national minorities. According to the census results, 82.86% of population are Serbs and the most numerous national minorities are Hungarians with 293.299 (3.91%), Bosniaks with 136.087 (1.81%) and Roma with 108.193 (1.44%). In relation to the percentage of national minority members, Serbia is classified among countries with pronounced homogenous population structure. Besides these ethnic groups, in Serbia also live members of Slovakian, Romanian, Vlachos, Russian, Ukrainian, Croatian, Bulgarian, Macedonian, Czech, German and Albanian population.

According to the Constitutional provisions, Serbia is defined as "a state of Serbian people and citizens that live in it, founded on the principles of rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and a belonging to European principles and values". The given definition was a subject of scrutiny by the professional population, as it "does not contribute to the development of integrative multiculturalism". The Constitution prescribes that national minority members have the right of cultural autonomy and the right to constitute minority self-governments, which triggers equality and evenness as well as the respect for diversity. Accordingly, Serbia is constituted, among others, by 13 minority self-governments.

The national councils of minorities are elected exclusively in an indirect manner at a state level. In local self-governments and on regional levels, the choice of establishing any kind of self-governments for national minorities is not prescribed.

The amendment of the Law on the election of deputies, from 2004, abolished the census for minority political parties, as well as introduced the measures of affirmative action, which foresees that their representatives win mandates under the condition of reaching the natural threshold that, in cases of average turnouts is about 15.000 votes. However, according

to the demographic situation of national minorities, as well as when taking into account the distribution of mandates, it can be understood that the mandates in the Parliament are won by only the representatives of Bosniaks' and Hungarians' political parties.

3.3.3 *Representation of minorities in the Republic of Croatia*

For Croatia, the degree of affirmation and protection of minorities' rights represents one of the important conditions for the state's integration into the European Union and NATO. The European Commission stipulated in the "Avis"[35], the need and the importance of adopting the constitutional law on the rights of national minorities, as a necessary legal framework that would ensure the exercise of the rights of minorities residing in that country. What has also been stipulated in the document is the right of representation of national minorities in the Croatian Parliament, as well as increasing the guaranteed mandates for minority representatives, from 5 that was provided by the electoral law from 2000, to 8, as stipulated by the Constitutional law and as was achieved during the 2003 and 2007 elections. The commission also pronounced the need to respect the right of national minorities to be represented in the bodies of local self-governments, and in their executive and judicial bodies. Croatia ratified the European Convention on the Protection of National Minorities, the European Charter on Regional and Minority Languages, as well as the UN Convention on Civic and Political Rights. Croatia managed to prepare an adequate model of protection of national minorities' rights at state and local levels, which was is, at the same time, harmonized with European and international standards and principles. The number of guaranteed mandates that one national minority can win depends on the percentage of representation of a specific national minority in the overall population of Croatia or a specific local community.

According to the latest Constitutional amendments, minorities whose participation in the overall population is greater than 1.5% are guaranteed three mandates, while minorities who participate with less than this number are guaranteed 5 mandates, on the basis of special electoral right. Namely, all minorities, except from the most numerous – Serbian, who participate with 5%, are awarded the double right of vote. "Considering that the members of Serbian minority are potential SDP voters, such situation can be viewed as a compromise of two strongest political parties. Due to such a compromise, minority population in Croatia, which constitutes about 10% of the population, has been divided into 2 parts: the more homogenous part, comprised by the Serbian minority, which is easily mobilized in the pre-election campaign, which is why they were granted the general voting right, and the heterogeneous part, comprised by the remaining 21 minority groups and which was awarded with the double voting right. This also proved to be a solution to an important problem of the minorities' identity. The previous electoral law forced the following dilemma to every minority member: whether one should be a member of national minority or the citizen of the republic. This issue has been resolved in a way

35 The opinion of the European Commission on the membership application of the Republic of Croatia, European Commission, Brussels, page 24

that the members of Serbian minority would not have to choose, due to the general voting right, as all other citizens, while the members of the remaining minority groups would have a double voting right, and as such can declare themselves as both the members of national minorities and as citizens of the republic. Such a principle in literature is called the concept of dominant minority." [36]

4. Possible scenarios for resolving the issues related to the lack of adequate representation of minorities

4.1 Main points of contention in the amendment of the Electoral law

After the adoption of the Constitution of Montenegro, the question of harmonizing the electoral law with the newly adopted constitutional text remains open. In a debate, which did not include a significant number of interested parties, the issue of voting rights and the corrections of the election system in order to ensure an adequate representation of minorities in Montenegro was a dominant one.

