

## Introductory address

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Mr Gianni Buquicchio  
*Secretary of the Venice Commission*

Ladies and Gentlemen,

Dear Friends,

I am delighted to welcome you all to this UniDem seminar, which our Croatian friends had the wonderful idea of holding in the magnificent setting of Zagreb's Old City Hall.

For several years, the Venice Commission has been seeking to focus academic debate on various aspects of democracy through the UniDem seminars.

As you are aware, our theme this year will be "the participation of minorities in public life", which I am sure will give rise to high-quality reports and fruitful exchanges.

Indeed, over 17 years after the fall of the Berlin Wall and in spite of the resulting reunification of Europe, the issue of minorities is still a very topical one. It is not therefore surprising that the Action Plan adopted at the Warsaw Summit in 2005 calls for the continuation of the Council of Europe's activities in this area, as, and I quote, "Europe's chequered history has shown that the protection of national minorities is essential for the maintenance of peace and the development of democratic stability".

From the point of view of the Venice Commission, it is particularly interesting to consider the topic of the participation of minorities through the prism of the various constitutional models that co-exist in Europe. This is because these models have a significant impact on the solutions adopted in this area by individual states, either because of the constraints they impose or, alternatively, the flexibility they involve.

This brings us to the very core of the expertise developed by the Venice Commission since it was set up, and this expertise will be decisive in understanding the extent to which further progress in terms of participation is possible or, alternatively, likely to be more difficult for constitutional reasons.

For instance, it is a fact that unitary, centralised states will continue to exist alongside federal or regionalist states with varying degrees of territorial solutions to the problems of minorities. It is therefore necessary to seek to draw maximum benefit from what unitary states can offer in terms of taking account of social

and cultural diversity while ensuring the harmonious co-existence of groups with specific identities.

In spite of the conceptual barriers to the recognition of minorities within the community of citizens in unitary states, the reality of pluralism will increasingly make itself felt in them, if only because of the obligation they have to effectively combat discrimination which, in practice, usually affects vulnerable minority groups.

It is therefore essential to seek to show that promoting effective equality, both in the socio-economic and in the cultural and linguistic fields, is entirely compatible with the requirements of a unitary state, whose sovereignty and territory are, by definition, indivisible.

In the case of regionalist or federal states, it would probably be wrong to assume that they have settled, once and for all, the issue of the protection and the participation of minorities through territorial arrangements, which are sometimes generous but are often historically intended – sometimes actually following conflicts – to respond to the needs of groups which are in the majority or, at the very least, present in large numbers at local level. There again, contemporary social reality, which is marked by increased diversity, including in federate or regional entities, will lead the states concerned, facing a whole range of demands, to seek fresh responses to cultural, linguistic and social needs extending far beyond the conventional protection of historically threatened minorities.

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In short, the challenge for regionalist or federal states will be to move from a static system of protecting minorities traditionally present in given parts of their territories to a more dynamic, multifunctional system offering graded and adaptable solutions to the necessarily more complex aspirations of diverse minorities whose identity is no longer formed by mere reference to states.

The seminar will also provide an opportunity for considering the current state of the international standards governing the participation of minorities, which have been expanded spectacularly in recent years, through the efforts both of the Council of Europe and of other international organisations such as the Organisation for Security and Co-operation in Europe (OSCE). In this connection, I am delighted that the Office of the OSCE High Commissioner on National Minorities has accepted our invitation to take an active part in the seminar, as its work regarding the participation of minorities, in particular through the preparation of what is known as the Lund recommendations, has shed valuable light on the relevant international standards. Moreover, the Venice Commission is delighted to continue its discussions with the Office of the OSCE High Commissioner on “special measures to promote minority representation in elected bodies”, a topic which will be dealt with in greater depth at the second session of the seminar.

Lastly, thanks to the expertise of the University of Glasgow, an entire session will look at the cultural autonomy of minorities and should give us an idea of the real practical significance in modern Europe of this model which was developed

by the visionary Austrian thinkers and politicians, Karl Renner and Otto Bauer, at the beginning of the 20th century. The examples closest to cultural autonomy are to be found in east European countries, where various problems and shortcomings have, however, tarnished the reputation of this potentially promising model for strengthening the participation of minorities.

It is therefore instructive to stop and look briefly at the case of Belgium, whose constitution has for over 30 years granted the Flemish and French-speaking communities non-territorial cultural autonomy applicable in the Brussels-Capital region. Modelled on the theories of the above-mentioned Austrian politicians, this system is not the same as real personal autonomy, as it does not involve the recognition of sub-nationalities, but it does succeed in functioning by taking as its basis the various institutions such as schools or museums, whose activities concern only one or the other community. However, the operation of the system is extremely complex and poses many problems of overlapping responsibilities, which do not appear to have been entirely resolved.

