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Masters of Their Own Destiny:
Minorities' Right to Effective Participation in Public Life
in Vietnam

A Minor Field Study
of the minorities' *formal* participation in the legislative process on national
level and
in the implementation of state law and policies on local level; and
the minorities' *informal* participation through the emerging civil society of
Vietnam

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Summary

The main international provisions concerning minorities' right to participation in public life at national and local levels are enshrined in Article 2 of the UN Minority Declaration in conjunction with Article 25 of the ICCPR, providing minorities the right to take part in the conduct of public affairs. Vital adjacent political rights, include the freedom of association as enshrined in Article 2(4) of the UN Minority Declaration, which in conjunction with Article 22 of the ICCPR provides the right to establish and maintain minority associations.

As most UN Member States, Vietnam has accepted international obligations to ensure *de jure* and *de facto* compliance with the international standards concerning minorities' right to effective participation in public life, guaranteeing its citizens of all ethnicities equal enjoyment and non-discrimination. However, international human rights law grants a wide latitude for States to comply with the right to effective participation in public life in general and in devising their electoral systems in particular.

Vietnam's constitution and laws promote the equality between its 54 different ethnic groups, where the 53 ethnic minority groups constitute approximately 14% of the population. The ethnic minorities enjoy higher representation in the National Assembly than their share of the population, although the ethnic minority deputies appear to have a weaker voice relative to deputies from the ethnic majority group. The Ethnic Council, a parliamentary organ, has far-reaching powers in the legislative and executive processes. Elections to the National Assembly are held according to the principles of universal, equal, direct and secret suffrage. Voting material, however, appear to be limited or non-existing in minority languages.

While exercising the democratic centralism principle, Vietnam is in a process of decentralisation promoting direct participation in decision-making at the local levels. Decree 29 (1998), provides a legal framework which, despite several obstacles in the implementation, should enable ethnic minorities to participate in local public decisions that affect them and the regions they inhabit.

Although civil society in Vietnam yet is very weak in an international comparison, during the 1990s a legal framework has been put in place enabling some NGOs in Vietnam to emerge, while being monitored quite closely. While a mushrooming of *de facto* associations at local level is taking place, these are mainly established and enabled to perform socio-economic gap-filling functions, while policy-oriented associations are scarce. The developments have however opened the door for informal influence for ethnic minorities in decision-making at local and national level.

While the Vietnamese Government is taking many steps to promote the participation of ethnic minorities, various socio-economic reasons hinder an enhanced participation of Vietnam's ethnic minorities in public life. Ensuring international standards of participation in public life and freedom of association interrelate with socio-economic development and re-enforce each other.

The study concludes with some practical recommendations of furthering minorities' participation in public life in Vietnam, including support of a Law on Minorities and Law on Association reflecting international standards and clarifying regulations on the democratic rights at the grassroots level.

Preface

This is a Master of Laws thesis for graduating at the Faculty of Law of Lund University in Sweden September 2002. My interest in minority questions emerged particularly from studying the situation of the Aborigines in Australia in combination with the exposure of the persistent hideous experiences of violent ethnic conflicts during the second half of the 20th century. These violent conflicts foremost display the failures of nation-states to manage ethnic diversity, and in ensuring the equal enjoyment of fundamental human rights. Being a Master student of law, my interest is identifying sustainable but yet flexible constitutional and practical arrangements enabling the nation-state structure to peacefully harbour various ethnicities. Minorities' right to participation in public life, as prescribed in international human rights law, has the benefit of constituting an inclusive, and not a separating concept.

My long-held interest in Vietnam stems from the country's fascinating but troublesome history, accompanied with the very interesting current development phase Vietnam is undergoing with rapid changes in the economical, judicial and political sectors. After a visit to Vietnam in 1999 and later involvement in a SIDA-funded project between Hanoi Law University and the Law Faculty at Lund University, several Vietnamese friends inspired me to return to Vietnam and pursue studies within my particular field of interest.

This thesis would not have been realised without the support of the Raoul Wallenberg Institute for Human Rights and Humanitarian Law in Lund, Sweden, and the Vietnamese Research Centre for Human Rights at the Ho Chi Minh National Political Academy in Hanoi, Vietnam. I am very grateful to the Raoul Wallenberg Institute granting me a Minor Field Study Scholarship from SIDA (Swedish International Development Cooperation Agency) and the generous support from my academic supervisor Professor Gudmundur Alfredsson and Johan Hallenborg. Likewise, I am deeply grateful to the Vietnamese Research Centre for Human Rights in Hanoi and its Director Dr. Cao Duc Thai for welcoming me to Hanoi and being my second academic supervisor, as well as the invaluable help from Luc Nguyen and Nghia Hoang Van. Considering that I have yet to learn Vietnamese, Luc Nguyen's numerous hours providing input, and performing interpretations and translations were crucial for enabling the study.

In facilitating contacts in Vietnam, my thanks goes to the Swedish Embassy and SIDA representation in Hanoi, with Christine Johansson, Nguyen Quang Ngoc and Vu Tuan Minh.

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Abbreviations

ADB	Asian Development Bank
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDEW	Convention on the Elimination of All Kinds of Discrimination
CERACOMD	Center of Research and Cooperation For Mountainous Area Development
CPV	Communist Party of Vietnam
CRC	Convention on the Rights of the Child
ECO-ECO	Institute of Ecological Economy
GCOP	Governmental Committee on Organisation and Personnel
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
INGO	International Non-Governmental Organisation
JOPSO	Joint Project Support Office
LERES	Center for Legal Research and Services
MOST	Ministry of Science and Technology
NGO	Non-Governmental Organisation
PRA	Public Administration Reform
PTF	Poverty Task Force
RDSC	Rural Developmet Services Center
SIDA	Swedish International Development Cooperation Agency
SIPU	Swedish Institute for Public Administration
TEW	Towards Ethnic Women
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
VUSTA	Vietnam Union of Science and Technology Associations
WB	World Bank

1 Introduction

“The working people of the various ethnicities (in Vietnam) are masters of their own destiny”¹

While minorities and persons belonging to them benefit from the rules of equal enjoyment of all human rights, as well as the prohibition of discrimination, accommodating ethnic diversity is a challenge for all multi-ethnic societies. Even in the most developed democracies, several aspects of the legal and political framework of governance continue to present challenges, from campaign finance to promoting minority groups representation and participation.² The World Bank acknowledges that poverty is more than inadequate income and human development – it is also vulnerability and lack of voice, power and representation.³ It is equally important to value processes and outcomes, reflecting the intrinsic value of participation (and individual choice), as recognised by *Amartya Sen*.⁴ In a time of numerous internal violent conflicts, the effective participation of minorities serves the role of turning the face of the minorities towards the society, constituting an inclusive concept and not a separating concept.

Few countries have experienced the degree of external interventions in modern times as Vietnam. Vietnam today is in the middle of an ongoing *doi moi* policy (renovation), with far-reaching economic reform, public administration reform and changes in the very fundamentals of the legal sector. Further, there is a trend towards the implementation of the principle of subsidiary and decentralisation in Vietnam, with the effect that decisions are taken as close as possible to, and involving, those most directly concerned and affected. This paper examines the ethnic minorities’ right to effective participation in public life in Vietnam in light of these current changes taking place in Vietnam.

1.1 Objective and Purpose

The *first* objective of this study is to identify the international standards on minorities’ right to participation in public life, as prescribed in international law. The *second* objective is to analyse Vietnam as a case study, learning about the ethnic minorities’ possibilities of formal and informal participation in public life. The *third* objective is to attempt to examine the overall merits of the Vietnamese system mainly from a legal perspective and on the basis of international law articulate concrete suggestions, which could possibly enhance the participation of Vietnam’s ethnic minorities in public life.

The general purpose of studying the topic of effective participation of minorities is to study and identify inclusive measures that may alleviate ethnic tensions in a

¹ Dang Nghiem Van et al, *Ethnic Minorities in Vietnam*, Hanoi, 1984, p 14.

² See National Democratic Institute, *Strengthening the Representative Capacity of Legislatures: A Guidebook*, Background paper for UNDP Staff Training Seminar “Strengthening the Legislature-Challenges and Techniques” in the Bruxelles October 22-24, 2001, p5.

³ World Bank, *World Development Report 2000-2001: Attacking Poverty*, Oxford, 2000, 29.

⁴ *Sen* argues that deprivations severely restrict the capabilities that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she values. See Amartya Sen, *Development as Freedom*, New York, 1999, p 87.

society and therefore indirectly serve as measures of conflict prevention. The purpose of studying Vietnam is to learn from the Vietnamese experiences, to present an overview of the current situation of participation of the ethnic minorities in Vietnam and hopefully deepen the reader's knowledge of Vietnam's ethnic minorities' right to effective participation under international law.

1.2 Scope of the study

The question of participation in public life is broad and can include many aspects. The scope of this study is mainly a *de jure* and *de facto* evaluation of the constitutional and legislative guarantees from three aspects, the ethnic minorities':

- formal participation in the legislative process on national level
- formal participation in the implementation of state law and policies at the local levels and
- informal participation through the emerging civil society

The chapter concerning the legislative process is narrowly defined and mainly dealing with the very last stages of when a law is being finalised and adopted by the National Assembly. While the legislative process includes numerous pre-adoption stages of great interest for the topic, these are unfortunately outside the scope of this paper. The chapter on the implementation of state laws and policies at the local levels is limited to the commune and village levels, and does not cover district or province levels. In presenting the third aspect, the chapter on informal participation mainly examines the legal environment of setting up a local association in Vietnam today, as an indicator to estimate the possibilities for ethnic minorities to exert influence through legally recognised local NGOs.

Many widely debated issues on definitions are left out from the scope of the study, for example the classical debate on the definition of a "minority", to understand which ethnic groups are protected under international law.⁵ For this study, the 53 ethnic groups as officially recognised by Vietnam as "ethnic minorities" is thus accepted, although referring to all groups as "ethnic" minorities may be simplified.⁶ Also, this paper exclusively discusses minorities and not indigenous groups, although some of the ethnic minorities in Vietnam may argue that they fall into the later definition.⁷ Neither does this paper engage in the ongoing discussion of whether minority rights are individual or collective in nature, although the question of participation in public life and the notion of that right being exercised in community with other members of their group, particularly imply a collective

⁵ There is no universally accepted definition of what constitutes a "minority". For a compilation of definition proposals, see UN Doc. E/CN.4/1987/WG.5/WP.1. The most commonly used definition was probably forwarded in 1991 by the Chairman of the Working Group on Minorities, Francesco Capotorti. *Capotorti* speaks of minorities as groups "numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show is only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language." See UN Doc. E/CN.4/Sub.2/384/Add.1-7.

⁶ The conceptual discussion of differences between "national" and "ethnic, religious and linguistic" minorities is consequently left out of this study. See Henrard, Kristin, *Devising an Adequate System of Minority Protection*, Great Britain, 2000, pp 50-55.

⁷ There are several additional international standards, in addition to standards relating to minorities, from which indigenous groups can benefit. These standards include, *inter alia*, the ILO Convention No 169, which would add further weight with its extensive references to participation. As of 2002-09-05, Vietnam was not a State Party to the ILO Convention No 169.

dimension.⁸ Consequently, the text will refrain from using the traditionally individualistic “rights of persons belonging to minorities”, and favouring a collective approach using the terminology of “the minorities’ rights”.

While the scope of this paper is not to discuss the power relations within Vietnam’s state structure, it is unfortunate that the role and functioning of the Communist Party of Vietnam (hereinafter referred to as CPV or the Party) largely has been left out of the study, due to difficulties in accessing sufficient relevant information. However, it should be stated that the Party as enshrined in the 1992 Constitution is the “force leading the State and society” and the “vanguard of the working class, the faithful representative of the rights and interests of the working class, the working people and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh’s thought.”⁹

1.3 Methodology and sources

The difficulties and the potential pit-falls for a non-Asian law student in examining the question of participation in an un-familiar context are numerous. Hopefully the most apparent pit-falls have been avoided, although the author is fully aware of that some conclusions may be based on insufficient and misinterpreted information. The problems facing the Westerner studying Vietnamese law are issues “at a more profound level than just methodological problems”, but as *Buhmann* continues, “solving these problems requires a theoretical framework, which has not yet been developed”.¹⁰ One of the issues that a non-Vietnamese studying Vietnamese law is confronted with is the relationship between politics and law. While attempting to be an objective researcher, the author’s point of departure for evaluating the system of minorities in Vietnam is obviously shaped by the system that has formed the author’s legal background.¹¹ To assess Vietnamese law against a wider socio-political culture, in which certain values or concepts have different connotations from those in the author’s own legal culture, is indeed a challenge.¹² For example, neither the legal systems nor the organisational state structures in Vietnam have by tradition operated with a strict division of the executive, the legislative and the judiciary powers. How can one then accurately define what constitutes the legislative process? This text is written with great respect realising the author’s brief understanding of the legal and political culture, context and history.

⁸ While the traditional view on minority rights follows the focus on individualism, the collective dimension seems to have gained ground in recent years. *Alfredsson* observes hopeful signs that the promotion and protection of group rights, with an emphasis on prevention and dialogue, are slowly but very slowly gaining ground in international fora, see Gudmundur Alfredsson, *Minority Rights: A Summary of Existing Practice*, in Phillips Alan, and Roses Allan, *Universal Minority Rights*, Åbo, 1995, p 86. *Eide* states however in 2000, that unlike the rights of indigenous peoples, “the rights of minorities were individual”, see Report of the Working Group on Minorities on its sixth session, UN Doc. E/CN.4/Sub.2/2000/27 (2000) para 29.

⁹ 1992 Constitution of Vietnam, article 4. This article and its consequences have been much debated. It should also be noted that there is a tension between the 1996 Party Statute and the 1992 Constitution in that only the latter refers to the need of the Party to comply with the law. Before the 1992 Constitution the Party was only required to operate within the framework of the Constitution, no mention being made of the law.

¹⁰ Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 65.

¹¹ Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 63 in referring to Chen 1999:4, warning about the dangers of assessing a legal system in terms of conceptions, assumptions and terminology’s from another legal culture.

¹² See Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 64.

Consequently, the aim has been to be diligent in learning and understanding, while slow in judging.

Primary research for this paper was mainly conducted on the basis of publicly available written information and analysis, accompanied by comments from 31 interviews. Interviews included representatives from the state organs at the central and local levels, Vietnamese academics and staff from various Vietnamese and international agencies and organisations involved in development cooperation. Approximately half, 16 of the total of 31 interviews were held in Vietnamese, facilitated by a qualified interpreter, who was very familiar with the topic. The interviews were conducted in northern and central Vietnam, and in Hanoi. Four field trips were conducted from June to August 2002. Interviews were semi-structured and based on a set questionnaire, from which discussions flowed freely. In several cases, the questions were forwarded beforehand, and some also translated into Vietnamese.

Information from these interviews are used directly in the paper, but as a rule, the person is not directly referred to, other than part of one of these categories:

- *national official*, Vietnamese working in the central or local state structure;
- *national academic*, Vietnamese working in academia;
- *national observer*, Vietnamese working at an international NGO or Foreign Embassy;
- *international observer*, Non-Vietnamese working at an international NGO or Foreign Embassy;
- *international academic*, non-Vietnamese working in academia.

Regarding secondary sources, the academic literature is dominated by authors of a Western background, while studies and reports from international and national associations are balanced between Western and Vietnamese sources.

1.4 Disposition

This paper is divided into three parts. The introductory part provides the theoretical backbone, against which the second part, using Vietnam as a case study, is examined. A third part concludes the paper putting forward some reflections and recommendations.

Part I consists of chapters 2 and 3. Chapter 2 discusses the inter-relation of minority rights, effective participation and good governance while chapter 3 concerns the relevant international standards relating to the effective participation of minorities in public life.

Part II and the case study of Vietnam are embodied in chapters 4 to 7.

Chapter 4 introduces the ethnic minorities in Vietnam and the applicable international standards relevant to Vietnam on the issue in question, and describes the entrenchment of the participation of the ethnic minorities in the Vietnamese legal system.

Chapter 5 examines the formal participation of the ethnic minorities in the legislative process through the National Assembly.

Chapter 6 concerns the formal participation of the ethnic minorities in the implementation of state law and policies in communes and villages.

Chapter 7 describes the legal framework and partly the functioning of Vietnamese NGOs, thus discussing the potentials of the ethnic minorities' informal participation through the emerging civil society.

Part III consists of chapter 8 with some final comments and conclusions resulting in some recommendations for further enhancing the minorities' participation in public life in Vietnam.

2 Relation between minority rights, effective public participation and good governance

The “old” question of minority rights has been brought to the forefront of international attention due to a growing emphasis on cultural diversity in modern societies and concern for internal and international stability. Most of the violent conflicts during the last 50 years have been conflicts within States. Many of these internal conflicts have been due to ethnic strife, indicating an incapacity of societies and political systems to manage differences and diversity. The linkage between respect for minority rights and the maintenance of peace and international and internal security is well-recognised and was explicitly mentioned by the former UN Secretary-General Boutros Boutros-Ghali in his 1992 Report on an Agenda for Peace.¹³ The international moral responsibility of the hideous experiences in, *inter alia*, Rwanda, former Yugoslavia and East Timor, has increased the focus on minority rights, and preventive measures, recognising the human and financial gains possible. While this paper does not deal explicitly with the conflict prevention aspects of respecting and implementing minority rights, it builds strongly on the underlying assumption that effective minority participation can build mutual loyalty and trust between majority and minority groups, and thus, ease potential ethnic related disputes from turning into violent conflicts. Effective participation of national minorities in public life is an essential component of a peaceful and democratic society. If minorities are able to access avenues to participate in the overall governance of the state they live in and especially if minorities are able to participate in decisions affecting them, the tension between the minority and majority groups can be eased. However, the marginalisation of minorities is a human rights issue irrespective of the conflict-resolution perspective.

The concept of good governance aims at improving the efficiency in the performance of the government and addresses issues as inclusiveness, transparency, accountability, anti-corruption, accessibility, competitiveness and the rule of law – issues equally relevant to all States.¹⁴ A UN General Assembly resolution in 1999 points out an intersection in the UN system at which the human rights concerning participation, the electoral process and elements of good governance meet.¹⁵ The resolution comments appreciatively on the activities of the UN with respect to “building a political culture through human rights observance, mobilisation or civil society, electoral assistance, free and independent media, enhancing the rule of law and improving accountability, transparency and quality of public sector management and democratic structures of government.”¹⁶ The concept of good governance includes the assumption that simple majoritarian decision-making is not always sufficient. Some States have special provisions in

¹³ UN Doc. A/47/277-S/24111, para 18.

¹⁴ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 203.

¹⁵ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 205.