Parliamentary working group for a long time has not managed to start its work, while after it commencement, the work was closed to the public. Additionally, it was not accepted for its work to be monitored by a representative of NGO sector. The lack of the openness of the process has resulted in the lack of public debate. During the ensuing time different solutions were speculated on, until finally the key government and the largest opposition party stood around the solution that was initially offered by the largest opposition party - the SNP. Just about the time when the impression was that the two thirds majority, needed for the adoption of amendments, will be reached, the opposition parties have denounced the support for this proposal.

The right to vote belongs to the citizen or the resident?

The main point of contention is the question of who has the right to vote. That is, whether the citizens who are in the electoral lists, and who, at the same time, are not citizens of Montenegro, have the right to vote. By gaining independence, all its citizens (persons residing in Montenegro) who have not taken or can't acquire the Montenegrin citizenship, but are citizens of another state, have the status of stateless persons or even refugees, and therefore do not meet the basic, constitutionally defined, condition for obtaining active and passive voting rights - to be a Montenegrin citizen. The abolition of voting rights to those in the voter lists, and to those who are not Montenegrin citizens would significantly change the electoral chances of some electoral actors. It is assumed that the opposition would, therefore, loose many of their voters, especially the part of the opposition which once has belonged to the Unionist bloc.

36 Baketa, Nikola, Kovacic Marko: " Who represents minorities and in what manner", in Political analysis number 3, Faculty of Political Sciences, Zagreb, pages 11-19

Therefore, a strong resistance of opposition parties to respect the constitutional decisions that only citizens can have the active and passive voting rights does not surprise.

Reserved seats for the representatives of the national minorities or for the parties with a presage of the national minorities?!

Another issue that causes the contestation is the model of representation of minorities. Parties that are presenting themselves as representatives of the Albanian national community in Montenegro, strongly oppose the change of the current system of representation of the Albanian community, by insisting that the right to apply for the current five seats can only have nationally oriented, not civic oriented parties. However, representatives of the Albanian national parties did not win the support of other minority communities. Representatives of the Bosniak party have advocated for a loosely applied model of reserved seats, thereat accepting part of the arguments of the Albanian national parties, by asking that these mandates are reserved for national parties regardless of voters' support, and that the members of these national minorities who belong to the civil parties, cannot candidate for these seats.

Should the law be improved with the recommendations of the international organizations that have monitored the elections?

The third major issue of contention is the adoption of recommendations of the international organizations. Representatives of the ruling coalition have refused the idea that this is a process of adopting a new electoral law, i.e. the opportunity to improve the legal framework that regulates the election process, in accordance with the international standards. Gradually, during the preparation of the legal text, parts of the provisions related to the acceptance of the recommendations of the international organizations were included in the text. International recommendations raised several issues, where some had particular significance for the democratization of the electoral process, such as:

1) The method of the distribution of seats – changes of the candidate sequence on electoral lists after the elections, by party leadership

2) Professionalism, performance and capacities of the election administration,

3) The role of the state in the electoral process,

4) Enabling citizens to apply as individuals and not within the electoral lists[37],

5) Publishing of the official results within the appropriate timeframe (deadlines),

6) The representation of national minorities,

7) Representation of women.

37" To act in accordance with the paragraph 7.5 of the Copenhagen Document from the 1990, in order to allow citizens to apply as individuals and not as a part of the list of nominees "- recommendations of OSCE ODIHR EOM, by Olivera Komar, Zlatko Vujovic, from „The Elections and Electoral Legislation in Montenegro" 1990-2006, CEMI, Podgorica, 2007.

4.2. Legislative proposals arising from the work of the parliamentary working group - proposal of deputies of the ruling party vs. proposal of deputies of the opposition parties.

The proposal that was supposed to be a product of the working group, was eventually filed by MPs of the ruling party only, not by the working group itself. In regard to the minority representation, solutions were sought within the existing system of party lists, thereat keeping the solution that Montenegro is one constituency. Unlike Serbia, which completely abolished the legal electoral census, leaving the so-called effective census to act prohibitively, the Montenegrin legislator has introduced a model of guaranteed seats for each minority community, granting them each one guaranteed mandate.

The solutions of both proposals attempted to bypass the operation of the so-called "natural census[38]", which would at the last election be 1.041%, due to the small size of the Parliament (MP 81), which would mean that the abolition of the legal census would not be enough for certain minorities. In the first line this applied to the Croatian minority, it would be necessary for all registered Croatians to vote in order for their minority party to win one mandate.