Before we begin our discussions, I should like to underline that it is no coincidence that this UniDem seminar is being held in Croatia: for several years, the country has been making most deserving efforts to reform and move closer to its goal of full integration into the Euro-Atlantic structures. The Venice Commission will continue to stand by Croatia and help it along this road with any assistance that may be useful here.

Our co-operation with Croatia, which dates back to the early 1990s, has been extremely wide-ranging and has involved many areas, including the status of the Constitutional Court, electoral issues, local democracy and, of course, the constitutional law on the rights of national minorities. The latter, no doubt, was an essential stage in the consolidation of the rights of minorities in Croatia and the advances it involved were rightly welcomed by the Venice Commission. I am therefore particularly pleased that today's seminar offers an opportunity to find out how the implementation of the constitutional law is perceived in the country, in particular by the representatives of minorities.

In broader terms and going beyond the example of Croatia itself, the whole Balkan region has a duty to strengthen democracy and the rule of law as a means of reconciling more effectively the aspirations of the many population groups which live together in this part of Europe. In future, the Venice Commission will continue to support and encourage corresponding developments, in particular in Montenegro, in Kosovo, in Albania and in "the former Yugoslav Republic of Macedonia", as that will help to increase the stability of the region, which remains vital to Europe as a whole.

Before wishing you all an excellent seminar and stimulating discussions, I must now extend my sincere thanks to our hosts and joint organisers from Croatia, namely the Presidency of the Republic, the Ministry of Foreign Affairs and European Integration and the University of Zagreb. Their efficiency and

helpfulness has enabled us to stage this promising event under the best possible conditions.

I would also like to thank the University of Glasgow for its help with organising one of the seminar sessions.

# Constitutional non-recognition of minorities in the context of unitary states: an insurmountable obstacle?

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## Introduction

In principle, the question of minorities should not arise in the constitutional framework of unitary states. In its traditional sense the term “unitary state” implies a single state. This unity is above all territorial. It means political as well as geographical unity, with political power being exercised in identical manner throughout the country. It follows from this that the unity is also sociological: the unitary state seeks to unify its population sociologically and legally.

Thus defined, the unitary state is the fullest realisation of the nation-state political model, an ideal expression of its political and legal aim, which is an actively brought-about coincidence of single nation and single state: “the state forms a single legal system in which the same instruments (the constitution, laws, decrees, etc.) are to apply everywhere and to everyone in exactly the same way. The unitariness of the state precludes having different rules for groups with particular characteristics or differentiating between groups according to concrete data”.<sup>1</sup> That is why constitutional affirmation of the state’s unitariness often goes hand in hand with assertion of the state’s national character, as in the case of Romania,<sup>2</sup> and indivisibility, as in French constitutions (with the notable exception of the present 1958 constitution, which drops the reference to unity).<sup>3</sup> Similarly, the Turkish Constitution provides that: “The Turkish State, with its territory and nation, is an indivisible entity” (Article 3).

Unity is a characteristic of the state, while indivisibility is a characteristic of sovereignty. Sovereignty is an essential characteristic of the state, which, however, explains why unity and indivisibility are usually linked, or indeed treated as identical. As an attribute of sovereignty – that is, in constitutional democracies, sovereignty of the nation or people<sup>4</sup> – indivisibility involves the nation’s sovereignty or the people’s collective unity and is therefore basic to the nation as a

1. Constantinesco V., Pierré-Caps S., *Droit constitutionnel*, Paris, PUF, 2nd edition, 2006, p. 290.

2. Article 1: “Romania is a sovereign, independent, unitary and indivisible National State”.

3. Article 1 lays down: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis”.

4. Article 3 of the French Constitution, Articles 1-2 of the Bulgarian Constitution, Articles 2-1 of the Romanian Constitution and Article 6 of the Turkish Constitution.

constitutional law construct. And as this legal nation is identified with the state,<sup>5</sup> indivisibility also becomes a characteristic of the state. So while indivisibility relates in the first instance to the sovereignty of the nation or people and to how the political power which it authorises is apportioned, it also affects the form of the state in being closely linked with the unitary state. In that it reflects the unity of the legal nation, the unitary state guarantees and preserves the indivisibility of national sovereignty through the unity of impetus supplied by the political and law-making power.