¹⁶ UN Doc. A/53/31 on support by the United Nations system of the efforts of Governments to promote and consolidate new and restored democracies, para 2, adopted on 5 January 1999.

the constitution or in electoral laws that promotes representation of historically underrepresented groups or where there are strong religious or ethnic differences. In Singapore, for example, the constitution allows for group representation constituencies to “ensure the representation in Parliament of Members of the Malay, Indian and other minority communities.”¹⁷ Political parties should ideally be open and cut across narrow ethnic lines, seeking to include members of minorities to reduce the need or desire for ethnic parties. In some situations though, such communal parties may be the only hope for effective representation of specific interests and, thus, for effective participation.¹⁸ When ethnic homogenous political parties cease to obtain popular support among the ethnic group(s) in question, this may be an indirect indicator that their interests are adequately taken into consideration and taken care of within the main-stream parties and the political structure as a whole.¹⁹

The process of decision-making is as important as the substance of the decisions made. The concept of good governance implies that decisions should always be inclusive of those concerned, transparent for all to see and judge, and accountable to those affected. Various forms of decentralisation may be appropriate to assure inclusive decision-making. Decisions from such processes are more likely to inspire voluntary compliance.

However, the questions of minority rights are not without complications. *Leuprecht* argues that “an obsession of questions of identity, could bring us back to aggressive nationalism and ethnocentrism.”²⁰ As an example of the conflicting areas of concern regarding the right to participation in public life - how to reconcile the majority’s right to non-discrimination if 40% of the population consists of various minority groups requesting preferential treatment?

With this brief overview acknowledging an inter-relation between minority rights, effective participation in public life and good governance, various authors recognise that the challenge of the 21st century in this context, is national implementation and international monitoring of existing minority rights standards.²¹

¹⁷ National Democratic Institute, *Strengthening the Representative Capacity of Legislatures: A Guidebook*, Background paper for UNDP Staff Training Seminar “Strengthening the Legislature-Challenges and Techniques” in the Bruxelles October 22-24, 2001, p 7. It should be stated, however, that the role of the Parliament within Singapore is by international standards very limited.

¹⁸ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Commentary, point 6.

¹⁹ Comment by an international academic, 2002-08-17.

²⁰ Peter Leuprecht, *Minority Rights Revisited: New Glimpses of an Old Issue in Peoples’ Rights* by Philip Alston, Oxford, 2001, p 118.

²¹ See, *inter alia*, Gaetano Pentassuglia, *Minority Protection in International Law: From Standard-Setting to Implementation*, Nordic Journal of International Law no 68, 1999, p 132; Gudmundur Alfredsson, *The Usefulness of Human Rights for Democracy and Good Governance*, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 20.

3 Minorities' right to effective participation in public life according to international law

3.1 Introduction

"By expanding people's choices about how and by whom they are governed, democracy brings principles of participation and accountability to the process of human development."

*Deepening Democracy in a Fragmented World
UNDP Human Development Report 2002*²²

The Vienna Declaration of the World Conference on Human Rights in 1993 states that measures to advance the rights of persons belonging to minorities should include facilitation of their full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development of their country.²³ Both the UNDP Human Development Report year 2000²⁴ and the above-quoted edition in 2002 stress the importance of inclusion of all groups of society in the public decision-making, including the marginalised groups such as minorities often constitute. The Swedish International Development Cooperation Agency (SIDA) defines participation as the process through which people take part in, and influence, public decisions that affect their lives.²⁵ But what does participation in public life mean according to international law?

The right to participation has moved from a strict focus on elections to other modes of "taking part" and participating in public life. More demanding theories involve varied and flexible modes of non-electoral participation that supplement rather than substitute for voting. A nearly exclusive reliance on elections heightens the sense of powerlessness of the many to act other than passively by reacting to choices formulated by someone else.²⁶

With the The United Nations 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁷ (hereinafter called the UN Minority Declaration), the well-established principle of the right to political participation was extended to minorities, with the strengthened standard of requiring an *effective* participation. This chapter attempts to overview the nebulous concept and contents of effective participation in public life for minorities, as established in international law.

²² UNDP, *Deepening Democracy in a Fragmented World*, Human Development Report 2002.

²³ Vienna Declaration and the Programme of Action of the World Conference on Human Rights, 1993, section B 2, para 27. UN Doc. A/CONF.157/23.

²⁴ UNDP, *Human rights and human development*, Human Development Report 2000.

²⁵ SIDA, *Participation in Democratic Governance*, Stockholm, 2001, p 5.

²⁶ There is a clear trend of decreasing participation in general elections in many Western states. One can indeed question how representative a presidential election in the US is, attracting merely 50 per cent of the population to cast their votes.

²⁷ United Nation 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, C.A res. 47/135, UN GAOR Supp. (No. 49) at 210, UN Doc. A/47/49 (1992), adopted 18 December 1992.

3.2 Defining the right to effective public participation of minorities

3.2.1 Equal enjoyment and non-discrimination

Various international treaties and declarations clearly demonstrate that the rules on equal enjoyment and on non-discrimination are fundamental to international human rights law.²⁸ The starting point of assessing any minority rights standard is that, although minorities may enjoy complementary protection, the fundamental rules on equal enjoyment and on non-discrimination apply to minorities as well as majorities.

The rules of non-discrimination and equal enjoyment extend to all human rights, civil, cultural, economic, political and social, including education, language and democracy.²⁹ The Human Rights Committee states in its General Comment on non-discrimination that the term ‘discrimination’ as used in the ICCPR should be understood to imply “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms.”³⁰ The Committee added that “equality” does not necessarily mean identical treatment – groups may be treated differently for purposes legitimate under the Covenant, such as achieving equal rights in fact.³¹ Achieving equal rights “in fact” implies that equal enjoyment under the law and the prohibition of discrimination is not sufficient. Special measures, such as affirmative action, preferential treatment and quotas, may be needed to realize equal enjoyment and to place the minority groups in a position comparable with the majority population. The special measures are established through a variety of international instruments (and will be discussed *infra* in this chapter), and while special measures primarily exist in the fields of education, culture, language and religion, the measures are also used in the political sphere.³² Special measures are often necessary to guarantee minority participation in national politics, and *Alfredsson* argues “particularly when decisions may affect the destiny of the group.”³³ Great latitude is however given to States on designing the appropriate design of such measures, as will be elaborated *infra* in this chapter.

There are minority-specific provisions in numerous human rights instruments aiming to achieve equal rights for all. Provisions directly concerning the rights of minorities include Article 27 of the ICCPR:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy

²⁸ See, *inter alia*, Article 2 of the Universal Declaration of Human Rights, Articles 2 and 26 of the ICCPR, Article 2 of the ICESCR and Article 1 of the CERD.

²⁹ Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly 5/6 1998, Latvia, p 15.

³⁰ Human Rights Committee General Comment 18, UN. Doc. CCPR/C/21/Rev.1/Add.1, para 7.

³¹ Human Rights Committee General Comment 18, UN. Doc. CCPR/C/21/Rev.1/Add.1, para 8 and 13.

³² Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly 5/6 1998, Latvia, p 17.

³³ Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly 5/6 1998, Latvia, p 19.

their own culture, to profess and practise their own religion, or to use their own language.”³⁴

3.2.2 The 1992 UN Minority Declaration

The UN Minority Declaration was adopted by the UN General Assembly in 1992 and is the first international human rights instrument dealing exclusively with the promotion and protection of minorities. The Declaration sets out the international minimum standards and complements the provisions concerning minority rights in other international instruments.

“Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.”

Article 2(2) UN Minority Declaration

Article 2(2) is a right of persons belonging to minorities to participate in the conduct of public affairs, for instance, in law-making, to at least the same extent as other groups of society. At the time of drafting, the term “public life” was preferred to “political life” by the Working Group, indicating that “public” is more comprehensible than “political” because the former includes “both political and administrative life”.³⁵ For the purpose of this paper, the terms public life and political life are used interchangeably, and political rights are assumed necessary, while maybe not sufficient, in guaranteeing the right to participation in public life.

“Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.”

Article 2(3) UN Minority Declaration

Article 2(3) implies that persons belonging to minorities should be granted special political rights with regard to questions which directly affect the group to which they belong or the region in which they live.³⁶

Article 4(5) of the UN Minority Declaration further develops the theme of participation:

“States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.”

This “participation in progress” principle is important for minorities in order to avoid that they are retrained in an economical and social backwater.³⁷

³⁴ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Article 27.

³⁵ Patrik Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations*, in A. Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 43. For the Report of the Working Group, see UN Doc. E/CN.4/1992/48, para 30.

³⁶ Kristian Myntti, *National Minorities, Indigenous Peoples and Various Modes of Political Participation*, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 12.

Establishing the standard of “effective” participation is a groundbreaking, qualitative element. It is simply not enough for persons belonging to a minority to be able to participate politically, but their political participation must be “effective.” The provisions require minorities to have a significant role in the formulation, passage and implementation of public policies.

A Declaration such as the UN Minority Declaration, is however not legally binding, but does have the authority as adopted by resolution in the UN General Assembly. Further, it was adopted by consensus, thus expressing a certain *opinio juris*, which could evolve into international customary law, provided that the necessary supporting state practice develops.³⁸ The UN Minority Declaration can be argued to concern a universal standard, reflecting an evolution of views in the world since the UN Covenants of 1966.³⁹ However, the provisions are formulated in a manner that states easily can argue that they comply with. In line with a persistent passage in the Declaration, Article 2(3) requires compatibility with “national legislation,” which gives an unfortunate shadow to the provisions.⁴⁰

In order to further understand the contents of the right to participate in political life, guidance should be taken from the “non-minority-specific” contents of the right to political participation, provisions that then will have to be applied in an equal and non-discriminatory way towards minorities of States.

3.2.3 ICCPR – the principal treaty declaring a right to political participation

The Universal Declaration of Human Rights⁴¹ contains references concerning participation in article 21 and 27. Article 21 states:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal suffrage and shall be held by equivalent free voting procedures.

Article 21, Universal Declaration of Human Rights

³⁷ Patrick Thornberry, *Minorities, Indigenous peoples, Participation: An Assessment of International Standards*, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 35.

³⁸ See Articles 1 and 55 of the UN Charter, holding all States responsible for observing the standards contained in the UDHR and some other declaratory texts. While these are adopted by vote and are thus not subject to ratification, some of them have become or about to emerge as international customary law which is binding on all States, see Gudmundur Alfredsson, *The Usefulness of Human Rights for Democracy and Good Governance*, in Sano, Hans-Otto and Alfredsson, Gudmundur (ed.), *Human Rights and Good Governance*, Netherlands, 2002, p 23.

³⁹ Kristin Henrard, *Devising an Adequate System of Minority Protection – Individual Human Rights, Minority Rights and the Right to Self-Determination*, Great Britain, 2000, p 186.

⁴⁰ Alfredsson argues though that while these expressions give the “unfortunate impression of non-objective and selective standards”, some of these phrases may not be as harmful as they sound, taking the legislative history into account. See Gudmundur Alfredsson, *Minority Rights: A Summary of Existing Practice*, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 82.

⁴¹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

The participation right in the Universal Declaration is translated into “hard law”⁴² in article 25 of the International Covenant on Civil and Political Rights⁴³ (ICCPR), and it is hence the principle treaty declaring the right to political participation:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country.”

Article 25, ICCPR

Article 25 validates both direct and representative participation, but does not indicate how citizens are to “take part in the conduct of public affairs”, as stated in (a) other than through the “genuine and periodic elections” as stated in (b). *Nowak* notes that Article 25 is the only Article of the ICCPR that does not guarantee a universal human right, but rather a “citizen’s right”, thus explicitly stating that the political rights may only be exercised by those persons holding citizenship.⁴⁴ *Nowak* also observes that citizens have not only the right but also the “opportunity” to the articles provisions, which sets up a duty on States Parties to guarantee the rights with positive measures when necessary.⁴⁵

The ICCPR does not by its terms distinguish among such political systems as liberal democracy, democratic socialism, corporatism, or communism.⁴⁶ The discordant understandings of the right to political participation were made explicit during the period of drafting of the ICCPR and stem from incompatible political theories.⁴⁷

3.2.3.1 “To take part in the conduct of public affairs” – ICCPR Article 25 (a)

The Human Rights Committee expresses that the provisions in ICCPR of the “right to take part in the conduct of public affairs”⁴⁸ is a very broad concept “which relates to the exercise of political power, in particular the exercise of legislative,

⁴² This paper will use the useful, however often criticised, division between “hard” human rights law and “soft” human rights law. “Hard” human rights law refers to obligations legally binding on States that have accepted them and “soft” human rights law refers to an obligation considered morally and politically binding upon those states that have participated in the formulation.

⁴³ International Covenant on Civil and Political Rights, UN. Doc. A/6316 (1966).

⁴⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 445. The bearing of this is obviously crucially important for minority groups in States, where they do not hold citizenship for some reason.

⁴⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 439.

⁴⁶ See Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, pp 87f.

⁴⁷ Henry J. Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 84ff. *Steiner* argues that the language used in the ICCPR was sufficiently “abstract and porous – with respect to the ‘take part’ clause – to permit democratic and non-democratic states to assert that they satisfied the norms’ demands”.

⁴⁸ This is also the wording in, *inter alia*, Article 21(1) of the UDHR, Article 5(c) of the CERD and Article 7(b) of the CEDAW.

executive and administrative powers.”⁴⁹ Further, the Human Rights Committee states, that the provisions of conduct of public affairs cover “all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”⁵⁰

Article 25 (a) speaks of the right of the citizens to take part in the “conduct of public affairs”, a reference that several scholars of international law have interpreted to mean that Article 25 recognises the existence of a broader right of political participation for the citizens than merely the right to vote at periodic elections.⁵¹ Political participation as defined in Article 25 of the ICCPR is not limited to elections, but may contain a number of other mechanisms, such as access to public service, membership in decision-making and consultative bodies.⁵² However, the Human Rights Committee (hereinafter called CCPR) in the case of *Mikmaq Tribal Society v. Canada* found that article 25 cannot be taken to mean that “any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs” and concluded that “it is hence not up to every citizen to determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives”.⁵³ Thus, the view of the Human Rights Committee does not fully support the presumption that article 25 includes an obligation for the State parties to implement modes of political participation following the ideals of participatory democracy (see section 3.3 *infra* of different modes of political participation).⁵⁴

In addition to the representational system based on election and later specified in para (b), Article 25 (a) also guarantees the right to take part in the conduct of public affairs “directly”. It has the effect of giving citizens a right to take part in referenda and other forms of plebiscitary political participation when these are provided for by the respective State Party.⁵⁵ However, while obligated to hold periodic elections, the States Parties are not required to conduct public referenda.⁵⁶

Complementing the provision of Article 25 (a) of the ICCPR, Article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁷ should be mentioned, which states every citizen’s equal right to take part in the conduct of public affairs at any level. The issued General Recommendation on Article 5 (c) states that:

⁴⁹ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 5.

⁵⁰ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 5.

⁵¹ See Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, pp 77-134; Kristian Myntti, National Minorities, Indigenous Peoples and Various Modes of Political Participation, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 9.

⁵² Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 224.

⁵³ *Mikmaq Tribal Society v. Canada*, Communications No. 205/1986, views adopted on November 4 1991, UN Doc. A/47/40.

⁵⁴ Kristian Myntti, National Minorities, Indigenous Peoples and Various Modes of Political Participation, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 10.

⁵⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 442.

⁵⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 442.

⁵⁷ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

“In consequence, governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins”⁵⁸

3.2.3.2 “To vote and to be elected at genuine periodic elections” – ICCPR Article 25 (b)

The right to participation is particularly well specified in the area of electoral process, where a number of well-established rules exist,⁵⁹ containing provisions that can arguably be classified as customary international law.⁶⁰

The basic subjective rights of political participation is the right to vote and a right to stand for election.⁶¹ *Suksi* argues that Article 25 (a) of the ICCPR expresses not merely a right, but also the “opportunity” to participate, which could mean that the nomination of candidates should not solely be left to the political parties, but that there should exist a mechanism through which those with the right to vote could, under certain conditions and without the interference of the political parties, nominate candidates.⁶²

Elections required by Article 25 (b) must be “genuine” and “periodic”, terms that *Nowak* refers to as “extremely vague”.⁶³ Genuine elections, in conjunction with the principle of free elections, mean that eligible voters may freely choose among various alternatives – parties, programs or at least several candidates of the uniform party.

A General Assembly resolution from 1988 on enhancing the effect of the principle of periodic and genuine elections, states:

“... periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and ... the right for everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, including political, economic, social and cultural rights.”⁶⁴

In response to this annual resolution, however, it should be noted that a number of non-western countries have annually promoted a parallel General Assembly

⁵⁸ CERD General Recommendation 21 on the Right to self-determination, 23 August 1996, para. 4.

⁵⁹ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 223.

⁶⁰ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 205. As an example, Suksi argues in the same article, p 212, that “the secrecy of the vote is so well established in international law and supported by state practice that it should be understood as a norm of customary international law.

⁶¹ See Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 439 and Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 208..

⁶² Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 206.

⁶³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 443.

⁶⁴ G.A Res. 43/157/(1988) on enhancing the effect of the principle of periodic and genuine elections, para 2.

resolution on “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes.”⁶⁵

The electoral procedure is further specified by a number of voting principles:⁶⁶

- *universal suffrage*: that the right to vote may not be restricted to certain groups or classes;
- *equal suffrage*: that each vote carries equal weight. This requirement can be fulfilled in a variety of electoral systems, i.e. in the majority-vote system as well;
- *free election and secret ballot*: States Parties are not only obligated to respect the secrecy of the ballot, but also take positive measures to create the actual opportunity for voters to cast their votes without fear of being observed, also from their immediate family members⁶⁷ unless objective grounds exist.

These electoral procedural provisions can arguably constitute international customary law.⁶⁸

Further, a relevant standard specifically targeting minorities includes that voting material should be made available in minority languages, as stated by the Human Rights Committee in its General Comment on Article 25.⁶⁹ Further, the same General Comment provides that the drawing of electoral boundaries should not discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.⁷⁰

3.2.4 Standards proposed by international expert groups

While excluding valuable comparative standards from regional organisations such as OSSE⁷¹ and the Council of Europe,⁷² this section aims at providing some examples of special measures and standards (relevant for the following case study of Vietnam) forwarded by international expert groups. These concrete proposals elaborate on ways in which Governments could give effect to the standard of effective participation of minorities in public life. These examples from western-based expert groups, and considering the focus *infra* on Vietnam can be found by some to be yet another example of cultural bias towards the Western way of articulating human rights. But as *Buhmann* writes on a similar note “the application is not undertaken in order to point at deficiencies. It is undertaken with the aim of

⁶⁵ *Inter alia*, G.A. Res. 44/147(1989), G.A. Res. 48/124(1993) and G.A. Res. 52/119/(1997). In these resolutions, the General Assembly recognises that there is no single universal model for electoral processes equally suited for all nations and their peoples, and that the electoral systems and electoral processes are subject to historical, political, cultural and religious factors.

⁶⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 445.

⁶⁷ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 212.