4.2.1. Recommendation of the ruling coalition- DPS and SDP

Although the text was supposed to be the result of working groups' activities, this text was recommended by the ruling party delegates, namely its part comprised by representatives of DPS and SDP. Venetian commission also published an opinion about this text of recommendations.

According to the Venetian commission's opinion "the draft version of this law introduces the system of 'authentic' representation of minorities that is based on the following principles:

- affirmative action is broadened to all minority groups (not only for Albanians which previously was the case),
- besides political parties, groups of citizens can also submit electoral lists,
- two different kinds of measures of affirmative action are predicted for bigger and smaller minority groups (smaller than 2%),
- statement about membership to some minority group is obviously on voluntary basis,
- there is no maximal numerical threshold for any minority group to receive privileges from affirmative measures that are prescribed by the law (Montenegrin and Serbian lists are free to state that they represent some minority group);

38 Natural threshold depends on the magnitude (M), the number of parties with the prominent candidate (S) and the method of converting votes into seats. In the case of Montenegro, which uses D'Ontova formula, natural electoral census will be calculated by using the following formula: Pi = 100 (M + S - 1) and Pi = 100: (81 + 16 - 1) = 1 041%

- votes given to some minority group are not lost.
- There are no reserved mandates and in order to ensure one mandate it is necessary to get certain number of votes; in certain contexts , however, the smallest minorities have one guaranteed mandate provided that they reach a certain threshold".

The great improvement to the legislation is the introduction of affirmative action for all national minorities, thereat differing for those who participate in census with percentage larger than 2% and for those with smaller percentage.

We review this proposed text as following:

1. System of affirmative action is directed primarily to ensure mandates for parties that claim to represent minorities rather than minority representatives. Recommended act does not fulfill the recommendation of OSCE and ODIHR, where the system of individual candidatures is proposed, as opposed to the exclusive candidatures via the candidate lists. Existing solutions can provide the activation of "spare mandate", through affirmative action, even in cases when a party that represents certain minority has won the parliamentary status, even when it did not apply for the application of affirmative action. Other party that applied for the usage of affirmative action, and represent the same community, by using this mechanism can receive the "reserved mandate". Similar situation is if some minority party won mandates through participating in the coalition. In this way, it is obvious that this solution is not directed towards ensuring the minority representation; instead it represents a mechanism for ensuring mandates to national minority parties.
2. The second practical problem occurs in relation to the solution planned for representation of communities whose participation in total population is smaller than 2%. Namely, this opens contingencies for misuse of this solution because it is possible to apply for representation, i.e. demand representation of those communities that do not significantly participate in population, while it is obvious that the party claiming to represent this minority has other motives for participation in the electoral process.
3. Existing solution leaves a big room for electoral manipulations, such as selecting delegates through votes of members of bigger national communities, who allegedly represent certain minorities because there is no guarantee that minority members will vote for minority deputies that use affirmative action. Therefore, some of bigger communities can render the system of affirmative action absurd, or the same instrument can be misused by some group that enjoys the support of more than 0.7%, or equal to 0.2 percent of the entire population, while only declaratively stating that it applies for the usage of affirmative action mechanism.
4. Particular problem represents the fact that a number of overall mandates that can be distributed through the principle of affirmative action is not limited. Related to this issue is the lack of criteria that would stipulate which parties have the right to use this

mechanism. Anyone can declare to represent a smaller group of persons that belong to a national minority, registered in the census, even if that group is comprised by a handful of individuals. In this way, the possibility exists for some parties to win parliamentary seats under the privileged conditions, while their case does not represent the intent of the legislator.

This text, which had not won the necessary 2/3 support from the members of Parliament, did not contain enough stipulations that were the subject of recommendations from the OSCE and the ODIHR. The document introduces recommendations in a selective and superficial manner, and the main issues in this text are related to: 1) enabling citizens to candidate as individuals and not within the electoral list, 2) publishing of official results in an adequate time frame, 3) representation of women.

The suggested law, although containing some provisions that are to enable mechanisms for minority representation, opens a space for the misuse of the principle of affirmative action, and does not guarantee the legitimacy of representatives chosen in this way as representatives of minority communities. Therefore, we hold the opinion that this law should not be adopted nor implemented.