The point here is that French constitutionalism's construction of the one and indivisible state from the late 18th century onwards should above all be seen in the context of promoting the nation as holder of sovereignty – as the new embodiment of political legitimacy and main organ of power. Originally, therefore, the concept of nation had nothing to do with the make-up of the national population, with its human substratum. It had to do with the new legitimacy of power deriving from the French Revolution: as the sole holder of sovereignty, and being essentially indivisible, the nation necessarily expressed a single will. It was not until much later that the holder of sovereignty was also presumed to be homogeneous and that the Constitutional Council used the "legal concept of the French people" to reject any differential treatment of the national population.<sup>6</sup> The singleness of sovereignty required homogeneity of its holder: no one "section of the people" (Article 3.2 of the constitution) could be allowed to arrogate to itself the exercise of sovereignty and no component of the "French people" could be set apart. The "French people", as the concomitant of the unitary state, was a unified and homogeneous community with no differentiation between its members, who were therefore equal citizens "without distinction of origin, race or religion" (Article 1 of the constitution).

This reasoning, which the Constitutional Council based on a concept that has recurred in French constitutions for two centuries, that of the "French people", nonetheless rests on a confusion in that the concept of the "French people" has more to do with where sovereignty lies than with describing the national population. In other words, the Constitutional Council's reasoning lumps together two different things: it "treats the status of the groups of individuals that make up the French people in terms of that people's oneness".<sup>7</sup> This rules out the unitary nation-state's constitutionally recognising specific rights to any minorities as such, of whatever kind, a situation which can be seen in Bulgaria, Roma-

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5. In French public law theory this is what is conveyed by Esmein's famous century-old dictum, "The state is the legal personification of a nation" (*Éléments de droit constitutionnel français et comparé*, 6th edition, 1914, reprinted Editions Panthéon-Assas, 2001, p. 1). Carré de Malberg said that it "followed ... from the principle of national sovereignty that the state was none other than the nation itself" (*Contribution à la théorie générale de l'Etat*, Paris, Sirey, 1920, p. 14).

6. Cons. Const, Decision No. 91-290 DC of 9 May 1991, Statut de la Corse, Rec. p. 50; Decision No. 99-412 of 15 June 1999, European Charter for Regional or Minority Languages of the Council of Europe, Rec. p. 71.

7. Haquet A., *Le concept de souveraineté en droit constitutionnel français*, Paris, PUF, 2004, p. 90.

nia and Turkey as well as France. In those states the national community and the community of citizens are one and the same, forming a single state community. Minorities cannot be recognised as distinctive legal communities. At most they will exist only through the community of citizens, as in Romania, where Article 6-1 of the constitution recognises the right to identity “of persons belonging to national minorities”.

This approach nonetheless lacks solidity, particularly in France, where it involves a narrow, sovereignty-oriented interpretation of the concept of the “French people”: “the people ... becomes the almost mystic focus of a whole series of attributes that it owes, not to its actual make-up or strength of numbers, but to an imponderable abstraction, its sovereignty”.<sup>8</sup> This is an approach designed to underpin political and constitutional democracy, and it cannot accommodate the requirements inherent in contemporary social democracy, which is centrally about the “situated individual” or individual in actual context. Social democracy “endeavours to establish among individuals a de facto equality that their theoretical freedom is powerless to bring about”. In social democracy human rights are “the gauge of a necessity”<sup>9</sup> and it is no longer enough for the unitary state to promote a national community in which citizens are simply so many atoms, establishing the institutions of political power through purely arithmetical representation and decision-making processes. It requires that the unitary state now address the question of the identity of its own human substratum and see the individual as someone with a variety of everyday allegiances: “alongside the people in the traditional sense of the community of citizens or voters, another people emerges – a group of contextualised human beings”, the “people as society”.<sup>10</sup>

Consequently constitutional non-recognition of minorities in the context of unitary states is not the insurmountable obstacle it once was, despite the apparent durability of the principles that justified the non-recognition. Those principles are increasingly being adapted so that the law takes into account an extremely wide range of manifestations of minority, whether ethnic, linguistic, cultural, religious, or (more recently) immigrant, as in France. In this last case we are witnessing the sudden emergence, in the public sphere, of a “minority policy” that “subjects to critical scrutiny the social norms which allow the discrimination the law itself prohibits”.<sup>11</sup>

This development is by no means clear-cut. It takes various forms which reflect the sociological features and diversity of the national population. Nor is it unambiguous, in that recognition by the unitary state may also have the objective of

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8. Burdeau G., *La démocratie*, Paris, Seuil, 1966, p. 27.