⁶⁸ See Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 205. *Suksi* argues that the right to participation contains provisions concerning elections that can arguably be classified as customary international law.

⁶⁹ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 12.

⁷⁰ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 21.

⁷¹ See, *inter alia*, para 35 of the 1990 Copenhagen meeting of OSCE and the Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991, Part IV.

⁷² See, *inter alia*, Framework Convention for the Protection of National Minorities (1995). See www.riga.lv/minelres/inter, which provides valuable links to the most important minority-related instruments within the Council of Europe, OSCE and the European Union.

assessing shared ideals and objectives with a view to increased dialogue and pro-active co-operation on human rights implementation...⁷³

The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note⁷⁴ (hereinafter called the “Lund Recommendations”) contains a detailed inventory of special measures and provides numerous potential arrangements to be considered by States. Also valuable, however somewhat less detailed, the Proposals of an expert seminar organized by the European Centre for Minority Issues⁷⁵ (hereinafter called the “ECMI Proposals”) are also mentioned in the following text.

The question of adequate representation

A difficult problem is the tendency for minorities to be under-represented in political and public life, simply being a manifestation of a structural difficulty in many political systems – because of their low numbers, minorities are systematically being outvoted and the numbers of minorities tend to be much lower than the actual percentage of the population.⁷⁶

The Lund Recommendations state that States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements such as special representation of national minorities through a reserved number of seats in parliament or in parliamentary committees.⁷⁷ The ECMI Proposals forward mechanisms such as proportional representation, guaranteed minority seats, reduced voting thresholds, minority legislative veto, and advisory and consultative bodies for minorities.⁷⁸ Eide observes that States should establish advisory or consultative bodies involving minorities, and that such bodies or roundtables should be attributed political weight and effectively consulted on issues affecting the minority population.⁷⁹ The Lund Recommendations states that these advisory and consultative bodies might include “special purpose committees for addressing such issues as housing, land, education, language, and culture” and that the governmental authorities should consult these bodies regularly regarding minority-related legislation.⁸⁰ These bodies should further be composed of minority representatives and others who can offer special expertise, provided with adequate resources, and given serious attention by decisionmakers.⁸¹

⁷³ Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 79.

⁷⁴ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999.

⁷⁵ European Centre for Minority Issues, *Proposals of the ECMI Seminar “Towards Effective Participation of Minorities*, 1999, UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.4.

⁷⁶ Fernand de Varennes, *Towards Effective Political Participation and Representation of Minorities*, Working Paper to the UN Working Group on Minorities, UN. Doc. E/CN.4/Sub.2/AC.5/1998/WP.4, p 3.

⁷⁷ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Recommendation No. 6.

⁷⁸ European Centre for Minority Issues, *Proposals of the ECMI Seminar “Towards Effective Participation of Minorities*, 1999, UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.4, para 9.

⁷⁹ Asbjorn Eide, *The Role of the Sub-Commission on Promotion and Protection of Human Rights and its Working Groups in the Prevention of Conflicts*, International Journal on Minority and Group Rights No. 8, Netherlands, 2001, p 28.

⁸⁰ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Recommendation No. 12 and 13.

⁸¹ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Explanatory Note to Recommendation No. 12 .

Decentralisation

Eide notes that decentralisation of powers based on the principle of subsidiarity, whether called self-government or devolved power would increase the chances of minorities to participate in the exercise over matters affecting themselves and the entire societies in which they live.⁸² The Lund Recommendations state that various forms of decentralization may be appropriate to assure the maximum relevance and accountability of decision-making processes for those affected, thus improving the opportunities of minorities to exercise authority over matters affecting them.⁸³

3.2.5 Adjacent political rights

The explicit norms concerning participation are not functional without the adjacent political rights, that is, freedom of speech and of the press, freedom of association and freedom of assembly.⁸⁴ This section focuses only on the freedom of association, due to its application *infra* in the paper.

Nowak observes that freedom of association lies in the overlapping zone between civil and political rights; as a *civil* right it grants protection against arbitrary interference by the State when an individual wishes to associate with others; as a *political* right it is indispensable for the existence of and functioning of democracy.⁸⁵

“Persons belonging to minorities have the right to establish and maintain their own associations.”

Article 2(4), UN Minority Declaration

Freedom of association is a powerful individual human right which lends strength to the provision in Article 2(4) of the UN Minority Declaration, establishing the unqualified right to establish and maintain minority associations.⁸⁶ There is no limitation of the objects of the associations and participation can therefore involve the creation of ethnic, cultural and religious associations and societies, as well as political parties in a State.⁸⁷ Interest groups using lobbying and other strategies can supplement the electoral process.

The freedom of association is articulated in several international instruments, including Article 20 of the Universal Declaration of Human Rights, Article 22 of the ICCPR. While the States Parties are under a positive duty to provide the legal framework for founding juridical persons, the legal form of an association is

⁸² Asbjorn Eide, *The Role of the Sub-Commission on Promotion and Protection of Human Rights and its Working Groups in the Prevention of Conflicts*, International Journal on Minority and Group Rights No. 8, Netherlands, 2001, p 29.

⁸³ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Explanatory Note to Recommendation No. 6.

⁸⁴ Markku Suksi, Good Governance in the Electoral Process, in Hans-Otto Sano and Gudmundur Alfredsson (ed.) *Human Rights and Good Governance*, Netherlands, 2002, p 204. Suksi notes that the paragraphs 12, 25 and 26 of the CCPR General Comment to Article 25 could be understood as defining the political rights, see UN Doc. ICCPR/C/21/Rev1/Add.7 (1996).

⁸⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 385.

⁸⁶ Patrik Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 45.

⁸⁷ Patrick Thornberry, Minorities, Indigenous peoples, Participation: An Assessment of International Standards, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 34.

basically unrestricted, *de facto* associations are likewise protected under the ICCPR.⁸⁸ Participation can therefore involve the creation of ethnic, cultural and religious associations and societies, as well as political parties in a State.⁸⁹ Restrictions on freedom of association must according to Article 22(1) of ICCPR be prescribed by law, necessary in a democratic society and serve one of the purposes justifying interference. For example, no political party or other association may incite hatred, which is prohibited by Article 20 of the ICCPR and Article 4 of the CERD.

3.3 Modes of political participation

Here will be discussed two main discourses of political participation:

- 1) Representative democracy (indirect participation)
- 2) Participatory democracy (direct participation)

Without intending to present a euro-centric overview of the classical political thought stemming from Locke, Bentham, Mill and Rousseau, it is clear that liberal democratic tradition has treated elections as the paramount form of participation. However, even within this mode of representative democracy, little agreement exists among Western democracies on how to enhance participation.⁹⁰ It can be noted that in the United States, voting is probably the sole political experience for most citizens and that surveys show “a picture of low levels of citizen participation and the concentration of political activity in the hands of a small portion of the citizens.”⁹¹

In a representative democracy, one can distinguish between two opposing concepts of what constitutes fair political representation, the view of interest-group pluralism and that of “one person, one vote”.⁹² Rawls argues the idea of pure procedural fairness as the surest route to fair representation, implying that as long as individuals have equally weighted votes and equal opportunities to organise politically, the representational outcome will be “fair, whatever is, provided that the procedures have been properly followed.”⁹³

Academic writing often distinguishes between two main forms for election of a representative legislature: proportional representation and the district-system. In the former, the legislature is divided among parties according to the percentage vote received by each party list in the popular election; in the latter, the winner in an electoral district takes all the seats. Steiner writes that it is obvious that the two described systems may have radically different implications for the political access of ethnic minorities.⁹⁴

⁸⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 387.

⁸⁹ Patrik Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 43.

⁹⁰ See Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 97.

⁹¹ S. Verba and N. Nie, Participation in America: Political Democracy and Social Equality, 1972, p 26f as referred to in Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 103.

⁹² Melissa S. Williams, Memory, History and Membership – the Moral Claims of Marginalized Groups in Political Representation in J Rääkkä (ed.), *Do We Need Minority Rights?*, Netherlands, 1996, p 85.

⁹³ John Rawls, *A Theory of Justice*, Cambridge, 1971, p 86.

⁹⁴ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 106.

While the notion of representative democracy traditionally has gained widespread acceptance, exercised through elections, the participatory democratic discourse is gaining ground, although it can be said that a more profound understanding or development of the concept of participatory democracy is needed. The underlying constraints on direct participation remain in practice. The people cannot directly govern by participating in the setting of a political agenda or the making of governmental decisions. Nor will occasional resort to referendas, another classical example of direct participation, significantly change the role of the electorate.⁹⁵

The theorists of direct or participatory democracy advocate decentralisation of authority, and direct attention towards local governments with functions and of a size that is more likely to promote active public involvement. These modes of participation can, and in many states do, take forms such as citizen representation on governmental boards, public meetings and discussions, more extensive functions of city government responsive to the citizens' needs.⁹⁶ Other examples may be representation in *ad hoc* and standing committees, commissions with consultative or administrative functions, local or neighbourhood councils. Citizens' groups, interest groups dealing with issues as diverse as environment, education, welfare institutions – have in some countries been brought into formal consultative arrangements with relevant governmental bodies.⁹⁷ Subsidiary and participatory democracy have much in common. The principle of subsidiary is probably best known as a principle of EC law and advocates that decisions should be taken by those most affected by them.

Concerning the legal implications in international law, as implied *supra*, it has been recognised that direct and indirect participation represent equally valid forms through which the right to political participation may be exercised.

3.4 Distinguishing effective from ineffective participation

The UN Minority Declaration does not itself suggest any particular formula for achieving “effective” participation, no objective criteria that can be conveniently and comparatively measured. How can one value the effectiveness of political participation? One suggestion forwarded is to examine the quality and quantity of the interactions between the citizens and their representatives.⁹⁸ But how can the quality criteria be estimated objectively?

Statistics of the representation of minorities in the legislative branch of government, in the central government, figures of deputies at local levels of government and numbers of minority staff in the offices of government at the local levels is a convenient, objective tool to estimate the effectiveness of participation. However, while a measure that guarantees or facilitates minority persons to hold office is commendable and an improvement of a simple majoritarian rule, it does not in itself guarantee that the interests of minorities are protected in fact. *Varenes*

⁹⁵ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 101.

⁹⁶ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 103.

⁹⁷ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 111.

⁹⁸ See National Democratic Institute, *Strengthening the Representative Capacity of Legislatures: A Guidebook*, Background paper for UNDP Staff Training Seminar “Strengthening the Legislature-Challenges and Techniques” in the Bruxelles October 22-24, 2001, p1.

observes that on the other hand, while a minority guaranteed of a few seats in Parliament may not be able to influence greatly, “the increased visibility and voice contribute to a more effective participation than a completely majoritarian approach to representative and participatory democracy.”⁹⁹

In this paper, statistics are therefore applied as an objective tool to measure the effectiveness of participation. Representation can be viewed as a necessary but not sufficient ingredient in achieving effective participation. While representation may indicate *potential* participation, a tool to estimate *actual* participation has not been found. A subjective element should be developed. For the purpose of this paper, in order to estimate whether the minorities have an effective voice that is seriously listened to, the objective statistical assessment is complemented by subjective estimations of various persons interviewed.

3.5 Distinguishing public participation from self-government, autonomy and self-determination in international law

Does the right to effective political participation include collective political rights or aspects of self-determination such as autonomy or self-government? In this section the relation between these various concepts are discussed.

Self-government

Political participation and self-government are generally considered different concepts in international law. In practice, self-government often concerns whether a group must be content with participation in the existing structures of decision-making of a State, or if it has the right to create its own decision-making organs – to control its own affairs.¹⁰⁰

Territorial self-government can help preserve the unity of States while increasing the level of participation and involvement of minorities by giving them a greater role in a level of government that reflects their population concentration.¹⁰¹

Autonomy

There is no generally accepted definition of autonomy in international law, but it can be used as a concept that describes the extent of degree of independence of a particular entity, a central government that agrees to share power and leave local matters in the hand of group representatives.¹⁰² It is important though to differentiate various levels and meanings of autonomy. Autonomy can be defined in territorial terms, requiring a territorial base, and autonomy that do not require a “territorial base”, such as certain forms of personal autonomy in the areas of religion, culture and civil status.¹⁰³

⁹⁹ Fernand de Varennes, *Towards Effective Participation and Representation of Minorities*, Working Paper to the UN Working Group on Minorities, 1998, UN Doc. E/CN.4/Sub.2/AC.5/1998/WP.4, p 6.

¹⁰⁰ Kristian Myntti, National Minorities, Indigenous Peoples and Various Modes of Political Participation, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 15.

¹⁰¹ Foundation of Inter-Ethnic Relations, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague, 1999, Commentary, point 19.

¹⁰² Markku Suksi, *Frames of Autonomy and the Åland Islands*, Åbo, 1995, p 9.

¹⁰³ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination – The Accommodation of Conflicting Rights*, Philadelphia, 1992, p 467.

Alfredsson states allowing group control of local affairs is the most effective way to protect group dignity, identity and diverse customs and thus to place minorities on equal footing with other parts of society.¹⁰⁴ *Lijphart* has identified autonomy as one of the crucial elements in consociational democracy, because it creates opportunities to promote minorities' interests.¹⁰⁵

Many ethnic groups, who are campaigning for greater political freedom, claim that ethnically defined and segregated "autonomous enclaves" may be necessary to strengthen ethnic and cultural peculiarities, and protect from dilution.¹⁰⁶ This may be so, but at the same time this can have the effect of creating ethnic division fortresses and segregation, which is a clear diversion from the building of multi-ethnic societies enhancing tolerance and cross-cultural understanding. The idea of participation has, as previously stated, the plausible effect of turning the minority towards the majority and thus constituting an inclusive approach.

There has been a reluctance to introduce any substantial law in terms of international law agreements guaranteeing autonomy as a legal right to minorities, except to some extent regarding indigenous peoples.¹⁰⁷ The Article 2(3) in the above mentioned UN Minority Declaration lays down participatory rights but do not amount to a right to autonomy. The Article 4(2) in the same Declaration¹⁰⁸ appears to make recommendations favourable of autonomy and in the words of *Thornberry* '[t]here is no specific right to autonomy in the Declaration, but "effective" participation through local and national organisations may necessitate the creation of autonomies to achieve the Declaration's standard'.¹⁰⁹ *Welangama* states that the Declaration's article 4(2) relates to no more than personal or cultural autonomy, that the right to territorial autonomy is not entrenched in the Declaration.¹¹⁰ Although many minority rights activists were disappointed that the Declaration did not provide any explicit mentioning of autonomy, *Alfredsson* observes that a lot can be done from the notion of public participation and with dynamic interpretation, it may open the doors to autonomy or self-government.¹¹¹

¹⁰⁴ Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly 5/6 1998, Latvia, p 20.

¹⁰⁵ While the theory of consociational democracy is left out of the scope of this paper, it briefly means a manner of governance apart from traditional majority decision making and provides elements to protect the interests of minorities in the decision-making, such as giving minorities a right to veto on questions relating to them etc. See the works of A. Lijphart as one of the main theoretical analysts of consociational democracy, inter alia: Arend Lijphart, Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems, in W. Kymlicka (ed.) *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995, pp 275-287;

¹⁰⁶ Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, Nordic Journal of International Law no. 68, Netherlands, 2000, p 414.

¹⁰⁷ Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, Nordic Journal of International Law, No 68, the Netherlands, 2000, p 429.

¹⁰⁸ Article 4(2) UN Minority Declaration reads: "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards."

¹⁰⁹ Patrik Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 42f. See also Report on a Workshop on the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Turku/Åbo, Finland, 7-8 May 1993, which also noted that the full participation of minorities in public life "may, in some cases" call for special arrangements involving, *inter alia*, local government, federalism or autonomy.

¹¹⁰ Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, Nordic Journal of International Law, No 68, the Netherlands, 2000, p 429.

¹¹¹ Gudmundur Alfredsson, *Minority Rights: A Summary of Existing Practice*, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 81.

Although there are several positive international examples of autonomy arrangements in Switzerland, Austria, Belgium and Ukraine, it should also be noted that experiences of autonomous regimes are not solely a list of success stories. Eritrea's autonomy from Ethiopia 1952-1962, the autonomy for the Basque in Spain in 1979 and the autonomy accord in Sri Lanka 1987 are all examples where autonomy arrangements neither solved the situation or alleviated tensions in short-run nor the long-run.¹¹² The concept of autonomy should therefore not be praised as the ultimate solution to alleviate tensions between minority and majority, but viewed in each specific case and according to its circumstances.

The establishment of adequate autonomous measures is in the final analysis, up to the State in question. *Hannikainen* argues that from a legal perspective, as long as a state has not assumed any specific obligation to consent to autonomous arrangements, it is up to that state whether to provide autonomy or not.¹¹³ *Welhengama* writes that while autonomy is a half-way between claims and rights and that it is not a legal right that can be exercised as a right in international law, a claim is the first step towards acquiring legal rights.¹¹⁴

Self-determination

The Human Rights Committee acknowledges that the rights under Article 25 of the ICCPR are related to, but distinct from the rights of peoples to self-determination.¹¹⁵ CERD distinguishes between internal and external self-determination of peoples, and holds that there exists a link between internal self-determination and the right of every citizen to take part in the conduct of public affairs at any level, as referred to in CERD Article 5(c).¹¹⁶ *Rosas* argues that the right of self-determination of peoples may also be of some relevance when it comes to minorities' participatory rights, particularly the contested "internal" aspect of self-determination implying that the whole population must be guaranteed a say in the shaping of the constitution and the exercise of political rights.¹¹⁷

Traditionally, the concept of self-determination has been related to people under colonial rule, but as *Myntii* argues, it would be a simplification of current interpretation of international law to state that the right to self-determination has only one component – the right of people under colonial rule organised in states to be free from external intervention and pressure.¹¹⁸ The concept of self-determination does not need to correspond to a separating idea, but can be accommodated in existing multinational states.

¹¹² For a comprehensive overview of the mentioned and other examples of autonomy arrangements in the 20th century and the contemporary debate among States, see Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, Nordic Journal of International Law, No 68, the Netherlands, 2000, p 417-424 with the references for more literature on the individual arrangements stipulated in note 53.

¹¹³ Hannikainen, Self-determination and Autonomy in International Law, in Suksi(ed.) *Autonomy: Applications and Implications*, Kluwer Law International, The Hague, 1998, p 87.

¹¹⁴ Gnanapala Welhengama, *The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination*, Nordic Journal of International Law, No 68, the Netherlands, 2000, p 438.

¹¹⁵ CCPR General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para 2.

¹¹⁶ CERD General Recommendation No. 21, UN Doc. A/51/18 (1996), para 4.

¹¹⁷ *Rosas* states that the existence of an internal aspect of self-determination was contested in the past but is indirectly acknowledged in the CERD General Recommendation No. 21, UN Doc. A/51/18 (1996). See Allan Rosas, Electoral Rights and Foreigners, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 52.