4.2.2.Recommendation of oppositional parties - SPP, NOVA and MfC

After leaving the working group and after the opinion of the Venetian commission was released, following the refusal of the proposed text prepared by the ruling party coalition, opposition parties issued their own recommended legal text.

The proposed text won the support of three strongest opposition parties. In focus of suggested changes, there are no institutional mechanisms for minority representation, but instead the questions for which opposition parties are more interested are: (1) the utilization of state resources, (2) the media coverage, (3) electoral administration. The biggest portion of introduced changes is with OSCE and ODIHIR recommendations, but, unfortunately, without any improvement on strengthening the integrity of electoral administration. Instead, the proposed measures have for their aim strengthening of the status of oppositional parties. Opposition parties, dealing with other questions, maintained the recommendations of the OSCE and the ODIHR, which is evident in stipulations related to women representation. Suggested changes introduce an obligation of electing at least one thirds of women. Suggested solution, along with the introduction of closed blocked lists, represents an important improvement.

In regard to minorities, the SNP suggested improvements of model that was a part of ruling parties' proposition and it is partly based on the recommendations of Venetian commission. First of all, the recommendations are related to the prevention of a possibility where a specific minority party can use the affirmative action in situations where minority is represented in the Parliament through a party that is elected in a regular way. Additionally, an attempt has been

observed related to the prevention of the abuse from the side of illegitimate representatives of minorities that would use the affirmative action model, through a stipulation regulating that State electoral commission, or local self-government, decides whether the applied party can use affirmative action model. Although this is an attempt in narrowing the room for abuse, the lack of predicted criteria on the basis of which members of electoral administration will make such a decision. As a result, such regulation would provide more room for abuse as it would allow the representative of electoral administration to, on the basis of their own conviction, decide whether someone will participate or not in the election process on the basis of affirmative action.

In regard to both of the proposals prepared by the working group, we must express regret for the lack of initiation on the preparation of the new electoral law, but instead the result of the overall process are amended 40 articles, as provided by the ruling parties, and up to 73 articles proposed by the opposition parties.

The proposed solutions do not give resolve all issues, followed by the lack of a study that would observe the effects of suggested recommendations. The proposal of the opposition, mostly based on the recommendations of the OSCE and the Venetian commission, as well as on the NGO sector analyses, has a bigger value than that of the ruling coalition, due to the fact that it deals with issues, in a comprehensive way, that need to be resolved in order to improve the electoral framework, but it does not solve the question of minority representation in an adequate manner.

4.2.3. Recommended changes in the form of introducing the mixed member proportional system, CEMI Model 1

The first model, advocated by CEMI, foresees changes of the existing electoral system and the introduction of the mixed member proportional system. This system would combine the majoritarian with proportionate method, by keeping the corrective action of the proportionate, such as the case with the German model, and with the aim of retaining the high degree of proportionality produced by the current system in Montenegro.

The territory of Montenegro would be considered as a single electoral unit. Single electoral unit is divided into one-mandate electoral units according to the following principles:

1) Municipality borders will be respected.
2) Every one-mandate electoral unit must be a coherent entirety.
3) In every municipality at last one candidate from candidate lists will be selected.
4) Depending on the number of voters in a municipality, the one-mandate electoral units therein will be determined, and with it, the number of mandates that are to be elected in that municipality.
5) Every one-mandate electoral unit will be comprised of almost the same number of voters.

The average number of voters will be determined by the State Electoral Commission in a manner that will include dividing the overall number of voters with the number of mandates that are to be distributed.

The total number of MPs would be 81. This number would be corrected on the basis of the additional member system, in those situations when a party has won more direct mandates in one-mandate electoral units. The ratio of mandates that are distributed within the majority system, in relation to the proportionate model, would be 55:45. According to this model, 45 mandates are distributed according to the results in one-mandate electoral units, through a one-phase system of relative majority, or simply, the candidate that won most votes in one-mandate electoral unit will be considered as a chosen candidate. The remaining 36 mandates are distributed on the basis of the results of electoral list achieved in a single electoral unit, thereat correcting the disproportionality that stems from the usage of the majority method. On the basis of the above mentioned principles, the expected distribution of mandates in municipalities would appear in the following manner:

- Andrijevica 1
- Bar 3
- Bijelo Polje 4
- Berane 1
- Budva 1
- Cetinje 1
- Danilovgrad 1
- Herceg Novi 2
- Kolašin 1
- Kotor 2
- Mojkovac 1
- Nikšić 5
- Plav 1
- Pljevlja 3
- Plužine 1
- Podgorica 11 (Tuzi 1) Golubovci (1)
- Rožaje 2
- Tivat 1
- Ulcinj 2
- Žabljak 1

The introduction of the separate unit would exist only for those communities that participate with more than 1% and less than 4% in the overall population. In such electoral unit, the direct mandate would be distributed through the system of relative majority. Other communities would be represented through multinational one-mandate units and one national unit. The minority representation would be based on the following 4 components:

1. The distribution of a mandate in one-mandate electoral units – firm geographical

concentration.