9. Burdeau G., *ibid.* See pp. 63, 65, 68.

10. Koutsoubinas S., *Le peuple dans la Constitution hellénique de 1975*, Presses universitaires de Nancy, 1989, p. 5.

11. Fassin E., “Pourquoi et comment notre vision du monde se racialise – Grand entretien”, *Le Monde*, 5 March 2007.

reducing the particular group's difference from the community at large, thus, paradoxically, promoting its assimilation. At all events the trend can be verified in two areas. The first is law-making, with, in particular, internationalisation of national constitutions – the tendency of international influences to shape and relativise constitutional provisions, especially in minority matters. The other area is at once sociological and legal and has to do with basic shifts within society and within the national population: in particular there is “growing acknowledgment of discrimination of various kinds, acknowledgment which compels action and raises minority issues”.<sup>12</sup> While in the first case a standard supranational model is being put forward for incorporation into unitary systems, in the second it is the configuration of the “people as society” which is forcing them to adjust their law.

### I. An obstacle eased by the internationalisation of national constitutions

The phenomenon is sufficiently well-known for there to be no need to describe it in detail. It results in particular from the process of democratic transition in central and eastern Europe and the effect on constitution-makers of international treaty law and especially European human rights law. This was initially a question of meeting the prerequisites for admission to the Council of Europe: “The wish to conform to the liberal-democracy constitutional model operating in the countries that were going to be taking the decision on their admission, the desire to assert their Europeanness ... led the applicant countries to include in their constitutions elements of what may be called the *European constitutional heritage*”.<sup>13</sup> This includes the Statute of the Council of Europe and the Council of Europe conventions, in particular the European Convention on Human Rights and the case law interpretation of it. It also includes national constitutional traditions insofar as they help a single democratic society take shape.

Law on minorities is a further component of this European constitutional heritage, in the form of a general obligation to protect minorities or the “principle of minority protection”. “The principle amounts to a general obligation on states to guarantee a degree of protection for minorities on their territory. Commonly accepted by them as being a legal duty, it has entered European law through the usual law-making channels, although the multilateral agreements on the subject have also helped establish it”.<sup>14</sup>

Constitutional non-recognition of minorities is in fact neutralised, as it were, by this general obligation to protect minorities which sets a “minimum standard”,

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12. Fassin E., *ibid.*

13. See Constantinesco V. and Pierré-Caps S., *op. cit.* pp. 246-7. On the concept of “European constitutional heritage”, see European Commission for Democracy through Law, “European Constitutional Heritage”, Strasbourg, Council of Europe Publications, 1997.

14. Boev I., “Le règlement européen des problèmes minoritaires en Europe de l'Est: formation d'un *corpus juris* relatif aux minorités et institutionnalisation de ses mécanismes d'application”, law thesis, Nancy, 2003, p. 313.

“guaranteeing not only general human rights and fundamental freedoms as being relevant to minorities, but also specifically minority rights and freedoms protecting particular aspects of identity”.<sup>15</sup> What is precluded is protection measures for minorities which involve special territorial arrangements conferring territorial and/or personal autonomies incompatible with unitariness, these being prerogatives of the state by virtue of the principle of constitutional autonomy.

The general obligation self-evidently applies to states that have acceded to the relevant treaties. This is the case with Bulgaria. Its Constitutional Court<sup>16</sup> approved Bulgarian accession to the Framework Convention for the Protection of National Minorities precisely on the ground of compliance with international human rights law. The court held that Bulgarian law had taken over the concept of the national minority by virtue of Bulgaria’s accession to the European Convention on Human Rights (Article 14). On that same ground Bulgaria has also incurred several adverse judgments of the European Court of Human Rights under Article 11 (freedom of assembly) in connection with its treatment of the “Macedonian minority”.<sup>17</sup> The concept of the national minority has been given practical expression in Bulgarian anti-discrimination law through various legislation since 2000 to bring Bulgaria into line with EU law ahead of EU membership.<sup>18</sup> For the first time, this legislation explicitly prohibits discrimination (as well as xenophobic and racist acts) against national minorities. These prohibitions have been included in the Criminal Code.

Romania recognises minorities through its participation in a wide range of treaties. The Romanian Constitution suggests recognition of humanitarian conventions as having supra-constitutional authority.<sup>19</sup> The Advisory Committee on the Framework Convention, in its two rounds of monitoring since the framework convention came into force in Romania (1998), has accepted that the country has an appropriate framework for protection of minorities. This encompasses the rights, fundamental freedoms and principle of non-discrimination that people belonging to minorities enjoy in ordinary law – that is, indirectly and not specifically – together with rights and freedoms directly and specifically applying to members of minorities in language, religion, culture and other spheres. However, the committee also said that the legal framework was being less than adequately implemented, particularly with regard to the Roma.

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15. Boev I., *ibid.*, p. 326.

16. Decision No. 2, 18 February 1998.

17. Stankov and the United Macedonian Organisation (UMO) Ilinden, 2 October 2001; *UMO Ilinden and Ivanov v. Bulgaria*, 20 October 2005; *UMO Ilinden and others v. Bulgaria*, 19 January 2006.