¹¹⁸ Kristian Myntii, *Minoriteter och Urfolks Politiska Rättigheter*, Rovaniemi, 1998, p 97.

3.6 Conclusion

As elections are the form of participation, which engages the masses of citizens, it was long assumed that voting behaviour constituted the core element of political participation.¹¹⁹ The scope of participation in international law has extended from the mere political participation in towards the recognition of other forms of participation, such as participation in cultural, religious, social life, economy and economic progress, planning and development, national and international NGOs, decision-making, and the devising of legislative and administrative measures.¹²⁰ In brief, political participation is about influencing public policy and governmental action and the inclusive process of decision-making should be valued as important as the substance of decisions made.

The UN Minority Declaration, especially Articles 2(2) and 2(3), in conjunction with Article 25 of the ICCPR and Article 5 of CERD provide the comprehensive contents of minorities' right to effective participation in international law. Minorities have, *inter alia*, the right to vote and be elected in periodic and genuine elections, the right to obtain voting material in minority language, the right to secrecy of the ballot and the right to take part if a referenda is held. Although there is no provision guaranteeing representation in the legislative organ of State proportional to the minority population, this could evolve into an international standard.¹²¹ However, international human rights law grants a wide latitude for States to comply with the right to effective participation of ethnic minorities in public life in general and in particular in devising their electoral systems.¹²²

Further, participatory rights' exists relating to decisions on local levels, when these decisions concern the ethnic group, affect its identity or the region it inhabits - thus the formulation and implementation of policy at local level.¹²³ The UN Minority Declaration extends the "participation in decisions" principle to the regions where the minorities live, as well as to the minority itself. Thus, in regions mainly inhabited of minorities as well as in "mixed regions", the minority should be recognised as an actor in decision-making processes. It is also likely that that effective participation for minorities will move in the direction of greater decentralisation, towards levels of government appropriate to enabling an "effective" involvement.

Drawing on the traditional division between "hard" versus "soft" human rights law, one can argue that the right to participation constitutes "hard" law in Article 25 of the ICCPR, and thereby obligations legally binding on State Parties. While the extension of the right to political participation to minorities, through the UN Minority Declaration, may be perceived as "soft" human rights law, the references in various instruments on the right of minorities to "effective participation" is suggesting the emergence of a general principle, which is reinforced by the General Comment on Article 27 of the ICCPR.¹²⁴ Further, since the right to political

¹¹⁹ Kristian Myntti, National Minorities, Indigenous Peoples and Various Modes of Political Participation, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 3.

¹²⁰ Päivi Hernesniemi, *Minorities and Indigenous Peoples in Development Cooperation: A Survey of the position of minorities and indigenous peoples in selected development countries*, Åbo, 1999, p 31.

¹²¹ Comment from an international academic, 2002-08-10.

¹²² Allan Rosas, Electoral Rights and Foreigners, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 52.

¹²³ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 5.

¹²⁴ Allan Rosas, Electoral Rights and Foreigners, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 53.

participation is to be applied equally in fact to all individuals in a state, if minorities are unjustifiably excluded this would constitute a violation of the well recognised principle of non-discrimination and could imply special measures in order to guarantee an equal enjoyment of rights.

The theoretical backbone of this paper is that minority groups, in States that have adhered to the relevant international treaties as mentioned *supra*, enjoy a right to effective participation in public life which includes a participation at least equivalent to other citizens' in the conduct of public affairs. In order to achieve this equal enjoyment in fact and the standard of *effective* participation, will often require affirmative action and special measures.¹²⁵

In order for the participation to be effective, it has to have a real impact on the decisions taken.¹²⁶ While all adjacent political rights are necessary for the right to participation to be enjoyed, it can be concluded that, *inter alia*, the establishment of minority associations with consultative functions may be necessary and should, under all circumstances, be supported. The General Recommendation of the Human Rights Committee on article 25, states aside from representative political participation also "exerting influence" as modes of participation in the conduct of public affairs.¹²⁷ Freedom of association, as prescribed *inter alia* in Article 22 of the ICCPR in conjunction with the provision in Article 2(4) of the UN Minority Declaration, states the unqualified right to establish and maintain minority associations.¹²⁸

Using the division *supra* in this chapter between the "electoral clause" and the "take part" clause of Article 25 of the ICCPR, difficulties do not only lie in the formulation of the latter, but also in assessing compliance with an international norm embodying it – while election either take place or they do not and can easily be assessed.¹²⁹ Steiner argues that the right to political participation be viewed as a programmatic right, one responsive to a shared ideal but to be realised progressively over time in different ways in different contexts, sharing the programmatic character of many economic and social rights at least when considering the "take part" clause.¹³⁰

There is a number of modes of political participation, among which voting in national elections is one. Voting being the cornerstone of any democratic society, representative democracy is no longer the single ideal model for democratic decision-making. No one ideal of political participation can be argued on the basis of international law and therefore, no single scale can measure political

¹²⁵ As far as special measures, positive obligations, it is difficult to establish clear rules on the content of State obligations. However, the Human Rights Committee General Comment on Article 27 states, regarding the enjoyment of cultural rights, "may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them", see CCPR, General Comment 23 adopted on 8 April 1994.

¹²⁶ Kristian Myntti, National Minorities, Indigenous Peoples and Various Modes of Political Participation, in Frank Horn (ed.) *Minorities and Their Right of Political Participation*, Rovaniemi, 1996, p 25.

¹²⁷ CCPR General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7(1996), para 8. It should be noted though that the General Comment does not apply the terminology "right".

¹²⁸ Patrik Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations, in A Phillips and A. Rosas (eds.) *The UN Minority Rights Declaration*, Turku, 1993, p 45.

¹²⁹ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 111.

¹³⁰ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 130.

participation comparatively, neither between liberal democracies or considering one-party states.

The legal significance of the international instruments applicable for minority standards has to be taken into account in each particular case, in line with the adherence of the State to be studied. It is important to distinguish *de lege lata* from *de lege ferenda* if confidence in the existing normative system is to be supported. Writers arguing that minorities have the unqualified right to self-determination or autonomy do probably not stimulate minority-friendly notions of participation and autonomy. International law should not be abused by too creative interpretations in order to support an opinion in one direction or another. Minority rights relating to the effective participation of minorities in public life must be exercised in a manner consistent with other principles of international law, such as the sovereignty, territorial integrity and national unity of States and the maintenance of international peace and security.¹³¹

¹³¹ See Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly 5/6 1998, Latvia, p 21.

4 Overview of the Ethnic Minorities in Vietnam and the Entrenchment of their Participation in Public Life

4.1 Introduction

The Government's reform program known as *doi moi* (renovation) was officially launched in 1986, after which Vietnam has been carrying out extensive economic, legal and public administration reforms to facilitate the development of a socialist-oriented market economy and an enhanced socialist democracy.¹³² The *doi moi* process has meant a move away from central planning and aims at creating a society governed by the rule of law, where transparency, accountability and democratisation are essential ingredients. In the traditional division of legal systems, Vietnam largely belongs to the tradition of communist/socialist law, although arguably, the law reforms undertaken since the mid-1980s may in due time result in a shift to either civil or common law, and more likely in a combination.¹³³

Most States experience challenges in including the whole population in the gains of economic development, commonly the marginalised groups are being left behind. Vietnam is investing considerable resources in the provision of social services in remote, mountainous areas where most of the ethnic minority populations are located.¹³⁴ The Vietnamese government has and is putting great efforts into supporting the development of the ethnic minorities in Vietnam through various programs and in ensuring the equal enjoyment of rights and benefits for all. This chapter attempts to map out the main legal provisions which aim at guaranteeing the ethnic minorities in Vietnam their right to participation in public life.

4.2 Officially recognised ethnic minorities in Vietnam

Of Vietnam's 54 officially recognised ethnic groups,¹³⁵ the majority Kinh ethnic group (also called Viet) account to approximately 86% of the population, and

¹³² A progressive freeing of Vietnam's centrally planned economy began as early as 1979, but the official renovation policy is normally traced to the 6th Conference, 8th Plenum of the Communist Party of Vietnam in 1986. Five years later, in 1991, the Seventh Communist Party Congress expanded *doi moi* to encompass legal reform. See Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, *Law & Society Review*, Volume 32, Number 1, 1998, p 95 and 99.

¹³³ See Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 60. Buhmann observes though that several scholars in East and Southeast Asia contest the traditional division in common, civil and socialist law.

¹³⁴ See World Bank, *Voices of the Poor*, Hanoi, 1999, p 33.

¹³⁵ Despite continuing confusion over ethnic identities, the ethnic classification in the 1940s based on ethno-linguistic differences as developed by Vietnamese ethnologists and adopted by the Vietnamese State is the most current classification. Comment from a national academic in Hanoi, 2002-06-27. The same national academic stated that if an objective re-classification would take place,

ethnic minority groups almost 14%.¹³⁶ The ethnic minorities¹³⁷ in Vietnam are officially defined as those who have Vietnamese nationality and reside in Vietnam but do not share the identity, language and other cultural characteristics of the majority Kinh people.¹³⁸ There is a high degree of diversity among Vietnam's 53 ethnic minority groups with regard to language, agricultural practices, kinship systems, lifestyles and beliefs, and the different groups should therefore not mistakenly be treated as a homogenous group.¹³⁹

The bulk (approximately 75%) of the total ethnic minority population lives in mountainous areas, mainly in the northern mountains with a smaller number located in the central highlands and in the urban areas. It should be noted that with their 14% share of the population, the ethnic minorities inhabit about 75% of the area in Vietnam.¹⁴⁰ Ethnic minorities in fact constitute the majority in some mountainous districts and provinces, and it is also common to have districts and communes of mixed ethnic groups. UNDP Vietnam further states that in the big cities, images of ethnic minorities are celebrated on colourful postcards and in glossy tourist publications and their lifestyles are frequently romanticised as 'simple' and 'traditional'.¹⁴¹

4.3 Brief historical context

“In the light of Marxism-Leninism and Ho Chi Minh thought, carrying into effect the Programme of national construction in the period of transition to socialism, the Vietnamese people vow to unite millions as one”

Paragraph 6, Preamble of the 1992 Constitution

The leadership¹⁴² of Vietnam constantly states the national unity and the importance the various ethnic groups in Vietnam have played in the past, when the State was “faced with the constant threat of foreign invasions by imperialistic and feudal forces”.¹⁴³ Ho Chi Minh is said to have sent a letter in 1919 to the Delegation of the Victorious Allied forces in the First World war, demanding that the Vietnamese people be given access to such rights as equality, freedom and self-determination to be constitutionally safeguarded.¹⁴⁴

It is outside the scope of the present paper to reflect on consequences of Confucianism in the Vietnamese society today, but it is reported that since the *doi*

5 to 10 more ethnic groups should objectively be recognised, but this statement was disputed by another national observer. Comment by national observer, 2002-08-01. For a listing of the 54 ethnic groups in Vietnam and their respective population figures, see Supplement A.

¹³⁶ UNDP Vietnam, *Poverty Task Force: Promoting Ethnic Minority Development*, June 2002, p 3.

¹³⁷ It should be noted that the word “ethnic” does not exist in the Vietnamese language, normally the term employed would be “minority peoples”. Similarly, there are no exact translation in Vietnamese of “minority or ethnic group”, amore accurate translation of the Vietnamese expression would be “minority groups of people”. See Summary Record of Vietnam's presentation of the sixth to ninth periodic report under the CERD, 30 August 2001, UN Doc. CERD/C/SR.1481, para 3

¹³⁸ UNDP Vietnam, *Poverty Task Force: Promoting Ethnic Minority Development*, June 2002, p 3.

¹³⁹ For an overview on the different characteristics of the ethnic minority groups, see Dang Nghiem Van et al, *Ethnic Minorities in Vietnam*, Hanoi, 2000.

¹⁴⁰ Comment from national academic in Hanoi, 2002-07-04.

¹⁴¹ UNDP Vietnam, *Fact Sheet on Ethnic Minorities Groups*, Hanoi, December 2000, p 1.

¹⁴² This term is used in this study to jointly describe the Vietnamese Communist Party, the Government and the National Assembly.

¹⁴³ Dang Nghiem Van et al, *The Ethnic Minorities in Vietnam*, Foreign Languages Publishing House, Hanoi, 1984, p 9.

¹⁴⁴ See Hoàng Van Hao, *Fundamental viewpoints of the Party and the state of Vietnam on human rights*, Information of Human Rights, no 1. 2000, Hanoi, p 46.

moi, Confucian values and rituals have been restored and practised.¹⁴⁵ As a consequence, it should be kept in mind that the traditional notion of loyalty to the superior, to the leader as well as traditional gender relations continues to have some behavioural influence yet today.

Without giving a historical overview of the policies towards the ethnic minorities, a national academic explained that the three guiding principles in the state policy towards ethnic minorities have been:

- 1) Equality in rights and duties among ethnic groups
- 2) Solidarity among ethnic groups
- 3) Mutual assistance among ethnic groups.¹⁴⁶

4.4 International standards of public participation applicable in Vietnam

The Communist Party of Vietnam acknowledged in its outcome report from the 9th National Congress 2001 the explicit goal of the party to:

“protect all the people’s lawful rights and interests; respect and implement international conventions on human rights.”¹⁴⁷

Vietnam has ratified¹⁴⁸ or acceded¹⁴⁹ to five of the six core UN human rights instruments, CEDAW (1982), CERD (1992), CRC (1990), ICCPR (1992) and ICESCR (1992), and have thereby accepted the provisions as legally binding.¹⁵⁰ Some reservations and declarations were made upon the ratifications and accessions, but none relevant to issues discussed in this paper.¹⁵¹ Vietnam is not a State Party of the Optional Protocols to CEDAW, CERD or ICCPR, thus not enabling individual petition under these instruments.

The status of international treaties in the domestic legal order of Vietnam is unclear. *Buhmann* states that in the legal system of Vietnam the international treaties are claimed to be directly applicable and, in case of conflict with domestic

¹⁴⁵ The Four Books is reported to have been widely reprinted during the 1990s; the Four Books are significant for Confucism - *Confucian Analects*, the *Book of Mencius*, the *Great Learning* and the *Doctrine of the Mean*. A great deal of Confucian doctrine is the rational justification of the social system in Vietnam, with the special characteristics of “loyalty, filial piety, precedence and nobility, which became legal rules and norms to regulate Vietnamese social and family relations over space and time. See SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 9.

¹⁴⁶ Comment by a national academic, 2002-06-29.

¹⁴⁷ 9th National Congress of the CPV – Final Document, Hanoi, 2001 as a Special Supplementary Issue to Vietnam News April 20, 2001, p 8.

¹⁴⁸ “Ratification” defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. See United Nations Treaty Reference Guide, Glossary of terms relating to Treaty actions, as read at <http://untreaty.un.org/English/guide.asp#accession> on 2002-05-29.

¹⁴⁹ “Accession” is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. See United Nations Treaty Reference Guide, Glossary of terms relating to Treaty actions, as read at <http://untreaty.un.org/English/guide.asp#accession> on 2002-05-29.

¹⁵⁰ Vietnam is State Party to the mentioned international treaties, as viewed at www.unhchr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet on 2002-07-01. Vietnam is, as of August 2002, not a State Party to the UN 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁵¹ For information and full-text of Vietnam’s reservations and declarations under different instruments, see www.unhchr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet

law, to prevail over statutory law.¹⁵² The Ministry of Justice co-published a booklet stating that international conventions and treaties to which Vietnam is a party are considered sources of law and are claimed to have direct application.¹⁵³ This was however rejected by national academics interviewed in Vietnam, who claimed that international conventions were not directly applicable in the Vietnamese legal system.¹⁵⁴ They argued that international provisions have to be transformed in national law to be applied, if not explicitly stated in a particular law. Some laws state explicitly that if there is a conflict between national law and international provisions of a treaty that Vietnam is a party of, the international provision will prevail.¹⁵⁵ It appears though, as if an international provision has never been applied directly in the courts of Vietnam. A traditional approach of determining the effects of international law in any given domestic legal system, is to consider whether the State stem from a monist or dualist legal tradition. A monistic approach implies that international and domestic law form part of one combined legal system, however, there is a variety of monistic systems with different distinguishing features. *Buhmann* observes that a constitutional provision, as Article 112(8) in Vietnam's 1992 Constitution,¹⁵⁶ allowing a government to enter into treaty obligations implies an acceptance that the state becomes legally bound by the pertinent treaty obligations.¹⁵⁷ While this implies that Vietnam has a monistic legal culture, national academics in Hanoi stressed however that international law and national law should be regarded as two separate systems, thus implying a dualistic approach.¹⁵⁸ Seeming to contradict these opinions, the Vietnam's Ninth periodic report to CERD in 2000 states:

“Vietnam endorses the view that these international conventions take precedence over domestic laws and regards them as an organic part of Vietnamese law.”¹⁵⁹

The Ordinance on the conclusion and implementation of international treaties does not either offer any clarifying guidance in this matter.¹⁶⁰ It can be noted though, that this Ordinance is to be replaced by a law “in order to describe the incorporation of international treaties into the national legal system.”¹⁶¹

Leaving the disputed status of international legal provisions in the legal system of Vietnam aside, Vietnam can, as all State Parties, choose in which manner to implement the standards of international human rights instruments to which

¹⁵² Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 78.

¹⁵³ Ministry of Justice (Vietnam) and Umeå University (Sweden), *An Introduction to the Vietnamese Legal System*, Umeå, 1998, p 74.

¹⁵⁴ Comment by national academics, 2002-07-04 and 2002-08-02.

¹⁵⁵ For example the Vietnamese Civil Code, the Civil Aviation Law and the Law of the Sea. Comment by national academic, 2002-08-02.

¹⁵⁶ One of the duties and powers of the Government is to “ensure the overall management of the State's external relations; to sign, join, approve international agreements on behalf of the Government; to direct the implementation of international agreements subscribed to or joined by the Socialist Republic of Vietnam...”. Article 112(8) of Vietnam's 1992 Constitution.

¹⁵⁷ Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 74.

¹⁵⁸ Comment by national academics, 2002-07-04 and 2002-08-02.

¹⁵⁹ Document containing the sixth to ninth periodic reports of Vietnam to CERD, 17 October 2000, CERD/C/357/Add.2, para 15.

¹⁶⁰ Ordinance on the conclusion and implementation of international treaties. See www.vnagency.com.vn

¹⁶¹ Ordinance on the conclusion and implementation of international treaties is intended to be replaced by a Law on the conclusion of international conventions. See Inter-Agency Steering Committee, *Comprehensive Needs Assessment for the Development of Vietnam's Legal System to 2010*, Draft 9 (30 March 2002), p 31.

Vietnam is a party, as long as the rights are enjoyed in fact. It is clear that Vietnam has acceded or ratified the core UN human rights treaties and therefore is bound by provisions of international law as stated *supra* in Chapter 3 concerning the minority right to effective participation in public life.