Minorities, as is the case with other citizens, would have a double possibility to determine their candidates. The first would be achieved through gaining candidatures and voting for candidates for direct mandates, within the one-mandate units, which would encompass those electoral places with a dominant majority of voters of a specific national community, following the good example of "special voting places", used for providing the representation of the Albanian community. This method of the distribution of mandates represents the only adequate mechanism for the representation of minorities, due to the geographical circumstances. Namely, the minorities in Montenegro are geographically concentrated, so within this model of the distribution of the majoritarian mandates, the members of the Albanian community represent a clear majority in three electoral units (Ulcinj 2, Tuzi 1). Also, judging by the national structure, Bosniaks/Muslims have a dominant majority in at least two municipalities, which presents no problem for them to elect their representatives in three electoral units (Rožaje 2, Plav 1 mandate).

2. Acquiring mandates based on the system of proportional representation – a corrective mechanism, followed by the abolishing of the legal census at a national level for minority parties.

This method envisages that the parties representing national communities, in cases that they win one direct mandate or otherwise reach the census at a national level, enter the process of the mandate distribution, through voting for electoral lists. In such a way the voters' choices, residing outside the one-mandate electoral units where direct mandates are distributed to minority communities, would not dissipate.
In practice, this means that in cases when a minority party, for example Bosniak/Muslim, won 2 direct mandates, while at the national level it won 5% of support, on the basis of which it should win 4 mandates, in the case where proportionate method is used, it will receive from its electoral list 4 – 2 (direct mandates that it won) = 2 mandates. In this way, the distribution of mandates will include the votes that this party won in all electoral places, which will ensure the proportionality and prevent dissipation.

3. Acquiring mandates through special electoral units – for minorities that are bigger than 0.5% and smaller than 3%, according the results of the last census.

The smallest communities that according to the last census have more than 0.5% and less than 3%, have the right to special electoral unit in which one deputy is elected through one-round system of relative majority. In order to hold the elections for the representative of minority community, through this institute, it is necessary to include the members of this community into the special electoral list, in numbers not greater than 0.1% of the overall electorate. In cases

where an insufficient number of members of that community are included in the electoral list, these minorities would lose the right to their representative using this institute. If the percentage of registered voters in this special unit drops below 0.1% of the overall electoral body, between two elections, the minority loses the right to this institute during the upcoming elections. The established census of 0.1% would guarantee the legitimacy to the elected representative, which solves the issue of legitimacy in cases where the number of registered voters drops. This solution, according to the 2003 census, would include the Croatian national minority, and possibly for the Roma minority, if they pass the 0.5% census. During the 2003 census, 0.42% of Montenegrin citizens declared themselves as Roma. By increasing the quality of census, as well as through the greater inclusion of this population, which faces statelessness due to the lack of documents, would increase their participation in the overall population, therefore rendering this solution applicable to Roma population.

Such voters would have the double voting right. Such voting right would be guaranteed to only the smallest national minorities (0.5%-3%), whose representation is otherwise jeopardized through regular voting system. The introduction of a double voting right for all minorities would, according to some authors, [39] be possible only through its introduction followed by limited jurisdiction of minority representatives. In Croatia, the system of double voting right is introduced only for those minority members that participate in the overall population with less than 1.5%. Minorities that participate with the percentage greater than 1.5 do not have the double voting right.

This mechanism would prevent the forceful election between civic and national identity for members of minority communities. To the minority groups that constitute more than 3% of the overall population of Montenegro, would according to this proposition, make use of a significant set of mechanisms for adequate representation, so that there is no need for a double voting right.

4. Acquiring mandates through differentiated census for coalitions.

The lack of legal census for minority parties, which is also related to those that belong to coalitions, would additionally ease the process of mandate acquisition, where the representatives of such party would be additionally protected in relation to the minimum number of votes, required to win the mandate.