18. The cornerstone is the Prevention of Discrimination Act (2003).

19. Article 20: “(1) Constitutional provisions concerning the citizen’s rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between national law and the covenants and treaties on fundamental human rights which Romania is a party to, the international law shall take precedence unless the Constitution or national law contain more favourable provision.”

In Turkey the treatment of minorities has been making progress since 2001. This is a result of the national programme of incorporation of EU law in order to meet the political requirements for possible future EU membership, although, like France, Turkey is not a party to the Framework Convention or the European Charter for Regional or Minority Languages (signed by France on 7 May 1999, but not ratified). However, any suggestion of indirect, non-specific protection of minorities in terms of fundamental rights has to be qualified. This has to do less with the national, unitary nature of the state, which is inviolable and is not subject to constitutional amendment (Article 4 of the constitution), than with certain constitutional provisions' incompatibility with EU membership despite the reforms of 3 August 2002,<sup>20</sup> which were affected with EU membership in mind. In addition to the question of protection for minorities, there is the specific problem presented by the policy of forced displacements in regions with Kurdish population, a policy for which the European Court of Human Rights has frequently found against Turkey.

Lastly, France, arguably, does not escape this general obligation to protect minorities resulting from international and European law, although the obligation does not extend to minority situations arising from recent immigration or to foreign minorities. This is because, in addition to arising from treaties, the general obligation has a customary dimension and therefore applies to European countries which have neither acceded to the relevant conventions nor recognised minorities within the meaning of the European *corpus juris*. This customary dimension is not geographically restricted to central and eastern Europe. It applies to all countries involved in the process of European integration in the broad sense, including France. This can be inferred from France's comment on the general observation of the UN Human Rights Committee of 2 November 1994 concerning Article 27 of the International Covenant on Civil and Political Rights.<sup>21</sup> The comment was that Article 27 was declaratory in nature and reflected a minimum of rights recognised in customary law. In fact, France's refusal to accept that provision is not an obstacle to its wish to conform to it through customary law. At the European level, support for the customary thesis may be found in an *obiter*

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20. For example, the punishment of any "wrongful" use of human rights in the meaning of Articles 13: "Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant Articles of the Constitution", and 14: "None of the rights and freedoms embodied in the Constitution may be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas".

21. United Nations Human Rights Committee UN Doc. CCPR/C/2/Rev/1/add.6, p. 930. France had drafted a declaration interpreting Article 27 when it acceded to the covenant in 1980 and the Human Rights Committee then classed the declaration as a reservation. Article 27 requires states in which there are minorities not to deny them the exercise of rights relating to their identity.

*dictum* of the European Court of Human Rights in its *Chapman v. United Kingdom* judgment of 18 January 2001 concerning the right of a British national of Gypsy origin to live in a caravan on land belonging to her. The Court observed that there was an emerging consensus among Council of Europe member states "recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle".<sup>22</sup> This consensus can be inferred from Council of Europe conventions as well as non-binding documents adopted by various Council of Europe bodies. In the *Chapman* case, the general duty to protect minorities was held to imply the applicant's right "to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition".

Lastly, it may be noted that Article I-2 of the Treaty Establishing a Constitution for Europe introduces respect for "the rights of persons belonging to minorities" as one of the values of the European Union. Article I-59 provides for suspension of certain rights resulting from EU membership when there is found to be "a clear risk of a serious breach by a Member State of the values referred to in Article I-2". As regards protection of minorities, Article I-2 thus codifies customary practice as established by EU enlargement into central and eastern Europe. In its decision of 19 November 2004 preliminary to possible ratification of the treaty by France, the Constitutional Council observed that the Union's values were to be interpreted in harmony with the constitutional traditions common to the member states. The provisions concerned were not contrary to the French Constitution so long as there was no "recognition of collective rights of any group, whether characterised by shared origin, culture, language or belief".<sup>23</sup> This cannot be regarded as an interpretative reservation, such reservations being ruled out anyway "in the case of international conventions, which require uniform application by all the States Parties".<sup>24</sup> The Constitutional Council freely chose to consent in a general clause<sup>25</sup> to the transfer of powers necessitated by the treaty, although this should not be seen as in any way recognising a right of minorities as such to protection, for which the treaty does not provide in any case.

In reality this question can be looked at from another angle, in terms of the emergence, in the unitary states we are concerned with, of the people as society alongside the people as political entity.

## **II. An obstacle eased by the emergence of the people as society**

Although constitutional non-recognition of minorities in the context of unitary states is tempered by internationalisation of national constitutions, this internationalisation still limits law on minorities to protection of fundamental rights in the

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22. § 93 ff.