4.5 National standards of public participation in Vietnam

“In the Socialist Republic of Viet Nam human rights in the political, civic, economic, cultural and social fields are respected.”

*Article 50, 1992 Constitution*¹⁶²

“The right to mastery of all ethnic minorities is respected and developed.”
*2001 State Report of Vietnam to the Human Rights Committee*¹⁶³

Entrenchment of guarantees concerning ethnic minorities

Articles 5 and 30 of Vietnam’s 1992 Constitution are the principal constitutional provisions concerning the equal rights of Vietnam’s ethnic minorities, rule of non-discrimination and guaranteeing the ethnic minorities the right to preserve and develop their identity and culture.

“The Socialist Republic of Vietnam is the unified State of all nationalities living on the territory of Vietnam. The State carries out a policy of equality, solidarity and mutual assistance among all nationalities, and forbids all acts of ethnic discrimination and division. Every nationality has the right to use its own language and writing, to preserve its national identity, and to promote its own customs, habits, traditions and culture. The State pursues a policy of comprehensive development and progressively promotes the material and spiritual life of all ethnic minorities.”

Article 5, 1992 Constitution

Since the mid-1990s a *Law on Minorities* have been drafted, a process which was described by one national academic as “still being in the research phase”. The process of enacting a *Law on Minorities* can be expected to take several years to come, considering the strongly opposing views on the value and contents of such a law. Some national observers and academics argued in favour and foresee comprehensive provisions concerning ethnic minorities in such a law, with claimable rights following a thorough dissemination.¹⁶⁴ On the other hand, some national observers and academics argued against a Law on Minorities, because “it would be too general,” arguing that, since minorities are obviously very different in character, “such a law would produce inequality.”¹⁶⁵ Further reasons of hesitation towards supporting the law included a reluctance of “legitimising remote customs and superstitions”, or that the potential provisions were already existing in the

¹⁶² The 1992 Constitution was the first time the concept of “human rights” was introduced in the Vietnamese Constitution.

¹⁶³ Second Periodic Report of Vietnam to the Human Rights Committee, 14 May 2001, UN Doc. CCPR/C/VNM/2001/2, para 129.

¹⁶⁴ Comments from national observers, *inter alia*, 2002-07-05, 2002-07-14 and 2002-07-18.

¹⁶⁵ Comment from a national academic, 2002-06-29.

Constitution and state laws, such as the Law on Education and Law on Protection of Cultural Heritage.¹⁶⁶

Entrenchment of guarantees concerning the right to participation

“The citizen, regardless of nationality, sex, social background, religious belief, cultural standard, occupation, time of residence, shall, upon reaching the age of 18, have the right to vote, and upon reaching the age of 21, have the right to stand for election to the National Assembly and the People’s Councils in accordance with the provisions of the law”

Article 54, 1992 Constitution

Both the Law on Election of the Deputies to the National Assembly (Article 2) and the Law on Election of the Deputies to the People’s Councils (Article 2) echo the provision in Article 54 of the 1992 Constitution concerning the right to vote and stand for election.

These provisions mentioned above appear to reflect “the election clause” in Article 25 (b) of the ICCPR, while the “take part” clause of the ICCPR may be regarded as entrenched in Article 53 of the 1992 Constitution:

“The citizen has the right to participate in the administration of the State and management of society, in the discussing of problems of the country and the region, in sending petitions to State organs and voting in referendums organised by the State.”

Article 53, 1992 Constitution

It should be noted however, that the participation according to Article 53 is mainly limited to “discussing” and not “deciding”. Further, the 2001 State Report of Vietnam under the article 25 of the ICCPR states:

“The citizen takes part in the administration of the State through the exercise of the right to lodge complaints and denunciations with a competent State authority against unlawful acts committed by State organs, economic and social bodies, units of the People’s Armed Forces, or any individual whatsoever.”¹⁶⁷

This provision forwards the words of Articles 53 and 74 of the 1992 Constitution. An emphasis on “sending petitions” and “lodging complaints” could however indicate a “reactive” rather than “active” notion of the “taking part” clause in the management of public affairs.

Entrenchment of special measures granting ethnic minorities right to participation

Article 9 of the Law on Election of the Deputies to the National Assembly stipulates that the number of ethnic deputies at each National Assembly Legislature is decided by the Standing Committee of the National Assembly on the basis of ensuring an “appropriate” number of ethnic deputies.

¹⁶⁶ Comment from national academic, 2002-07-02.

¹⁶⁷ Second Periodic Report of Vietnam to the Human Rights Committee, 14 May 2001, UN Doc. CCPR/C/VNM/2001/2, para 129.

Article 5(4) of the 1992 Constitution expresses that the “State carries out a policy of comprehensive development and gradually raises the material and spiritual living conditions of the national minorities”. This provision of “gradual development”, especially in conjunction with Article 5(2) of the Constitution, stating the policy of equality and mutual assistance among all nationalities, may imply the necessity of special measures in order to achieve equal enjoyment in fact. As an example of this Vietnam supports various preferential treatments for ethnic minorities, including ethnic minority boarding schools, lower entry requirements and quota for minorities. These measures are indicated in Article 36(4) of the Constitution:

“Priority investment is reserved for educational work in the highlands, in regions inhabited by ethnic minorities and in regions encountering special difficulties.”

4.6 Conclusion

Vietnam is a State Party of the, for this study, relevant UN human rights instruments. Although the status and direct applicability of these treaties’ provision may be disputed, Vietnam is bound by international law to the international standards concerning minorities’ right to effective participation in public life. The 53 ethnic minority groups of Vietnam can benefit from substantive rights enshrined in the constitution and laws, promoting of equality and non-discrimination, indicating that the international obligations *de jure* are fulfilled. These provisions appear to be accompanied by special measures and supportive programs in order to achieve *de facto* equality, and examining elements of this will take place in the chapters to come.

On a general note of *de jure* compliance, this is a necessary, however not sufficient, ingredient in evaluating whether international standards are upheld. Legality does not necessarily lead to governance in accordance with human rights and minority rights standards, legislation can of course be discriminatory and arbitrarily implemented.¹⁶⁸ However, *Hao* observes correctly that “great thought and new revolutions on human rights are only utopian or demagogic unless they are expressed in the form of law and guaranteed by the law.”¹⁶⁹

¹⁶⁸ Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001, p 135.

¹⁶⁹ Hoàng Van Hao, *Fundamental viewpoints of the Party and the state of Vietnam on human rights*, Information of Human Rights, no 1. 2000, Hanoi, p 46.

5 Formal participation of Vietnam's Ethnic Minorities in the Legislative Process

5.1 Introduction

“The people exercise the state power through the National Assembly and the People’s Councils, the organs that represent the will and aspirations of the people, are elected by the people, and are accountable to the people.”

Article 6 of the 1992 Constitution

Even without engaging in a discussion and distinction between “rule of law”, “rule by law” and “rule by man” (decree) and its application in Vietnam, it is clear that during the *doi moi* process, “law” as a tool of governance has gained in importance. Various State organs can issue “normative legal documents,”¹⁷⁰ which have the force of “law,” making the definition of what constitutes the legislative process troublesome. The National Assembly has exclusive powers to enact “laws”, while the Standing Committee of the National Assembly can issue “ordinances.” Other normative legal documents are labeled sub-laws,¹⁷¹ which include governmental executive decrees, orders or ministerial instructions. One national academic stated that foreign researchers tend to be preoccupied with differences between “law” and “policy”, and argued that the necessity to separate between the two concepts may only be apparent for the foreign researcher.¹⁷² For the purpose of this chapter, however, the legislative process refers to the structure of the National Assembly in enacting laws.

Between 1945 and 1986, 8903 “normative legal documents” were promulgated, but only 62 were laws or ordinances enacted or issued by the National Assembly or its Standing Committee. The rest were “sub-law” documents, such as governmental executive orders or ministerial instructions.¹⁷³ Since 1986, the adoption of laws has increased significantly and *Rose* observes that the enactment of the 834-article Civil Code in October 1995 further illustrates the beginning of a shift from rule by party decree to rule by law.¹⁷⁴

¹⁷⁰ Article 1 of the Law on Promulgation of Legal Documents (1996) defines what is considered to be “normative legal documents”, which include laws and ordinances of the National Assembly and its Standing Committee, as well as orders, decisions, directives, and circulars, that is, regulations and instructions to implement laws and ordinances, issued by ministers and agency heads and by the State President, the Prime Minister, the Government and Government organs. According to the Resolution No 51/2001/QH10 dated December 25, 2001 of the National Assembly, Head of Government’s organs shall no longer have competence to promulgate normative legal documents.

See Bentley, John, *Completion of Vietnam’s Legal Framework for Economic Development*, UNDP Discussion Paper 2, UNDP Vietnam, Hanoi, 1999. For more information about the differences between “normative legal documents”, see Supplement C.

¹⁷¹ “Sub-laws” is a term used to describe normative legal documents” which rank below laws or ordinances enacted by the National Assembly and the Standing Committee of the National Assembly

¹⁷² Comment by a national academic, 2002-07-12.

¹⁷³ Carol V. Rose, *The “New ” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, *Law & Society Review*, Volume 32, Number 1, 1998, p 97 with references.

¹⁷⁴ Carol V. Rose, *The “New ” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, *Law & Society Review*, Volume 32, Number 1, 1998, p 101.

Besides discussing the representation and influence of the ethnic minorities in the legislative process of the National Assembly enacting laws, this chapter will also discuss the election procedure to the National Assembly. and the in order to evaluate their participation in the.

5.2 The National Assembly

5.2.1 Law-making power and the legislative process

”The National Assembly is the people’s highest representative organ and the highest state power organ”

Article 83 of the 1992 Constitution

The 498-seat¹⁷⁵ National Assembly is the only State organ that has constitutional and legislative power, and in addition, the National Assembly fills functions in State decision-making and supervision.¹⁷⁶ With two annual sessions of 4-5 weeks respectively, the National Assembly has a full-time Standing Committee, which functions as a deputy organ of the National Assembly between sessions. While there were previously 20 full-time deputies, the 11th legislature as elected in May 2002 comprises a National Assembly with 125 full-time deputies.¹⁷⁷ A national observer commented that this move away from having part-time legislators is one of many developments in recent years that has transformed the National Assembly into an active state organ with significant influence”.¹⁷⁸

The legislative process¹⁷⁹ in Vietnam continues to be characterised by a very complex consultative working procedure, where initiatives concerning new laws can come from the members of the National Assembly and from the Government, as well as from external agencies as the Supreme People’s Court, the Supreme People’s Procurator, the Vietnam Fatherland Front and its member associations.¹⁸⁰ A national observer stated, however, that laws are most often initiated in the Government ministries.¹⁸¹ Laws, and sometimes ordinances, are generally created by drafting committees, which are usually set up by the Government or occasionally the Standing Committee of the National Assembly.¹⁸² The drafting

¹⁷⁵ Article 8 of the Law on Elections of Deputies to the National Assembly was revised in December 2001, raising the maximum of deputies from 450 to 500. See *Updated election law increases strength of National Assembly*, Vietnam News, December 22, 2001, as read at www.vietnamnews.agency.com.vn/2001-12/21Stories/01 on May 13, 2002.

¹⁷⁶ Besides its legislative powers, the National Assembly has decision making authority in a number of key areas of national socio-economic development including state budgets, financial and monetary policies, taxation and other issues of domestic and foreign policy. The National Assembly also has a supervisory function, for example since courts are accountable to the National Assembly under the Constitution. See Phan Nguyen Toan, *A Brief Introduction to the Terminology of State Organisation and Legal System of Vietnam*, LEADCO, 2002, p 5.

¹⁷⁷ *Panel of qualified experts needed to help NA make informed choices*, Vietnam News, April 19 2002, as read at www.vietnamnews.agency.com.vn/2002-04/18/Stories/14 on May 13 2002.

¹⁷⁸ Comment from national observer, Hanoi, 2002-08-02.

¹⁷⁹ The bulk of the information in this paragraph stems from the booklet: Ministry of Justice and Umeå University, *An Introduction to the Vietnamese Legal System*, Umeå, 1998, p 28ff. This information was confirmed by comments from various national observers in July 2002. For more detailed information on the legislative process, see Hanoi Law University, *Manual for Drafting, Evaluating Legal Documents*, for the project VIE/94/003, 5th draft, July 2002, p 13. (unpublished)

¹⁸⁰ Article 87 of the 1992 Constitution.

¹⁸¹ Comment from a national observer, 2002-07-08.

¹⁸² Hanoi Law University, *Manual for Drafting, Evaluating Legal Documents*, for the project VIE/94/003, 5th draft, July 2002, p 13. (unpublished)

committee, consisting of representatives of State authorities and social organisations, collects opinions and arranges debates and expert seminars during which aspects of the draft law are being discussed. The Government then decides whether or not to submit the emerging draft to the Standing Committee of the National Assembly. When this is done, the Standing Committee designates a committee¹⁸³ of the National Assembly to examine the draft, and can also decide whether the draft should be published and subject to public debate. One national observer stated that the drafts are frequently revised before they eventually are submitted to the Standing Committee (ordinances) or to the National Assembly (laws) for adoption.¹⁸⁴ Members of the National Assembly must be sent the draft laws at least one month prior to the opening of the session at which the draft is to be considered. While one national observer stated that almost all laws are adopted at the proposal of, and as drafted by, the Government with very little involvement from the other institutions, other national observers stated that revisions upon the comments of the deputies of the National Assembly are common.¹⁸⁵

In the discussion during the presentation of the 2001 State Report of Vietnam under the ICCPR, the Vietnamese representative stated that while some 90 per cent of deputies of the National Assembly are Party members, this is unimportant because bills were not discussed in Party caucuses.¹⁸⁶ According to Article 84(1) of the 1992 Constitution, the National Assembly decides on the legislative program.¹⁸⁷ One national observer stated, however, that “it is unlikely that any initiative is taken without a subsequent initiative from the party”.¹⁸⁸

The homepage of the National Assembly states that over the last few years, the National Assembly has approved many important laws which have promoted a process of “intensive democratisation of the social activities in Vietnam” and “firmly established the right of the people to be master of the country and the implementation of social management by means of the constitution and the law.”¹⁸⁹ A SIDA evaluation observes that there appears to be an increased interest of the National Assembly deputies in protecting human rights, and in being the voice of the people.¹⁹⁰

Laws in Vietnam are implemented through the guiding provisions of the Government and/or relevant ministries or other government agencies. *Vietnam News* reports that some National Assembly deputies have aired their dissatisfaction about the actual effect of the enacted laws as legal documents, that it takes too long for there to be any effect in reality.¹⁹¹ Apparently, the National Assembly has also raised demands that the government should stop interfering in the making of laws and instead concentrate on their implementation.¹⁹² One national observer stated

¹⁸³ There are eight National Assembly Committees and one Ethnic Council as of August 2002. The Ethnic Council will be discussed *infra* in section 5.2.3.

¹⁸⁴ Comment from national observer, 2002-07-26.

¹⁸⁵ Comments from national observers, 2002-06-28, 2002-07-18, 2002-07-21 and 2002-08-03.

¹⁸⁶ Summary Record of Vietnam’s presentation of the second periodic report to the Human Rights Committee, 17 July 2002, UN Doc. CCPR/C/SR.2002, para 19.

¹⁸⁷ According to the homepage of the National Assembly, www.na.gov.vn, as read 2002-07-20. However, several national observers concluded that the agenda is still in practice set by the party.

¹⁸⁸ Comment from an international observer, 2002-06-28.

¹⁸⁹ Homepage of the Vietnam National Assembly, www.na.gov.vn/english/mission as read 2002-06-26.

¹⁹⁰ SIDA, *Human Rights Training in Vietnam*, SIDA evaluation 01/16, 2001, p 17.

¹⁹¹ Vietnam News, *Panel of qualified experts needed to help NA make informed choices*, April 19 2002, as read on www.Vietnamnews.vnagency.com.vn/2002-04/18/Stories/14.htm on May 13, 2002. , An example given in the article is that few people in 2002 know the existence of the Law on Health Care despite the fact that it was promulgated in 1998.

¹⁹² Comment from an international observer, 2002-08-08.

that the National Assembly is gaining more and more confidence in challenging the executive branch of the Government. As an example, the National Assembly holds public hearings, where the members of Government are requested to answer questions from the deputies of the National Assembly and these hearings are broadcasted live on national television.

5.2.2 Election procedure

“Elections to the National Assembly and the People’s Councils are held in accordance with the principles of universal, equal, direct and secret suffrage.”

Article 7 of the 1992 Constitution

The National Assembly is the highest representative organ of the people and the highest organ of State power in Vietnam.¹⁹³ The relevant provisions on equal enjoyment and non-discrimination of political rights in the electoral process are Article 54 of the 1992 Constitution and Article 2 of the Law on Election of the Deputies to the National Assembly.

“The citizens, regardless of nationality, sex, social background, religious belief, cultural standard, occupation, time of residence, shall, upon reaching the age of eighteen, have the right to vote, and upon reaching the age of twenty-one, have the right to stand for election to the National Assembly and the People’s Councils in accordance with the provisions of the law.”

Article 54 of the 1992 Constitution

Thus, the ethnic minorities have the same formal rights to vote and be candidates for elections to the National Assembly as the rest of the population, demonstrating a *de jure* accordance with international standards of equal enjoyment and non-discrimination. Considering the reports from the election to the National Assembly in May 2002, the percentage of votes cast were as high as 99.73%,¹⁹⁴ arguably due to that voting is mandatory, thereby demonstrating that the right to cast one’s vote is effectively ensured. One national official stated that ethnic minorities in his province vote near their residences as prepared by the local Election Committee. For the elderly or ill, who are not able to go to vote, the local Election Committee brings the election box to their home or hospital enabling them to exercise their right to vote.¹⁹⁵

In any multi-ethnic society, the electoral structure for choosing a legislature significantly influences the degree of representation and power of the different ethnic groups. In Vietnam, an Election Council must be established 105 days before the election date, and directs the nation-wide organisation of the elections to the National Assembly.¹⁹⁶ The National Assembly deputies are elected according to constituencies.¹⁹⁷ The Standing Committee of the National Assembly sets the number of constituencies in the elections to the National Assembly.¹⁹⁸ In the 2002 election there were a total of 188 constituencies, where for example, the capital

¹⁹³ Article 83 of the 1992 Constitution.

¹⁹⁴ Vietnam News, *NA election described as great success*, May 21, 2002, as read at www.vietnamnews.vnagency.com.vn/2002-05/20/Stories/02 on May 21, 2002.

¹⁹⁵ Comment from national official, 2002-07-18.

¹⁹⁶ Vietnam News, *Updated election law increases strength of National Assembly*, December 22, 2001, as read on www.vietnamnews.agency.com.vn/2001-12/21/Stories/01 on May 13, 2002.

¹⁹⁷ Article 11 of the 1992 Constitution.

¹⁹⁸ Article 11 of the Law on Election of the Deputies to the National Assembly (1997).