4.2.4. Recommended changes to the existing framework of party lists, CEMI Model 2

Existing proportionate system of party lists leaves enough room for the introduction of institutional mechanisms, aimed at the improvement of minority representation. Corrections, aimed at the improvement minority representation, can be presented through three following components:

39 Baketa, Nikola, Kovacic, Marko: "Who Represents Minorities and How", in Political analyses, number 3, Faculty of Political Science, Zagreb

1. **The introduction of legal census for minority parties, followed by the introduction of the differentiated census for coalitions**

This scenario envisages the introduction of differentiated census for coalitions – 7%, for individual parties that do not belong to coalitions – 4%, and for parties that belong to coalitions – 2%. The minority parties are not required to reach the legal census. The party is identified as a minority party through its statute. The direct votes go to parties, regardless if they belong to the coalition or not. This manner of voting would create multiplying effects, in terms of the representation of minorities, as well as the enhancement and legitimacy of elected deputies. To addition to the fact that the legal census would not be applied to minority parties, but instead the effective census, coalitions would additionally reduce the effect of natural census. Such solution would enable the minority parties, with support less than 0.3%, to win a mandate, through coalition forming, by applying the election formula for the mandate distribution within the coalition list.

2. **The acquisition of mandate through special electoral units – for minorities that are bigger than 0.5% and smaller than 3%, as according to the latest census results**

Based on the comparative practice, CEMI proposes corrections within the existing electoral system which would, along with the maintaining the principle of Montenegro as multinational, multi-mandate electoral unit (proportional method), introduce the exception of special unit for communities that participate with more than 0.5% and less than 3% in the overall population. Within this electoral unit, one direct mandate would be distributed via the system of relative majority. The same system for the mandate distribution would be used as explained in the previous scenario.

3. **The introduction of preferential voting**

The introduction of preferential voting (instead of the existing closed, modified electoral lists), would be achieved through utilization of the closed unblocked electoral lists (the voter has the right to vote for a candidate within one electoral list). In this way, the minority voters would be enabled to vote for their representative within the civic list, thereat avoiding the sequencing of party leadership.

5. The explanation of the chosen scenario, CEMI Model 2 and the proposed measure for its implementation

The Monitoring Center CEMI's team believes that the best scenario for solving the long list of problems of the Montenegrin electoral system is CEMI's Model 1. However, the Model 2, proposed by CEMI, could serve as an interim solution, given the opposition of political circles towards the introduction of any significant reforms of the electoral system. Aside from the fact that this model offers good mechanisms for minority representation, preserving at the same time the respect for democratic principles, this scenario resolves other issues in Montenegro that are directly related to the electoral system.

Aside from the issue of minority representation, the existence of direct proportional system used in Montenegro, gave rise to many other issues. Some of them are: (1) democratic deficit, (2) the nature of deputy's mandate, (3) high fragmentation of the parliament, (4) the representation of women and (5) the organization of the electoral administration.

5.1 The democratic deficit

This study treated the issue of direct election of representatives into the national and local parliaments. The way of election, where political plays the role of a "third party", as a mediator between the citizens and their representatives, with the arbitrary right and the right to determine the deputies themselves, regardless of the electoral list sequence, has been strongly criticized by both domestic and international professionals, and especially by the specialized organizations such as the OSCE.

Such norm breaks entirely the relation between the voter and their representatives, and violates the principle under which citizens elect their representatives independently.

If the mixed system of proportional member is to be used in Montenegro, which in theory is also known as the "personalized proportional system" (PPS) and is used in Germany, the closed blocked electoral lists would have to introduced. This would include an adequate implementation of the electoral list sequence, submitted prior to the elections.

The second problem of the democratic deficit is contained within the coalition forming, which eliminated the insight into the real strength of political parties. Most of the effective parties has independently entered the electoral process only a few times, and some only once during their work.

In order to resolve this problem, aside from the introduction of the differentiated threshold, it is necessary to establish independent lists of all parties, and enable voting on them, even if they are a part of the coalition. The result of the coalition would be accounted through summing up the won votes of all parties that belong to a coalition. The differentiated threshold would exist also for parties that do not belong to a coalition.

The differentiated threshold should be: 7% for coalitions, 4% for separate parties not

participating as a part of a coalition and 2% for parties that participate as a part of a coalition.