23. Decision No. 2004-505 DC, Rec. p. 173, §16.

24. Schoettl J.-E., "La ratification du traité établissant une Constitution pour l'Europe appelle-t-elle une révision de la Constitution?", *Les petites Affiches*, 29 November 2004, p. 7.

25. Article 88-1-2: "The Republic may participate in the European Union in the manner provided for by the Treaty Establishing a Constitution for Europe, signed on 29 October 2004".

individual sphere, which unitary states already recognise to a greater or lesser extent. As the Romanian Constitution puts it: what is involved is the individual right to identity. However, the general obligation to protect minorities under the European constitutional heritage extends to rights and freedoms directly and specifically established on the basis of membership of a minority, and it necessitates recognition of a special link with minority identity. But minority identity poses a challenge to the oneness of the national community of equal and identically treated citizens and to identification of that community with the unitary state because it raises issues as to the status of the groups of individuals of which the people is composed, issues which the supposed oneness of the people chooses to disregard, as we have seen in relation to France.

However, factual considerations are now forcing unitary states to take minority identity into account. Because such considerations have to do with features of national population they differ considerably from country to country. While in central and eastern Europe the issue is a political one, resulting from the plural make-up of the national community, in France there is more of a social or even economic issue stemming from a need for real equality of citizens. In the former case it is national minorities that challenge identification of the national community with the community of citizens; in the French one it is racial or immigrant minorities intent on making the community of citizens a reality and not a meaningless abstraction.

### **A. The challenge to identifying the national community with the community of citizens**

This particularly concerns Bulgaria and Romania.

Bulgaria is a particularly innovative example of adapting the rigour of the unitary state's constitutional principles to national realities. Although involvement of minorities in public life is a matter of ordinary law for lack of constitutional recognition of minorities, the political reality is significantly different because of the prominence of the Movement for Rights and Freedoms (MRF), a party representing the Turkish minority.<sup>26</sup> For the third time since 1991 the MRF is part of the governing coalition and is helping to stabilise Bulgarian political life. MRF participation in national and local elections was the subject of a Constitutional Court decision of 21 April 1992 (Article 11-4 of the constitution prohibits the formation and operation of parties on an ethnic, racial or religious basis). In view of the MRF's importance on the Bulgarian political scene, the Constitutional Court adopted a conciliatory interpretation of Article 11-4. It held that Article 11-4 did not seek to prohibit a specific group or specific groups of people who were distinct ethnically, racially or with regard to religion. What it

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26. Mention should also be made of the Democratic Justice Party, which also represents the Turkish minority in local authorities. In addition, many municipalities and some regions are run by coalitions led by the MRF.

disallowed was formation and operation of political parties according to ethnic, racial or religious criteria which excluded those who did not share those characteristics. Parties of the latter kind were devoted solely to defending a narrow minority identity and thus were incompatible with political pluralism. Although ambivalent, this reasoning made it possible to retrospectively validate MRF participation in the local elections, the law in this case yielding to the realities of political life.

A comparable situation is to be found in Romania. After the 2004 parliamentary elections, the Democratic Alliance of Magyars of Romania (DAMR), with its 22 MPs and 10 senators, entered the governing coalition following a political agreement.<sup>27</sup> The right of association forms the basis of national minorities' participation in public life.<sup>28</sup> Similar participation exists at local level under the law of 25 May 1991 on local public administration and local autonomy. Members of national minorities living in an administrative area where the national minority accounts for more than 20% of the population can obtain the agendas and decisions of local council meetings in their own language. When municipal councillors speaking a minority language represent at least one third of the council, they can ask for the minority language to be allowed in council meetings. The 2004 law on the election of administrative municipal authorities defines "national minority" as any ethnic group represented on the Council of National Minorities (Article 7). The council is attached to the Department for Interethnic Relations, which has itself been attached to the prime minister's office since July 2003. Both have an advisory role and deliver opinions, in particular on draft legislation concerning rights and duties of people belonging to national minorities, while the council is also responsible for defending and co-ordinating minority interests. In 2004 it comprised 19 organisations representing a total of 20 minorities. The Department for Interethnic Relations also includes a National Roma Agency.<sup>29</sup> There is a comparable consultative body in Bulgaria, the National Council for Ethnic and Demographic Questions, established in 1994 as part of the Cabinet office. This body does not exclusively represent the interests of people belonging to national minorities, however.

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27. National minority political organisations have majorities on some municipal councils.

28. Article 40 of the constitution: "(1) Citizens may freely associate into political parties, trade unions, employers' associations, and other forms of association. (2) The political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional". In addition, Article 62-2 provides: "(2) Organizations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organization only". It is the law on election of the Chamber of Deputies that implements this provision by assigning at least one seat to any party that obtains 20% of the votes cast.