Hanoi elected 21 deputies from eight constituencies.¹⁹⁹ Each constituency is divided into various electorates, a division to be decided by the local People's Committee and ratified by the immediately higher level of People's Committee in the State structure.²⁰⁰

One international observer noted that the key importance of popular elections in Vietnam lies perhaps not in the voting itself, but in the pre-election procedures.²⁰¹ The right to nominate candidates for election rests with organisations of the Fatherlands Front.²⁰²

“Vietnam Fatherlands Front shall organise consultations²⁰³ to select and nominate candidates for the National Assembly election; take part in supervising the election of the deputies to the National Assembly.”

Article 5 of the Law on Election of the Deputies to the National Assembly

Self-nomination to the National Assembly is reported having been introduced in 1997 and since then the numbers of non-party members has increased.²⁰⁴ In the 2002 elections, 13 candidates were self-nominated and the number of non-party member candidates rose from 112 (in 1997) to 135. The possibility to nominate oneself as candidate for election to the National Assembly is reported as enshrined in the Constitution and protected by the Law on Election of the Deputies to the National Assembly.²⁰⁵ In the 2002 elections, 762 candidates were approved and announced by the Election Council.²⁰⁶ Relating to figures of ethnic minority Party membership, a national observer stated that the percentage of members belonging to ethnic minority groups has been rising during the 1990s, but still constitutes less than 10% of the total party members, thus lower than their share of the population.²⁰⁷ Although there is a willingness to increase the number of non-party members,²⁰⁸ all candidates is continued to be chosen or approved by the Fatherlands Front.²⁰⁹

As to the issue of how information about the candidates is disseminated during elections, biographies of the candidates are provided, which include information about which ethnic group the candidate belongs to. The system forbids individual

¹⁹⁹ Vietnam News, *Revised election law decides NA strength*, March 9, 2002, as read at www.vietnamnews.agency.com.vn/2002-03/08/Stories/01 on May 13, 2002.

²⁰⁰ Article 12 of the Law on Election of the Deputies to the National Assembly (1997).

²⁰¹ Comment from an international observer in Hanoi, 2002-06-30.

²⁰² Fatherlands Front is an umbrella organisation for other mass organisations such as the Communist Party, the Women's Union, Youths' Union, Farmers' Union. The official function of the Fatherlands Front is to represent the views of the population, constituting the political base of the people's power. See Article 9 of the 1992 Constitution.

²⁰³ According to a national observer, the Standing Committee of Provincial Fatherlands Front holds a "consultative conference with a view to "fixing the structure, component and number of deputies that the province have been assigned". Written response from national observer at province level, 2002-07-18.

²⁰⁴ Summary Record of Vietnam's presentation of the second periodic report to Human Rights Committee, 17 July 2002, UN Doc. CCPR/C/SR.2002, para 20.

²⁰⁵ *Election Council puts out final candidate list*, Vietnam Law & Legal Forum, April 2002, p 22.

²⁰⁶ *Election Council puts out final candidate list*, Vietnam Law & Legal Forum, April 2002, p 22.

²⁰⁷ Comment by a national observer, 2002-08-03. The figures given of ethnic minority percentage share of the total figures of Party members were 7.9% (1991), 8,6% (1995), 9,9% (1998) and 9.6% (2001).

²⁰⁸ See Resolution on Doimoi and improving quality of the political system at grassroots level, 5th Plenum of Party Central Committee, 9th Congress, Hanoi 18 March, 2002, section 3.2.

²⁰⁹ A national academic observed that the Fatherlands Front tries to reflect the different parts of society when nominating candidates. Furthermore, the Fatherlands Front co-ordinates with its branches on provincial and local levels, where the "negotiation" of candidates take place. Comments from a national academic in Hanoi, 2002-07-02.

campaigning and private spending on election material, ostensibly due to concerns that poor candidates should not be disadvantaged.²¹⁰ According to various national observers, voting information is only available in the Vietnamese language, also in the mountainous areas where, in some parts, only 50 per cent of the population understands Vietnamese.²¹¹ One national official stated, though, that in one province voting information was translated into the minority languages of the five most numerous ethnic minority groups.²¹² An absence of voting information in minority languages would not be in accordance with the provision of the General Comment on Article 25 of the Human Rights Committee.²¹³ This may also have implications for the right to a secret vote within families at the local levels in mountainous areas, where the voting information is commonly passed on orally in local languages by men as the women generally speak less Vietnamese than their husbands.²¹⁴

5.2.3 Adequate representation of ethnic minorities

The Standing Committee of the National Assembly “advises” upon an “appropriate” number of ethnic minority deputies for an up-coming elected legislature:

“The number of the National Assembly deputies who are ethnic minority people shall be proposed by the Standing Committee of the National Assembly at the suggestion of the Nationality Council of the National Assembly in order to ensure that the different ethnic minorities have an appropriate number of deputies.”

Article 10 of the Law on Election of the Deputies to the National Assembly

In presenting the sixth to ninth periodic report of Vietnam under the CERD, the Vietnamese representative stated that in Vietnam there had been much discussion of the phrase “appropriate number of ethnic deputies”. While some had argued in favour of a specified quota, others had contended that a fixed quota might result in less able people becoming deputies.²¹⁵

Box 1 below provides the figures of ethnic minority representation throughout the different legislatures in Vietnam, elected every five years. In evaluating the *de facto* representation of ethnic minorities in the National Assembly, it is clear that ethnic minorities have, throughout the different legislatures, enjoyed a level of representation higher than the proportion of ethnic minorities to the total population, which has been around 12%-14%. In the current 11th legislature, elected for the term 2002-2007, 17.3% of the National Assembly deputies belong to ethnic minority groups.²¹⁶

²¹⁰ Margot Cohen, *The Business of Politics*, Far Eastern Economic Review, May 9 2002, p 22.

²¹¹ Comments from national observers, 2002-07-07, 2002-07-08, 2002-07-21.

²¹² Comment from national official, 2002-07-18.

²¹³ CCPR General Comment on Article 25, UN Doc. ICCPR/C/21/Rev.1/Add.7(1996), para 12. See also section 3.2.3.2. *supra*.

²¹⁴ Comment from a national observer, 2002-07-29. .

²¹⁵ See Summary Record of Vietnam’s presentation of the sixth to ninth periodic report under the CERD, 30 August 2001, UN Doc. CERD/C/SR.1481, para 8.

²¹⁶ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 31.

Legislature	Deputies (total)	Deputies (ethnic minorities)	Ethnic groups	Representation (%)
11 th (2002-)	498	86	42	17,3%
10 th	458	78	39	17,0%
9 th	395	66	27	16,7%
8 th	466	71	29	15,2%
7 th	496	79	33	15,9%
6 th	492	64	26	13,0%
5 th	424	71	19	16,7%
4 th	462	73	19	15,8%
3 rd	366	60	15	16,4%
2 nd	362	60	15	16,6%
1 st	333	34	14	10,2%

Box 1. Percentage of ethnic minority deputies and absolute numbers of ethnic groups represented in the National Assembly's legislatures.
Source: Vietnamese Ethnic Groups in the 20th Century, National Publishing House, Hanoi, 2001 as provided by a national academic in Hanoi 2002-07-02

The figures also reflect that the number of ethnic groups represented in the National Assembly has constantly risen. A national observer stated that some discussion has taken place whether each ethnic minority group should be ensured at least one deputy to represent them. However, the observer noted this idea had limited support, partly due to that 10 ethnic groups did not have a member graduated from secondary school, and in his words “leading to difficulties in finding a qualified candidate.”²¹⁷

5.2.4 The influence of the Ethnic Council

“The Ethnic Council studies and makes proposals to the National Assembly on issues concerning the nationalities; supervises and controls the implementation of policies on nationalities, the execution of programmes and plans for socio-economic development of the highlands and regions inhabited by ethnic minorities.”

Article 95(2) of the 1992 Constitution

The Ethnic Council of the National Assembly research, study and assess draft laws and ordinances which concern the ethnic minorities of Vietnam. Further, the Government is obligated to consult²¹⁸ the Ethnic Council prior to the promulgation of decisions relating to the policy²¹⁹ on ethnic minorities, and the chairman of the Ethnic Council can sit in on meetings of Government when issues concerning ethnic minority are discussed.²²⁰

Although this chapter is restricted to studying the representation of ethnic minorities at the very final stages of the legislative process, naturally it is crucially

²¹⁷ Comment from a national observer in Hanoi, 2002-07-02.

²¹⁸ According to a national official this happens regularly, especially concerning large-scale projects and major policy decisions.

²¹⁹ It should also be noted that Article 84(5) of the 1992 Constitution provides the National Assembly with the power to “decide the nationalities policy of the State”. A national observer stated though that in reality, the Party and Government determine the policy. Comment by a national observer, 2002-07-16.

²²⁰ See Article 94(2) and 94(3) of the 1992 Constitution.

important that draft legislation relating to the ethnic minorities also gets adequate input from the ethnic minorities or their representatives also before being presented to the National Assembly.²²¹ Eide observes that experiences have shown that it is of little use to involve minorities only at the final stages where there is very little room for compromise. Eide stresses the importance of being involved already from the very initial stages of decision-making.²²² The Ethnic Council provides an opportunity for participation at a stage prior to the adoption stage in the plenary of the National Assembly.

5.2.5 Public comment

In Vietnam there is a long-held tradition of public comment on draft laws. Before the Civil Code was enacted in 1995, 20,000 ideas were reportedly received from the public on the draft Civil Code and over 50,000 comments were received on the draft Constitution of 1992.²²³ However, currently there is no standardised process for persons who could be affected by a draft regulation to review it in advance and provide input. Under articles 39 and 62 of the Law on Promulgation of Legal Documents, this only occurs on an *ad hoc* basis where the National Assembly the Standing Committee of the National Assembly or the Government decides that public comment on a particular law or decree is needed.²²⁴

A national academic stated that public comment by ethnic minorities potentially took place by well-educated persons working at the provincial level, but that it cannot be expected to occur from the more remote areas, due to “language, isolation and low capacity.”²²⁵

5.2.6 Referendum

Although Article 84(14) of the 1992 Constitution provides the National Assembly with the power to hold a referendum, referendums have as of August 2002 never occurred in Vietnam. However, according to the Comprehensive Needs Assessment,²²⁶ a Referendum Law is expected to be enacted before 2010, and a national academic observed that research is underway.²²⁷ If this direct form of participation eventuates in the future, Article 53 of the 1992 Constitution provides each citizen with the right to vote in a referendum organised by the State, and together with the provisions of equal enjoyment and non-discrimination, it is clear that the ethnic minorities would also be able to exercise their right to vote.

5.3 Conclusion

In 2001, the UN Committee on the Elimination of Racial Discrimination in its Concluding Observations concerning Vietnam welcomed the “presence of a

²²¹ cf. Walter A. Kemp, *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, The Hague, 2001, p 121.

²²² Asbjørn Eide, *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, para 38. UN Doc. E/CN.4/Sub.2/AC.5/2001/2

²²³ Comment by national academic, 2002-07-02.

²²⁴ cf. John Bentley, *Towards Improved Transparency of Laws in Vietnam*, UNDP Project Vie/98/001, 2000, p 4.

²²⁵ Comment by a national observer, 2002-07-16.

²²⁶ Inter-Agency Steering Committee, *Comprehensive Needs Assessment for the Development of Vietnam's Legal System to 2010*, Draft 9 (30 March 2002), p 71.

²²⁷ Comment by national academic, 2002-07-04.

significant number of representatives of minority groups in the State party's parliament".²²⁸ It is clear that the numbers of ethnic minority deputies throughout the different legislatures have been higher than the proportion of ethnic minorities in the population, which should be commended. The high numbers of ethnic minority deputies appear to fill an "objective" requirement to effective participation.

Turning to a subjective estimation of the effectiveness of the ethnic minorities participation in the legislative process, comments from various national and international observers almost unanimously state that the ethnic minority deputies generally have a weaker voice and a lower competence and capacity in the National Assembly than the other deputies. While representation in the national parliament is a necessity, it is not a sufficient guarantee that the ethnic minorities have a real political influence. But the mere fact of being represented and thereby able to voice the interests of the ethnic minorities, even if the capacities of the deputies vary, inspire and encourage effective minority participation.²²⁹

Following the notion of the quality and quantity of interactions between the deputies to the National Assembly and the people they represent, one report demonstrates a weak relationship between the Members of Parliament and voters.²³⁰ However, a deputy to the National Assembly must report to his/her constituents on the fulfilment of his/her obligations as a deputy at least once a year.²³¹ The "distance" between elected representatives and voters is a challenge in all societies.

Electoral rights are stipulated in Article 7 and Article 54 of the Constitution, stating that elections to the National Assembly is held in accordance with the principles of universal, equal, direct and secret suffrage. Vietnam may not be fulfilling the standard of providing voting material in minority languages throughout the ethnic minority areas, although objective reasons for not providing this could probably be successfully argued. Finally, it can be repeated again, that international human rights law does not determine the appropriate selection of an electoral system in any given socio-economic context.

²²⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination, considering Vietnam's sixth to ninth periodic reports, 15 August 2001, UN Doc. A/56/18, paras. 408-428.

²²⁹ Comment by a national academic, 2002-06-28.

²³⁰ Phan Nguyen Toan, *A Brief Introduction to the Terminology of State Organisation and Legal System of Vietnam*, LEADCO, 2002, p 6.

²³¹ Second Periodic Report of Vietnam to the Human Rights Committee, 14 May 2001, UN Doc. CCPR/C/VNM/2001/2, para 116.

6 Formal Public Participation of Ethnic Minorities in the Implementation Process in Vietnam on the Local Level

6.1 Introduction

“The citizen exercises his right to mastery at the grassroots by participating in State and social affairs”

Article 11 of the 1992 Constitution

“Representative institution and social associations at grassroots level are of the best and most effective channels through which people implement their master right”

*Report from Ho Chi Minh National Political Academy, Hanoi*²³²

Vietnam is divided into 61 provinces and cities under central management. The structure of the State administration is stipulated in Article 118 of the 1992 Constitution.²³³ Each of these provinces or cities are divided into rural and urban districts; cities that are under provincial management; and towns. A rural district is further divided into communes and an urban district is divided into wards. Traditionally, the village is a nuclear unit established on the base of a developed clan which settled in some territory long ago. During its development process, villages received many waves of migration from persons of other descents. Villages are combined into a commune, which is the lowest level in the state administration. The number of villages in a commune varies considerably from region to region, and can in rural areas be numerous. Eighty percent of Vietnam’s population live in village-commune communities.²³⁴

The policies, decisions and plans of the Government and state laws and ordinances enacted by the National Assembly, as well as directives and decisions from the Party, indicate the consensus and the will at the centre of power. However, when realising these programs in local practice, for example in ethnic minority villages, the traditional structures and customary law play very important roles. In a commune, two lines of institutional power simultaneously determining the course of everyday life: government rule, and traditional customs and habits.²³⁵ Thus, the functioning of communes and villages is very relevant in determining the actual effect on the local people when normative legal documents and policies are implemented.

²³² Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 37.

²³³ See Supplement B for a further overview of the State structure.

²³⁴ Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 6.

²³⁵ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 3.

This chapter will discuss the implementation phase of state law and policies in order to study the level of participation of ethnic minorities at the commune and village level.

6.2 Representation and appointment in People’s Councils and People’s Committees

People’s Councils and People’s Committee are local State organs and exist at all administrative levels.²³⁶ While the People’s Council constitutes the legislative organ at local level, the People’s Committee, as being the executive organ of the People’s Council, is the more powerful organ of the two in shaping the reality of the laws and the policies.²³⁷ This applies perhaps especially to Vietnam, considering its legal culture, where the laws often lack in clarity, and thus enable and require an extensive scope of interpretation in the implementation process by the executing State agencies.²³⁸

The numbers of ethnic minority representatives in the local levels of the People’s Council and People’s Committees are stated below in Box 2.

State level	Source 1 ²³⁹ (1999)	Source 2 ²⁴⁰ (2001)
Provincial	18%	14%
District	19%	17%
Commune	23%	19%

Box 2. Percentage of ethnic minority persons in People’s Councils and People’s Committees according to two different sources.

The figures above indicate that the ethnic minorities are well represented in State organs at the various levels, and especially at the commune level. However, the figures do not disclose the distribution between the People’s Councils and People’s Committee. A UNDP report states however, that “despite positive efforts of the Government, relatively few are personnel of People’s Committees.”²⁴¹ The same report expresses the difficulties of finding concrete data covering the nation that can show this gap.²⁴² Moreover, the figures do not reflect the ethnic distribution of key positions held, such as those of Chairman of People’s Committee and the Secretary (leader) of local Party cells. Further, the representation of ethnic minorities at the grassroots level in a commune does not necessarily reflect the ethnic composition of the locality. One national observer noted that ethnic minority groups with higher literacy levels, such as the Tay and Nung, are generally well-represented while other ethnic minority groups can be under-represented. This

²³⁶ For an overview of the State structure, see Supplement B.

²³⁷ It should be noted though, that substantial efforts are taken in order to strengthen the role and capacity of People’s Councils at all levels, particularly at provincial level. See program VIE/98/H01 “Strengthening representative bodies with focus on Provincial People’s Councils.”

²³⁸ Comment by national academic, 2002-07-02.

²³⁹ Tran Quang Nhiep, *Implementation of Democracy at Commune – some issues*, Communist Journal no 10 (5-1999), p 41.

²⁴⁰ *Vietnamese Ethnic Groups in 20th Century*, National Publishing House, Hanoi, 2001 as provided by a national academic in Hanoi, 2002-07-02.

²⁴¹ UNDP, *Promoting Ethnic Minority Development*, Consultation draft, November 2001, p 7.

²⁴² UNDP, *Promoting Ethnic Minority Development*, Consultation draft, November 2001, p 7.

disparity can lead to inequities and limited influence of important sections of the local population on resource allocation and local development planning.²⁴³

While the scope of this paper is not to reflect on gender-specific considerations, it should be noted that the participation of women in many ethnic minority groups appear to be weak, both in public decision-making at the local level and within households.²⁴⁴

There appears to be awareness of the benefits of increasing the number of ethnic minority personnel from the locality, considering that the rates of ethnic minority recruitment are gradually improving.²⁴⁵ The starting point is however far from equal. In one mountainous district visited by the author in July 2002, where the 95% of the population came from one single ethnic minority group, only 35% of the district staff belonged to this ethnic minority group, while the rest were mainly Kinh. UNDP Vietnam suggests the consideration of developing positive recruitment policies that set a minimum quota for ethnic minorities in government structures to encourage ethnic minority participation in government services.²⁴⁶

6.3 Legal framework of participation in the implementation of state law and policies on commune level: consequences of Decree 29 on the Regulation of the Exercise of Democracy in Communes

6.3.1 Introduction

The Governmental Decree 29 on the Regulation of the Exercise of Democracy in Communes from 1998 (hereinafter referred to as Decree 29) aims to “bring into full play the commune people’s mastery and creativeness”.²⁴⁷ Decree 29 (et al)²⁴⁸ provide a legal framework of people’s direct participation in local decision making, following Ho Chi Minh’s ideas of participation – namely, the concept of “people know, people discuss, people decide and people supervise”. Other envisioned consequences from this introduction of “grassroots democracy” include enhanced transparency and accountability at the commune level and upwards for supervision of public programs and locally self-financed projects.²⁴⁹ *Vietnam News* reports that

²⁴³ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 19.