5.2 The nature of the MP mandate

After the introduction of the multi-party system, deputies' mandate was declared as binding. The imperativeness was additionally enforced through the existence of the institute of recall. Practice hasn't witnessed this institute to be used, so this norm was changed, while the passing of the Constitution in 1992 guaranteed the free MP mandate. However, the nature of the mandate freedom, guaranteed by the Constitution, was violated through the amendments of the Law on the Election of Councilors and Representatives from 1995 that provided that the MP's mandate stops being valid with the termination of membership within a party whose list the MP was elected from. The binding party mandate remained in force until 2004, when the Constitutional Court questioned the character of deputies' mandate and this time brought a decision that abrogated the provision adopted in 1995.

After the decision of the Constitutional Court in 200, the free mandate in Montenegro is again in force, where free is characterized through the following statement: "bearing in mind that the Electoral Law envisages the loss of deputy's mandate in cases where the political party's activities, whom one represents, are forbidden, this type of mandate can be characterized as free, although directly associated with the party".

Within the Constitutional draft, we again have attempts of incorporating more significant role of parties in the mandate allocation, with the inclinations of avoiding guarantees that a mandate is free, in order to leave space for the creation of eventual tighter bondage between mandates and parties, through the consequent electoral law modifications. The personalization of the proportional system through the introduction of elements of relative majority system for the election of a part of MPs, can give a strong contribution to the diminution of this problem, as well as strengthen the deputies' mandates as free.

5.4 The high parliament fragmentation

Within the section 2.1.1.1, we have noted that even beside the high parliament fragmentation stabile majority still exists. Namely, the existing proportional system with low threshold of 3% and the lack of differentiated threshold stimulates great number of parties to form coalitions.

Within the elections in 2006, 12 candidate lists that represented 22 parties, took part in the election race, while in the last elections in 2009 that number increased to 16 lists. Eight lists that represented 11 political parties did not pass the electoral threshold, while the remaining eight lists that passed the threshold, provided the parliamentary status for the remaining 11 political parties. A curiosity of these elections is the fact that 11 parties participated in the elections independently, which is two times more when compared to previous elections (5),

with the noted significantly increased dissipation of votes, from 2.5% to 12%.

The high parliament fragmentation ultimately results in the creation of political instability due to the lack of stabile majority. In Montenegro, aside from the existence of the fragmented parliament, we still have a stable majority. However, such condition is more an exception than a rule, so it is possible to expect in the upcoming elections, that no pre-electoral coalition will be able to form the government independently. The currently governing coalition represents the union of two bigger and two smaller parties.

The change of electoral system is needed in order to avoid possible political instability and a situation where a stable government would not be formed.

5.4.Women representation

Although the political rhetoric in Montenegro includes emphasizing the significance of women in political processes, the data concerning their real representation within institutions and especially the Parliament, is more than defeating. There is no institutional mechanism that would stimulate better representation of women in the parliament. Attempts of women organizations haven't yielded the effective change, but only moves of declarative character that were the subject of pre-electoral campaigns. In the Parliament, in 2002 12% of Montenegrin MPs were women and that percentage remained significantly low in 2006 – 12.3%.

The existence of closed electoral lists is very suitable for the introduction of the obligation of candidacy of certain percentage of women through candidate lists, and more importantly, the obligation of electing women from electoral lists within the overall representation rate.

The new electoral law needs to introduce the obligation for every candidate list to nominate at least 1/3 of women candidates, where the advantage in mandate allocation realized through candidate lists would go to women, until their minimal total participation of 25% of mandates is realized.

What would this mean in practice? Let us say that party A won 16 mandates, out of which 5 are direct mandates realized in single seat constituencies. Out of five mandates realized in this way, four were won by male and one by a female candidate. The total quota for minimal women representation for party A is four mandates. Let us assume that 3 out of the remaining 11 mandates need to be distributed. In such a situation, the advantage would be given to three first-ranked female candidates, regardless of their position in the party list. After the defined quota is realized, other candidates are elected according the sequence defined by the candidates list.

Table 5: The example of mandate allocation for female candidates in personalized proportional system

Direct seats (majority method)		*Seats allocated through electoral lists (proportional method)*		*Total*
M	4	M	8	12
F	1	F	3	4
Total	5		11	16

The allocation of mandates distributed on the basis of affirmative action, through candidate lists																		
1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.	17.	18.	19.
M	M	F	M	M	M	M	M	F	M	M	M	M	F	M	M	M	F	M

The table clearly demonstrates that the seats in the parliament have been won by women, i.e. candidates number 3, 9 and 14. The male candidate number 11, who belongs to the first 11 ranks, did not win the seat in the parliament, due to the application of affirmative action for women.

The proposed system is simple in terms of its implementation and gives clear results that are to better the representation of women. The percentages themselves can vary, depending on political decisions, while the suggested model itself must be maintained.