29. Nevertheless, the Advisory Committee on the Framework Convention noted that the impact of the Council for National Minorities on government decisions was fairly limited: it has no legal personality and inadequate human and material resources. In fact, its influence is more apparent through the prominent people who are members of it. Over-representation of the Hungarian minority should be noted.

## B. From de jure equality to de facto equality: minorities and the fight against discrimination

This is a matter mainly, but not solely, concerning France, where the constitution's affirmation of the oneness of the French people is entirely based on the principle of all citizens' equality before the law. As a token of a unitary, uniform and homogeneous society, the equality principle, which goes right back to Article 1 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, can be said to be the very foundation of the French legal order. The equality in question is abstract and formal, as indicated by Article 6 of the declaration.<sup>30</sup> Being equally subject to the rule of law, citizens are to be treated identically.

The equality principle thus has the function of unifying the national community, which it identifies as the community of officially recognised citizens. Clearly, however, this function of unifying society, this formal conception of equality, has only ever applied to the one category and that is why it is also part of a dialectic of unification and differentiation. This can be put down to the looseness of the principle, which "does not say wherein equalness consists and simply states that what is equal must be treated equally".<sup>31</sup> In other words, while the equality principle prohibits legal discrimination, it has never been an obstacle to catering for differences of situation, as the Constitutional Council has pointed out: "while the principle of equality before the law does not prevent legislation's laying down different rules for categories of people whose circumstances differ, this is only the case when the difference in treatment is justified by the difference in circumstances and is not incompatible with the purpose of the legislation",<sup>32</sup> with the legislation having to derive from some inherent general interest objective. The principle of differential equality is therefore well established in France, but the Constitutional Council ensures that it is non-discriminatory in character and regards this as the *raison d'être* of its own review function.

In this context it has always taken care to demarcate the scope of differential equality so as not to affect the legal homogeneity of the French people and thereby create minority situations – other, of course, than those acceptable to French constitutional law ("parity" principle, Article 3, paragraph 5, of the French Constitution; recognition of "overseas population forming part of the French people", Article 72-3; autonomous status of Polynesia, LO 27 February 2004; interim provisions on New Caledonia, Title XIII; special status of Corsica). In this approach differential equality can be seen, if anything, as a "requirement of equity applying to all policies that break with equality of rights in order to

30. "[The law] must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes .."

31. Moutouh H., "Recherche sur un 'droit des groupes' en droit public français", law thesis, Bordeaux, 1996, p. 314.

32. Decision No. 78-101 DC of 17 January 1979, Rec., p. 23.

restore equality of opportunity for disadvantaged individuals or groups".<sup>33</sup> As thus applied, differential equality has made most impact, within the French legal system, in the economic and social field since the object is above all to reduce de facto inequalities. Although it has not given any more prominence to minority situations, it has allowed some regionalisation of the French legal system.

For example, in its decision of 26 January 1995 on the outline Regional Planning and Development Act, in connection with the introduction of regional planning guidelines for adapting regional and urban planning legislation to local geographical factors, the Constitutional Council stated: "their application solely to certain parts of the national territory meets a need to take differences of situation into account but they cannot then ignore the principle of equality or contravene the principle of indivisibility of the Republic".<sup>34</sup> Article 1 of the Act (the law of 4 February 1995) accordingly states that its objective is to "guarantee equality of opportunity for all citizens throughout the territory". Consequently, it says, regional planning and development policy seeks to rectify the inequalities in people's lives that result from geographical location and to offset regional handicaps. It therefore makes certain exceptions so that the burdens on the individual can be adjusted.

But there is also some ambivalence to this "regionalisation" of the law, especially given Article 1 of the constitution. It is a euphemism to talk of "regional handicaps" and, more generally, "regional discrimination". In reality, the differentials are less about the regions than about the people who live there, have links with them and are socially defined by those links. As Dominique Schnapper has highlighted in relation to urban policy: "the declared refusal to take into account any 'ethnic' dimension is being circumvented by the use of social and regional criteria".<sup>35</sup> In other words, legislative provision for the regions involving adjustments to the equality principle becomes a pretext for singling out certain groups according to geographical origin, the regions concerned being designated on account of the population groups who live there.

In short, in French public law we are now seeing the equality principle mutate into a non-discrimination principle, with non-discrimination being seen as a prerequisite when action is taken to bring about real equality: "over and above a desire for rule-making to take into account differences of situation as a matter of 'justified' discrimination, the actual purpose of the legal rule is changing, and the rule is now expected to help reduce inequalities".<sup>36</sup> It is precisely to meet that objective that the authorities are not only countenancing differences in treatment,

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33. Stasse F., [Considérations générales] Sur le principe d'égalité, Conseil d'Etat, Rapport public, 1996, p. 85.