²⁴⁴ Ethnic minority women are reported to be greatly under-represented on commune People’s Committees. Further, it is predominately the “head of households” (men) that participate in village meetings and the “Elders Council” is stated to exclusively consist of men. In addition, the level of knowledge of the Vietnamese language is generally significantly lower among ethnic minority women. Comments by a national observer, 2002-08-12.

²⁴⁵ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 19.

²⁴⁶ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 20. UNDP Vietnam has a specific target of supporting the increase of the proportion of government personnel (at national, provincial and district level) of ethnic origin closer of its proportion in the national population by 2010. See the same report, p19.

²⁴⁷ Decree 29/1998/ND-CP on the Regulation of the Exercise of Democracy in Communes. This decree was preceded by the Instruction 30/CT-TW issued by the Politburo of the CPV.

²⁴⁸ While Decree 29 is the most important governmental document concerning grassroots democracy, other normative legal documents dealing with grassroots democracy include various directives from the prime minister and decisions from the Government.

²⁴⁹ SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 4.

the underlying principle of the initiative was that “local people know what is in their best interests, and should be involved in the discussion, planning, execution and review of major decisions.”²⁵⁰ Decree 29 also encourages local authorities to actively apply democratic principles in most activities of local concern, as described *infra*.

6.3.2 Provisions of Decree 29 - People know, People discuss, People decide, People supervise

Decree 29 has provisions concerning matters that people should be *informed* about, namely: changes and revisions in areas such as law and policy; administrative procedures, local socio-economic development strategies, land use plans, budget planning and expenditures, state or other funded programmes and loan programmes for poverty reduction.²⁵¹ One report states that before Decree 29, people had limited possibilities to get information about how a specific development project was designed, implemented and quality-supervised. If there was some information, it was released on an arbitrary basis.²⁵²

There are eight major areas where people should *discuss* and be consulted before the local government reaches decisions, such as: draft economic development plans, draft land use plans, and draft plans of implementation of national programmes on environment and clean water.²⁵³ One report states that “in the past, everything was decided by leaders, but now leadership is to make people able to decide themselves.”²⁵⁴

According to Chapter 3 of Decree 29, people should discuss and directly *decide* in issues such as: people’s contributions for infrastructure development, the formulation and preservation of customary rules, and the formulation and monitoring the management of people created funds.²⁵⁵

Decree 29 further points out 10 major areas where people should monitor and *supervise* such as the activities of the People’s Councils, the implementation of resolutions of the councils and decisions of the People’s Committees; the settlement of claims, land use, and the expenditure of funds.²⁵⁶

6.3.3 Factors hindering a thorough implementation of Decree 29

There are conflicting opinions concerning to what extent the provisions of Decree 29 have been implemented and exercised at the commune level. One governmental report stated that 83% of the communes are successfully carrying out the Decree.²⁵⁷ According to another study, 72% of the respondents confirm that during 1998-2001

²⁵⁰ Vietnam News, *Politburo member calls for law on grassroots rights*, 2002-02-26, as read at www.un.org.vn/donor/civil/VN%20NEWS2602 on 2002-06-11.

²⁵¹ Chapter 2 of the Decree 29.

²⁵² SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 19.

²⁵³ Chapter 4 in the Decree 29.

²⁵⁴ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 22.

²⁵⁵ Chapter 3 of the Decree 29.

²⁵⁶ Chapter 5 of the Decree 29.

²⁵⁷ Report of the Government Committee on Organisations and Personnel, *Results of the Implementation of the Decree 29*, 2001, (unpublished).

they were more informed and consulted about commune affairs and participated more in the affairs of the commune than before.²⁵⁸ However, at one district visited by the author in July 2002, the district Chairman of the People's Committee frankly stated that merely 1/3 of the communes in his district had implemented Decree 29 effectively.²⁵⁹ Comments from various national and international observers indicate that Decree 29 is very unequally implemented. A report from the Ho Chi Minh National Political Academy states that most of what has been done during the process of implementing grassroots democratic regulations is mainly focused on encouraging people to discuss and decide commune affairs relating to infrastructure building, as opposed to fostering grassroots democracy in a broader sense which has not been practised strongly nor effectively.²⁶⁰

While promoting bottom-up decision-making processes, Decree 29 is in itself, by being an initiative from the central Government, implemented as a top-down reform process. Different interpretations of grassroots democracy at the local levels have led and will continue to lead to different implementations. *Vietnam News* reported in April 2002 that the Party had commissioned a detailed study of socialist democracy, with the Theoretical Council of the Party Central Committee set to "clarify the conditions to observe citizens' democratic rights."²⁶¹ The Government characterises Decree 29 as an old and existing issue (democracy), yet one that is simply newly defined in its form of execution.²⁶² The majority of the current executive staff of local government were however educated and trained in a centrally planned system. Taking this into account, the outcomes of the implementation of Decree 29 depends on the government officers' perception and understanding of democracy, their qualifications and administration skills and their work ethics.²⁶³ Furthermore, a successful implementation of Decree 29 is also closely linked to a positive progression of the ongoing public administration reform process.²⁶⁴

One national observer stated that there is also a risk that the local authorities will "continue to consult only at the very last stage, at the very end of the decision-making process."²⁶⁵ Another factor hindering the effective implementation of Decree 29 is, as one international observer stated, a weak dissemination of the fact that citizens have certain entitlements under Decree 29.²⁶⁶ It can be assumed that in the mountainous areas, ethnic minorities have a narrower understanding and poor

²⁵⁸ Trinh Duy Luan, *What can the Implementation of Grassroots Democracy help the Poverty Reduction Strategy in Vietnam?*, Institute of Sociology (Center of Social Sciences and Humanities), Paper, 2001?, p 2.

²⁵⁹ Comment from national official, 2002-07-23.

²⁶⁰ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 21.

²⁶¹ Vietnam News, *Party commissions detailed study of socialist democracy*, 2002-04-05, as read at www.un.org.vn/donor/civil/VNNewsApril15, on 2002-09-02.

²⁶² SIDA and Vietnam's Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 19.

²⁶³ SIDA and Vietnam's Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 20s.

²⁶⁴ In 1995 the Government officially launched a Public Administration Reform Programme following the resolution of the 8th Party Plenum of the 7th Congress of the Party Central Committee. In 1998 a donor-working group on PAR was established with the aim of promoting a dialogue with the Government on policy issues emerging, among others, from the implementation of donor supported PAR projects. See World Bank, Vietnam 2010: Entering the 21st Century, Vietnam Development Report 2001 and Karin Buhmann, *Implementing human rights through administrative law reforms – the potentials in China and Vietnam*, Copenhagen 2001.

²⁶⁵ Comment by a national observer, 2002-07-17.

²⁶⁶ Comment by a international observer, 2002-06-27.

information about the democratic rights of citizens under Decree 29. In effect, this means that they are not able to utilise Decree 29 to their advantage.²⁶⁷

Furthermore, one report indicates that local communities have not been able to participate in the decision-making, management and monitoring process, because decision-making mainly takes place at provincial levels.²⁶⁸ One national observer stated that in all the regulations concerning grassroots democracy, there are no guidelines on *how* to involve people to participate, on how the information should be provided, nor about which fora the “decisions” should be taken in and to what extent they should be consulted.²⁶⁹ A report indicated that comprehensive new legislation concerning grassroots democracy can be expected.²⁷⁰

Steering Committees at various levels are generally set up to carry out new state policies, which also has also taken place in order to facilitate the implementation of Decree 29. In this context, it should be noted that according to one study, “the Steering Committees at all levels are overwhelmingly predominated by men and Viet ethnic people.”²⁷¹ It appears as if the representation of ethnic minorities in Steering Committees needs to be increased in order to reflect the diversity of ethnic minority interests involved.

6.4 Participation in the implementation of state law and policy at the *village* level

6.4.1 Village structure and social structures in decision-making

The villages in Vietnam were referred to by one national academic as social autonomous units, enjoying a wide degree of autonomy.²⁷² When it comes to decision-making in an ethnic minority village, the role of the formally appointed “*head of village*”, until recently commonly appointed by the district authorities, is weak in comparison with the “*traditional elder*,”²⁷³ who exerts very strong power. For example, in a Hmong village, the *traditional elder* advises the *head of village*, and this “advice” is consequently followed. The *traditional elder* may discuss a matter with the elders,²⁷⁴ discuss with the clan heads or take a decision on his own.²⁷⁵ One study states that “in a village, the elderly are endlessly respected and

²⁶⁷ See SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 22.

²⁶⁸ Bach Tan Sinh, *Civil Society and NGOs in Vietnam: Some Initial Thoughts on Developments and Obstacles*, Paper presented at the Meeting with the Delegation of the Swedish Parliamentary Commission Swedish Policy for Global Development to Vietnam, 2001, p 4.

²⁶⁹ See Bach Tan Sinh, *Civil Society and NGOs in Vietnam: Some Initial Thoughts on Developments and Obstacles*, Paper presented at the Meeting with the Delegation of the Swedish Parliamentary Commission Swedish Policy for Global Development to Vietnam, 2001, p 4.

²⁷⁰ UNDP, *Poverty Task Force: Promoting Ethnic Minority Development*, Consultation draft, November 2001, p 24.

²⁷¹ SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 16. (unpublished)

²⁷² Comment by national academic, 2002-06-28.

²⁷³ “Traditional elder” appears to be the closest translation from Vietnamese language, and is therefore used in this section. Other terms commonly used are “traditional leader” or “traditional head of village”.

²⁷⁴ Elders are in literature often referred to as the Elders’ Council, a term not used in the minority villages, however.

²⁷⁵ Most ethnic minority groups in Vietnam consist of various clans.

often have decisive influence”.²⁷⁶ The *head of village* may participate in commune or district meetings, but will always report back to the *traditional elder* and follow his “advice”.²⁷⁷ Several international NGOs stated that in their community development programs they attempt to engage directly with the *traditional elder*, instead of the formally appointed *head of village*, since it is the former who makes the actual decisions.²⁷⁸

According to Decree 29, described *supra* in section 6.4, the *head of village* must be democratically elected by the village people.²⁷⁹ There appears to be conflicting opinions about to what extent the *head of villages* are elected by the local people. Different sources indicate that between 40%-90% of the villages in Vietnam have elected their own formal *head of village*.²⁸⁰ A report from the Ho Chi Minh National Political Academy states that “village chief selection must be democratic and fair” and continues that “village party cells may nominate its own candidates, but non-party candidates should stand on equal foots, and the final outcome must be decided by votes.”²⁸¹ A consultative conference is held to select two of the candidates for the election, and the elected chief must be accepted by two thirds of the election participants.²⁸² It appears as if it is often not easy to find a volunteer candidate for the *head of village* position, probably due to the marginal allowance and remuneration offered. The 9th Party Congress encouraged “citizens to elect traditional head of village to work as official head of village”, preferring both roles being filled by the same person.²⁸³

An interesting question is how the decision-making process takes place within a village of mixed ethnicities. While it is not common that different ethnic minorities live together in the same village, in many areas the villages are inhabited by both an ethnic minority group and Kinh persons. In these villages, the *head of village* is usually a Kinh person, but the persons belonging to the ethnic minority group regard the *traditional elder* as their leader.

6.4.2 Traditional customary law and village conventions

”The ruling of the King has to yield to village custom”

Well-known Vietnamese proverb

The 9th Party Congress stated that traditional regulations should be taken into account in the implementation of all socio-economic programs, implying the need to respect the regulations of the communities.

²⁷⁶ See SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 10.

²⁷⁷ Comment by a national observer, 2002-07-25.

²⁷⁸ Comment by an international observer, 2002-08-05.

²⁷⁹ Article 15 of Decree No. 29/1998/ND-CP.

²⁸⁰ According to one national observer, this may be true regarding Kinh villages, but the percentage is significantly lower in ethnic minority villages, where the formally appointed leader is selected from the district.

²⁸¹ Traditionally, after negotiating with the social massorganisations, party cell nominates some candidates. See Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 5. This report also suggests a first round of village election to choose three to five candidates who receive the highest number of votes from all free-choice votes of all voters; then the second round will select one for the post. Ibid, p 23.

²⁸² SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 23.

²⁸³ Resolution on Doimoi and improving quality of the political system at grassroots level, 5th Plenum of Party Central Committee, 9th Congress, Hanoi 18 March, 2002, section 3.1.

One national observer stated that as long as the local authorities do not learn customary law, they will never be successful in implementing any state policy and that to date, district officials have looked down upon customary law, regarding it as backward.²⁸⁴ A national academic stated that the role of state law in villages in general and ethnic minority villages in particular is very weak, but that the role of traditional customary law is very strong.²⁸⁵

Since the early 1990s there has been a campaign from the central Government to encourage the establishment of “village conventions”, in an attempt to merge traditional customary law with state law. With Decree 29 the Vietnamese Government has introduced the concept of “cultural villages.” A “cultural village” is recognised by the authorities as being “civilised” and is thereafter rewarded. To become a “cultural village” the village needs to adopt a village convention, approved by the district authorities, and not have breached the village convention for two years. “Standardised” village conventions appear to be drafted at the provincial level, after which a village can “fill in” details and suggest changes. According to the draft “Village convention” used in the Gia Lai province, the articles cover issues as family planning, marriages, funerals, eliminating backward customs and abiding by Party policies and State law.²⁸⁶ Article 3 provides that the whole population is “committed to fully observe the Democratic Regulations at the grassroots level providing for the problem (sic) of allowing the people to be informed of, to discuss and to inspect the affairs of the village”. Figures are scarce as to what extent drafted village conventions have been approved, and as to what extent villages are empowered to amend the village conventions in order to reflect and develop their customary law. One village leader stated that his village was trying to conclude “writing down their customary law into a village convention, to increase the status of customary law vis-à-vis state law.”²⁸⁷ According to another village leader, on February 2nd each year, all representatives of households in his village participate, gather and review the convention and make some changes.²⁸⁸

6.5 Conclusion

The representation of ethnic minorities at the local level of People’s Council and People’s Committee appears to be significantly higher than their proportion of the population, however, these figures do not reflect the distribution of dominant key positions. It may be that ethnic minorities generally are well-represented at the less influential People’s Councils, while under-represented in the People’s Committees. Further, there may be inequalities in the distribution between ethnic minority groups.

Current changes to the government structures, and notably the decentralisation of administrative mechanisms and the introduction of Decree 29 and “grassroots democracy,” offer opportunities for strengthening the participation of ethnic minorities in decision-making processes. However, a study indicates that socio-economic participation has been emphasised during the implementation of Decree 29, at the expense of political participation.²⁸⁹ The degree of implementation of Decree 29 will vary across regions, depending on their socio-economic conditions,

²⁸⁴ Comment from national observer, 2002-07-08.

²⁸⁵ Comment by a national academic, 2002-06-28.

²⁸⁶ Articles 1, 14, 15 of standard “Customary/Legal Rules Convention”, Gia Lai province.

²⁸⁷ Comment from national observer, 2002-07-20.

²⁸⁸ Comment from national observer, 2002-07-18.

²⁸⁹ Trinh Duy Luan, What can the Implementation of Grassroots Democracy help the Poverty Reduction Strategy in Vietnam, Institute of Sociology (Center of Social Sciences and Humanities), Paper, 2001, p 2.

historical background and cultural values. Thus, an effective implementation of grass-root democracy will take several more years.

Despite the continuing obstacles facing thorough implementation of Decree 29, the Government's effort to involve local persons in decision-making through Decree 29 should be a praised initiative. Decree 29 can strengthen local people's participation and should be a useful tool for ethnic minorities to participate in decisions affecting them, which reflects the standard in Article 2(3) of the UN Minority Declaration. Politburo member Truong Quang Duoc argues in favour of strengthening the regulations on democratic rights at the grassroots level with legislation.²⁹⁰ UNDP Vietnam states that "the implementation of this Decree (Decree 29) is being strengthened, and it is expected to be absorbed in comprehensive new legislation."²⁹¹

The decentralisation process can encourage a sense of accountability, especially where there are opportunities for people to influence the appointment and performance of local executive officers as well as elected *head of village*.²⁹² A report from the Ho Chi Minh National Political Academy argues that more room should be given for village autonomy and that a strong and accountable village self-management framework is a pre-requisite for "enhancing grassroots democracy and bringing into play the peasantry's political participation."²⁹³ This study also calls upon Party cadres to be "pioneers", recognising that any success of an institutional design must rely on Party leadership. This is certainly true in the case of village-commune development. If commune Party committees and village party cells generally would act in order to implement the provisions of Decree 29, the implementation would undoubtedly be enhanced.

It is unclear to what extent customary law is accepted and recognised by districts in approving village conventions, but the Government's and Party's intent is apparently to increase the recognition and respect of customary law and traditional structures in the implementation of socio-economic programs.

²⁹⁰ Vietnam News, *Politburo member calls for law on grassroots rights*, 2002-02-26, as read on www.un.org.vn/donor/civil/VN%20NEWS2602 on 2002-06-11.

²⁹¹ UNDP, *Poverty Task Force: Promoting Ethnic Minority Development*, Consultation draft, November 2001, p 24.

²⁹² SIDA and Vietnam's Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 12.

²⁹³ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 5.

7 Informal Participation of Ethnic Minorities in Vietnam through an Emerging Civil Society

7.1 Introduction

“To encourage and support organisations, which are non-profit and working for the people’s needs and benefits; facilitate organisations carrying out a number of public services under communities’ oversight”

excerpt from Vietnam’s 10-year Socio-economic Development Strategy, 2001-2010²⁹⁴

There exists no single definition of the concepts of “civil society”²⁹⁵ or an “NGO”, but it is clear that in Vietnam, since the early 1990s, there have been a growing number of associations labelled as “NGOs”. In this chapter Vietnamese associations active at national level or in several provinces will be referred to as “domestic NGOs” and Vietnamese associations working in a locality will be referred to as “local NGOs.” Referring to domestic NGOs or local NGOs imply that they are non-state associations. While the division between non-state and state associations may not be obvious, considering the Government’s high level of involvement within the functioning of domestic NGOs, the division excludes the social mass organisations.²⁹⁶ Domestic NGOs are currently mainly concentrated in urban areas and a study conducted in 2000 identified more than 700 domestic NGOs in Ha Noi and Ho Chi Minh City.²⁹⁷ The domestic NGOs are recognised as both contributing to innovative approaches in the development of upland areas,²⁹⁸ and presenting interesting avenues of informal participation in public life. As one national observer stated, the main difference between the civil society in Vietnam in the past and today lies in the degree of its participation and capacity to influence developments.²⁹⁹

²⁹⁴ Central Committee of the CPV, Strategy for Socio-Economic Development 2001-2010, presented to the 9th National Congress. As read on www.cpv.org.vn/chevende/nationalcongress9/docs/stratery

²⁹⁵ SIDA defines civil society as the realm of networks and associations that is voluntary, self-generating, at least partially self-supporting, largely autonomous from the state, and bound by a legal order or a set of shared rules. See SIDA, *Participation in Democratic Governance*, Stockholm, 2001, p 15.