6. Conclusion

As it can be noted, the authors of this text favor the idea that the numerous issues related to the elections can only be resolved by changing the electoral system and introducing the mixed member proportional system, i.e. the personalized proportional system. The adoption of this system would resolve most of the imperfections of the existing one. Consequently, we believe that the reform of Montenegrin electoral system should be founded on several key elements.

1. The introduction of the mixed member proportional system instead of the existing direct proportional system.
2. More than half, 55%, i.e. 45 mandates would be allocated on the basis of directly won mandates in single seat constituencies, and the remaining 36 (45%) on the basis of results realized by electoral lists within a single constituency on the level of Montenegro.
3. The voter would have two votes at one's disposal, one that would be given to one of the

offered electoral lists, and the other for individual candidates in the singe seat constituencies (electoral units).

4. Mandates allocated through the proportional method will have a corrective role in relation to direct mandates so that the high proportionality index will be achieved.

5. Single-seat constituencies will be defined in a manner that they encompass almost equal number of voters. Average number of voters of a single constituency will be defined by the State Electoral Commission, in such a way so that the total number of voters is divided by the number of mandates that are to be allocated.

6. The minority parties should not confirm to the legal census, regardless if they participate in the electoral process independently or as part of the coalition.

7. The exception from the rule that constituencies should be similar to each other by the number of voters, should be allowed in the case of representation of a community that constitutes more than 0.5% and less than 3% of the total population.

8. The voters of minority communities that participate in the overall population with the percentage greater than 0.5% and less than 3%, have the right to special electoral unit, in which one deputy is elected through the system of relative majority.

9. The voters of minority communities that participate in the overall population with the percentage greater than 0.5% and less than 3% are entitled to a double voting right.

10. Candidate lists used for the allocation of mandates through proportional method should be closed and blocked.

11. Separate candidate lists should also exist for parties that represent a part of a coalition. Electors vote directly for those parties, and the complete result of the coalition is represented as a sum of all individual results.

12. For the allocation of mandates on the basis of proportional method, in order to achieve greater proportionality, Saint-Laguë formula needs to be used.

13. In order to achieve better women representation every list has to nominate 1/3 of female candidates. These candidates have the advantage during the sequence definition in a way that ¼ of mandates won has to belong to women.

14. Candidate lists that do not adhere to the minimum number of female candidates will not be accepted.

15. Differentiated threshold needs to be introduced, in the following manner: 7% for coalitions, 4% for separate parties not participating as part of a coalition and 2% for parties that participate in a coalition. Beside this threshold a party would alternatively acquire parliamentary status in case of winning 1 direct mandate. By winning 1 direct mandate, a list also gains the right to participate in mandate allocation through the application of the proportional method.

16. It is necessary to submit a candidacy for candidates' lists and every separate candidacy in every constituency (electoral unit).

17. Voting is done by using two separate voting ballots, which makes it easier for the citizen to either choose a certain list, and/or cast one's vote for direct mandate to the candidate that is not a representative on the list he voted for. This would enable the "splitting of votes".

18. It is necessary to establish the State Electoral Commission as an independent state authority that could take necessary steps for the conduction of electoral process in a professional manner.
19. It is necessary to annul the limitation of the MPs number, as defined by the Constitution, because such limitation prevents changes of the electoral system, i.e. prevents the introduction of certain electoral modes.

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About organization

The Monitoring Center – CEMI is a nongovernmental, non-profitable organization founded in May 2000, whose main goal is to provide infrastructural and expert support for continuous monitoring of the process of transition in Montenegro. CEMI envisages Montenegro as a land of free citizens, the rule of law, social justice and equal opportunities. The mission of CEMI is to continuously provide support to reforms and strengthening of institutions of political system and civil society organizations, by proposing and monitoring the implementation of public policies in the fields of human rights and freedoms, fight against corruption and Euro-Atlantic integration of Montenegro. CEMI implements its activities through three programs: Democratization and human rights, Fight against corruption and European Integration, while the organizational structure consists of four departments: Public policy research department, Legal department, Public opinion survey department and Public Relations Department. More information at: www.cemi.org.me.

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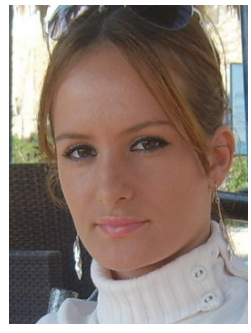

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