34. Decision No. 94-358 DC, JO, 1 February 1995, p. 1706.

35. Schnapper D., *La démocratie providentielle, Essai sur l'égalité contemporaine*, Paris, Gallimard, 2002.

36. Calvès G., "Egalité (Principe d')", in *Dictionnaire des droits fondamentaux* (ed. Chagnollaud D. et Drago G., Paris, Dalloz, 2006, p. 380.

but actually putting the emphasis on discrimination law. This necessarily involves designating the groups who are to be discriminated in favour of, though in fact those groups self-designate by complaining of being discriminated against in some respect.

Firstly, membership of an ethnic, national or religious group exists negatively in French public law in the form of a criterion for prohibiting negative discrimination.<sup>37</sup> Its legal effects are nonetheless indisputable. But secondly and mainly, it was the riots of October and November 2005 that changed the law's purely negative approach to discrimination by establishing a link between the social issue and the identity issue in that the places where there was urban violence combined economic inequalities and racial segregation. This is evident from Law 2006-396 of 31 March 2006 on equality of opportunity.<sup>38</sup> The explanatory memorandum submitted to the National Assembly in January 2006 stated: "There is particular discrimination, whether direct or indirect, against people living in disadvantaged neighbourhoods and those of immigrant origin or from the overseas French territories ... a person from a North African immigrant background is five times less likely to obtain a job interview than a person who is not". On the basis of this finding, Title 2 of the Act introduced a series of measures on equal opportunity and combating discrimination: a national agency for social cohesion and equal opportunity was established to take action on behalf of groups in difficulty,<sup>39</sup> and the powers of the Anti-Discrimination and Equality Authority were reinforced.

But in another area of French public law – the so-called right to remembrance<sup>40</sup> – we can see a similar mutation of the equality principle towards a "principle of equal dignity between groups",<sup>41</sup> the right in this case being more a matter of declaration than legislation and its subject matter being "commemoration or recognition of the difficulties or sufferings of a particular group of human beings". While the objective here is to integrate into the community "members of groups whose past differs from that of most French people",<sup>42</sup> it also involves taking into account the distinctive identities of which the nation is composed. Article 5 of the Law of 23 February 2005, for example, penalises "any insult or defamation of a person or group of persons for being or being taken for *harkis*."<sup>43</sup>

37. Article 225.1 of the Criminal Code; Article L 122-45 of the Employment Code. Law 2004-1486 of 30 December 2004 establishing the Anti-Discrimination and Equality Authority should also be mentioned.

38. Official Gazette, 2 April 2006.

39. Article 38 of the law explicitly refers to "immigrant communities and those of immigrant background" as the focus of the agency's integration work.

40. Law 2005-158 of 23 February 2005 on national recognition and a national contribution on behalf of repatriated French people; Law 2001-434 of 21 May 2001 recognising slavery and the slave trade as crimes against humanity.

41. Calvès G., *op. cit.*

42. Frangi M., "Les 'lois mémorielles': de l'expression de la volonté générale au législateur historien", *Revue du droit public*, 2005, p. 255.

43. The *harkis* were native North African troops who served in back-up units alongside Frenchmen.

Here, the singling out of particular identities results from circumstances peculiar to the French nation: we are dealing not with national minorities but ethnic identities linked to the consequences of decolonisation and, more broadly, immigration. Nor is it a matter of institutionalising particular identities. On the contrary, the strategy here involves integration into the community – “taking the Republic at its word and its motto and principles at face value”.<sup>44</sup> Moreover, it explains why the French courts have not followed European case law on non-discrimination. The European Court of Human Rights regards non-discrimination as involving a duty to treat differently people who are in different situations, which is the most direct way to improve minority situations: “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.<sup>45</sup> In France, there is still no duty to apply different rules to different situations. To do so is still an exception to the general rule, which continues to be the norm simply by virtue of being general.

Nonetheless, minority situations are increasingly making their way into French law concerning the unitary state. Because of sociological change the reiteration of traditional republican principles, encapsulated in the constitutional principle of oneness of the French people, is beginning to sound a little like lip service. While minority situations still too often get a paralipsical mention in French public law, the fact is that it can no longer ignore them, since the discriminations noted and denounced by the groups affected challenge the very effectiveness of republican principles. Social reality is serving notice on the French Republic to bring its principles into line. That particular reality cannot be replicated elsewhere and we now have to get used to the proteanness of law on minorities, to its adjusting to the specific features of each “people as society” rather than espousing a single model. The unitary state can no longer ignore the diversity of its own human substratum.

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44. Fassin E., interview, op. cit. (note 11).

45. Judgment of 6 April 2000, *Thlimmenos v. Greece*, Application No. 343669/97, §44.