²⁹⁶ Social massorganisations refer to the Vietnam Fatherlands Front and its member organisations, see note 202 in section 5.2.2 *supra*. The role of the mass organisations is not further dealt with in this paper, but it should be noted that while traditionally had a solely political role, some writers state that they are currently searching for a new role in development. See ADB, *A Study of NGOs: Vietnam*, April 1999, p 27.

²⁹⁷ Joerg Wischermann, *The Relationship between Civic Organisations and Governmental Organisations in Viet Nam – Selected Findings of an Empirical Survey*, Vietnam’s Socio-Economic Development Review, No 27, Autumn 2001, p 15.

²⁹⁸ UNDP Vietnam, *Participatory Evaluation of UNDP NV Highland Peoples Programme in 1998*, Draft June 1998, p 11.

²⁹⁹ Comment by national observer, 2002-07-19.

The Government recognised in the early 1990s the need to put in place a legal and policy framework for regulating domestic NGOs, which were perceived as positively complementing the traditional social mass organisations. This chapter outlines the possibilities of granting legal recognition to domestic NGOs and briefly describes the current functioning and roles of domestic NGOs in order to estimate the possibilities for ethnic minorities to participate informally through the emerging civil society in Vietnam. While the Asia Development Bank categorised NGOs in Vietnam into six groups,³⁰⁰ this chapter merely divides the relevant domestic NGOs as either socio-economic gap-filling associations or policy-oriented and lobbying associations, for the purpose of addressing the question whether ethnic minorities can exert influence informally through the civil society.

7.2 Legal framework for domestic NGOs in Vietnam

“The citizen shall enjoy... the right to form associations... in accordance with the provisions of the law.”

Article 69 of the 1992 Constitution

In 1983 VUSTA (Vietnam Union of Science and Technological Associations) was set up directly under the Politburo of the Central Committee of the CPV. The role of VUSTA was passive until the issuing of Decree 35/CP in 1992 on Some Measures to Encourage Scientific and Technological Activities, which allowed individuals to establish their own science and technology associations, *inter alia*, under the umbrella of VUSTA. The Decree 35/CP and a related circular³⁰¹ later in 1992 provided guidelines for the registration and activities of scientific research and technological organisations. If a domestic NGO registers as an association under VUSTA, the granting of the necessary operational permit³⁰² to function in several provinces is handled by DOST (the Provincial Department of Science and Technology) or to function nation-wide, by MOST (Ministry of Science and Technology). The definition of “science and technological associations” has been creatively interpreted and has enabled a mushrooming of domestic NGOs with various objectives and activities to register under VUSTA throughout the 1990s.³⁰³ As of August 2002, there were local branches of VUSTA established in 28 of Vietnam’s 61 provinces, mainly in provinces with urban areas following the location of most domestic NGOs, and therefore not in the mountainous provinces where the population of most ethnic minority groups is concentrated.

The enactment of the Science Technology Law in 2000,³⁰⁴ the issued Decree 14 in 200 and the Decision 22 in 2002 further established a framework for associations’

³⁰⁰ The six groups were: mass organisations; independent research and training organisations; professional and business associations, peasants’ organisations; others. See ADB, *A Study of NGOs: Vietnam*, Draft, April 1999, p 1.

³⁰¹ Joint Circular 195-LB of November 1992 of the Ministry of Science, Technology and Environment and the Government Commission for Organisation and Personnel promulgating implementing regulations for registration and activities of scientific research and technological development organisations.

³⁰² For domestic NGOs with activities limited to one province, the Chairman of the People’s Committee of a province of city direct under central authority is responsible for issuing permission. Respectively, if activities are limited to within a commune, the Chairman of the People’s Committee at commune level is responsible.

³⁰³ In this context, 1999 Decree 177/CP concerning social and charity funds should also be mentioned.

³⁰⁴ A national observer stated that the 2000 Law on Science and Technology (No.21/2000) provides domestic NGOs with several benefits, tax exemption, as well as the possibility to sign international

legal recognition and functioning.³⁰⁵ The Law on Science and Technology grants associations in the technical field “autonomy and self-responsibility in conducting the registered scientific and technological activities”.³⁰⁶ Decision 22 from the Prime Minister, enables VUSTA, and thereby the associations registered under VUSTA, with VUSTA’s permission, to freely monitor and make social assessments of any Governmental program.³⁰⁷

Considering these legal developments, it is clear that the Government has chosen an attitude supporting a civil society to emerge, step-by-step. The Government has further announced that many registration procedures will be cancelled, and will continue to provide favourable conditions for those interested in setting up an association.³⁰⁸

The regulations concerning domestic NGOs as described above are commonly regarded as a source of much confusion, probably reflecting the Governments intent to enable the civil society to merely evolve at a very moderate pace, step-by-step. However, since the mid-1990s a Law on Associations has been drafted, to comprehensively regulate the establishment and activities of the domestic NGOs. According to one international observer, the 17th draft has been concluded as of June 2002, and some of the remaining issues being debated include the definitional question of an “association” and taxation issues.³⁰⁹ A future Law on Associations, officially estimated of being enacted by 2003,³¹⁰ can on the one hand be expected to govern the registration and operation of domestic NGOs, while on the other hand recognising the Government’s intention to regulate and monitor the activities of domestic NGOs in Viet Nam.³¹¹

As one international observer stated: “It is not as if the associations are not there, there are several doing research and providing social delivery functions which need to be recognised to fill the criteria of rule of law”.³¹² While the legal recognition of minority associations is relevant, it is clear that according to Article 22 of the ICCPR *de facto* associations are also protected under international law.³¹³

agreements between a domestic NGO and foreign associations on cooperation and staff-exchange and training. Staff from the Ministry of Justice stated in an article that the legal provisions regulating the signing of international agreements by domestic NGOs are reported to “remain scattered and unspecific”. See Hoa Huu Long and Nguyen Huu Huyen, *On the conclusion and implementation of international agreements by localities and organizations*, Vietnam Law & Legal Forum, April 2002, p 17.

³⁰⁵ Comment by national observer, 2002-07-15.

³⁰⁶ Article 15, Law on Science and Technology (No.21/2000).

³⁰⁷ Comment by national observer, 2002-07-15.

³⁰⁸ Comment from a national observer, 2002-07-18.

³⁰⁹ Comment from international observer, 2002-06-25. Other challenges.

³¹⁰ See Inter-Agency Steering Committee, *Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to 2010*, Draft 9 (30 March 2002), p 71. An international observer stated though that 2005 is probably a more accurate estimation, 2002-06-29.

³¹¹ The Ministry of Interior (previously GCOP) is the agency responsible for drafting the Law on Associations. An international observer claimed that the Authorities ask a new development partner each year for study visits, but rarely invite the international community in any discussions regarding substance or the obstacles.

³¹² Comment from international observer, 2002-06-25.

³¹³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Germany, 1993, p 387.

7.3 Functioning of minority associations in Vietnam

7.3.1 Socio-economic gap-filling associations

There are a number of forms of communities set up voluntarily by people at the grassroots level to manage natural resources and development for a sustainable livelihood, and a growing trend of persons at the communal level to come together into common interest groups such as savings and credit groups, and parent-teacher associations.³¹⁴ A national observer stated that these groups do not only mobilise local resources but also provide focused and collective voices of people, including those who would otherwise not be heard.³¹⁵

One national observer³¹⁶ divided the socio-economic gap-filling interest groups in Vietnam today working with, *inter alia*:

- 1) Respecting different traditional cultural aspects, local wisdoms. Examples include a Northern Herbal Network;
- 2) Household income generation. Examples include savings and credit groups;
- 3) Integrating local traditional knowledge in preserving and developing their mode of agricultural cultivation. Examples include slope land cultivation. Agricultural, aiming at receiving land certificates so the farmers can decide and choose what they want to cultivate. Also technological, how to utilise modern technology in agricultural cultivation;
- 4) Capacity-building, providing professional skill-building educational services, disseminating legal information.

7.3.2 Policy oriented associations

Civil society in Vietnam can also be represented by groups of intellectual actors, such as journalists, historians and scientists as a cultural critique of the mainstream development.³¹⁷ There exists an Association of Young Businesses that comment on policy issues and is estimated to have significant influence on policies in their field.³¹⁸ A national observer stated that domestic NGOs in Vietnam will soon have a new-coming role in advocacy, by monitoring the performance of the government, but concluded that the present existence of such "advocacy associations" was very rare.³¹⁹

A national official stated how important the local NGOs are in transferring policy from central government to the minority areas, and mentioned "Towards Ethnic

³¹⁴ Bach Tan Sinh, *Civil Society and NGOs in Vietnam: Some Initial Thoughts on Developments and Obstacles*, Paper presented at the Meeting with the Delegation of the Swedish Parliamentary Commission Swedish Policy for Global Development to Vietnam, 2001, p 3.

³¹⁵ Comment by a national observer, 2002-07-14.

³¹⁶ Comment from national observer, 2002-07-14.

³¹⁷ Bach Tan Sinh, *Civil Society and NGOs in Vietnam: Some Initial Thoughts on Developments and Obstacles*, Paper presented at the Meeting with the Delegation of the Swedish Parliamentary Commission Swedish Policy for Global Development to Vietnam, 2001, p 3. The author of the cited article describes as an example, the situation of environmental impacts of coal mining in Quang Ninh Province. Journalists, scientists and academics participated in critically debating on the way coal mining had been operating and its consequences for some Buddhist historical site. As a result of the debate, the People's Committee together with the coal corporation had to organise a press conference to respond to the critiques.

³¹⁸ Comment from a national observer, 2002-06-28.

³¹⁹ Comment from a national observer, 2002-06-25.

Women” as an example.³²⁰ Towards Ethnic Women³²¹ (TEW) is a domestic NGO registered under VUSTA, and has linked their so called “key farmer network” with authorities in Hanoi, acting as a direct channel of sharing information and concerns between the local to the central levels. Further, TEW has consistently argued, and at local levels achieved, that both husbands and wives should have their names written in the document when land certificates are issued, for reasons of gender equality and inheritance (traditionally only the name of the husband was stated, as being the “head of household”). These initiatives may have influenced the later amendments, with this change, to national regulations.³²²

One report states that domestic NGOs do not have a position in formal dialogues with the Government, although “key” domestic NGOs recently have been invited to Poverty Task Force³²³ meetings to discuss the development of policy.³²⁴ This change demonstrates the willingness of the Government to include domestic NGOs in policy discussions.

7.4 Avenues for associations of local minority groups to gain legal recognition and exert influence

Will persons belonging to ethnic minorities in Vietnam be permitted to register as domestic NGOs with activities such as monitoring and advocacy? One national official stated that Ethnic Council has advised the Government to support the emerging civil society by enabling local NGOs also in minority areas to develop, associations that can play different functions such as consulting, advising and monitoring state organs.³²⁵

While local interest groups may be unregistered, they are often being recognised by local authorities at commune, district and even provincial level. One national observer noted that some of these local interest groups have asked existing registered domestic NGOs to assist them in their ambitions to gain legal recognition.³²⁶

The expanding presence of locally-based *de facto* associations will necessitate an increased recognition by the formal system at the local level as well as the national level. Some registered domestic NGOs working with community development around Vietnam appear to be ready to support local branches to take over their local project offices and create separate local NGOs, a development likely to take place within the next couple of years.³²⁷ These local NGOs would be encouraged to develop their own links with international donors. The Director of the domestic

³²⁰ Comment from a national official, 2002-07-28.

³²¹ Towards Ethnic Women is a national-level Vietnamese NGO supporting farmer networking and various village-level development projects.

³²² Comment by a national observer, 2002-08-03.

³²³ Poverty Task Force (PTF) is an government-donor-NGO partnership, *inter alia*, assisting the government in preparing a Comprehensive Poverty Reduction and Growth Strategy, see. www.vdic.org.vn/eng/cprs/pov_task_for001

³²⁴ Rural Development Services Centre, *Rapid Assessment of Poverty Reduction Strategy Paper and Mapping World Bank-Government-NGOs relationship*, Draft, Hanoi, March 2001, p 35. This report also states that the Government’s concentration on project-to-project approach has constrained the involvement of domestic NGOs in policy development.

³²⁵ Comment by a national observer, 2002-08-04.

³²⁶ Comment from a national observer, 2002-08-02.

³²⁷ Comment from a national observer, 2002-07-20.

NGO “Rural Development Services Centre” (RDSC) expresses in a newsletter: “It is a right time now for RDSC to transfer management responsibilities to its local partners” and continues “The local NGOs will have autonomy to access the support (both technical and financial) directly from local and international donors... using an authorised intermediary organisation.”³²⁸ This implies that local NGOs would still be linked to the “authorised” domestic NGO. However, once gaining legal recognition, the status could potentially be quite independent. Also TEW supports the persons at local level involved in the association to create their own local NGOs and estimates that this will take place in some area within the next two-three years.³²⁹

The future avenues of legal recognition for local NGOs is unclear, but they could potentially be recognised by the provincial levels of VUSTA.³³⁰ The future link to the current “mother-associations” is not clear. There appears to be different opinions whether its more likely that the local NGOs would register locally or merely be recognised locally, or registered through existing domestic NGOs linked with VUSTA.

One national observer indicated that the practical possibilities for minority associations with policy-oriented objectives may be limited, indicating that minority associations will be restricted to function as socio-economic gap-filling associations. However, both national law and international human rights law (as described in section 3.2.5 *supra*) stress the equal enjoyment of the freedom of association. Thus, granting of legal recognition of associations in Vietnam must not be restrained for any particular group of the population, unless any exception clauses are applicable.

7.5 Effective informal participation through the civil society?

Experiences from TEW display that it is possible today for ethnic minorities to participate in an informal manner effectively, both in changing policy at the national level and in influencing policy implementation at the local level.

One question related to the effectiveness of the domestic NGOs is the extent of involvement of authorities in associations registered.³³¹ Several national observers stated that the intervention of authorities is merely to “co-ordinate resources”, and as long as domestic NGOs comply with the regulations, they can operate and function quite independently.³³²

Another question is practical concerns in setting up domestic NGOs. One national observer stated that the domestic NGOs are being set up by already well-connected people, and that this may be necessary in order to get the required permission to

³²⁸ Dang Ngoc Quang, *Newsletter* RDSC, July 24 2002, p1.

³²⁹ TEW has Management Boards with responsibilities for different geographical areas. These management boards are likely to establish local NGOs. Comment from national observer in Hanoi, 2002-08-05.

³³⁰ It can be noted that according to one national observer, VUSTA classifies its “member associations” as “academic, charity or consultancy NGOs”. Comment from a national observer in Hanoi, 2002-07-20.

³³¹ The modes of intervention of VUSTA in the associations registered under VUSTA was described as one national observer as when concluding contracts with an international donor, when appointing directors or vice-directors, when staff is going abroad (facilitating VISA procedures, also concerning foreign visitors to Vietnam) and a potential dis-continuing of the activities of the association.

³³² Comment by national observers, 2002-07-22, 2002-08-01, 2002-08-03.

function. With a clearer legal framework, it should however become easier for anyone to establish a domestic NGO, if they have the financial capacity to do so. The provisions of financial assets are very high, with its obvious consequences for the poor.³³³

Being legally recognised associations or not, lobbying Government through providing the UN treaty-monitoring bodies with documentation is a possibility for domestic NGOs (as well as individuals).

7.6 Conclusion

The Government of Vietnam has taken significant steps to put in place a legal framework enabling, to some extent, a civil society to emerge in Vietnam.

The growth of organisations and the variety of their activities are important reflections of the current changes taking place within the Vietnamese society – including an increased reliance on the non-state sector. The Government is apparently attempting to redefine its involvement in the civil society from “intervention” to “monitoring” and especially “co-ordinating”.³³⁴

The Human Rights Committee noted in July 2002, in their Concluding Observations to Vietnam’s second periodic report under the ICCPR, that the Committee is concerned at reported obstacles imposed on the registration and free operation of non-governmental human rights organisations and political parties.³³⁵

In line with both national law and international human rights law (as described in section 3.2.5 *supra*), equal enjoyment of the freedom of association should be ensured, and the granting of legal recognition of associations not be restrained for any particular group of the population.

Institutionalising participation and engendering equity means that the groups already existing need formal registration and recognition to work in support of the grassroots democratic process promoted by the State. While the bulk of organisations in Vietnam have been operating as socio-economic gap-filling providers, the possibilities of associations to play more policy-oriented roles should be encouraged.

An effective informal participation will necessitate a strong networking and close and continuous co-operation between the domestic NGOs and different actors such as media, academics and the international NGOs. It is likely that a mushrooming of local NGOs will take place and that they will potentially serve an important role in facilitating the influence of ethnic minorities in shaping their own lives. The success of an association such as TEW indicates that advocacy for and by marginalised groups is possible. Thus, the domestic NGOs can provide the ethnic minorities with an effective voice both at the national standard-setting and the local standard-implementation levels.

³³³ There still appears to be some hindering requirements to register, such as bank accounts with a balance of between USD 6,000-10,000. See J. Uhrig, *Report on Vietnamese Non-Governmental Organizations in Population and Family Planning*, Hanoi, 1995.

³³⁴ One national observer stated that the Government’s “supporting cooperative and coordinating role” is not always reflected by local government, which often show limited interest, at least initially, in supporting and cooperating with domestic NGOs.

³³⁵ Concluding Observations of the Human Rights Committee, UN Doc. CCPR/CO/75/VNM, 26 July 2002, para 20.

8 Conclusion and Recommendations

“Only by having democratic institutional arrangements, can we build up people’s mastery rights”³³⁶

The right to political participation, as enshrined in Article 25 of the ICCPR and Article 5 of the CERD, has been extended to minorities with the UN Minority Declaration with the strengthened standard of requiring an *effective* participation. Minorities’ right to effective participation relate not only to electoral rights, but also to other notions of taking part in the conduct of public affairs. States are however granted a wide latitude to comply with the standards of the right to effective participation in public life in general and in devising their electoral systems in particular. While, the elections enlist the largest number of citizens, including the most marginalised groups in a society, the right to participation in public life extends to adjacent rights, such as the freedom of association.

As most UN Member States, Vietnam has accepted international obligations to ensure *de jure* and *de facto* compliance with the international standards concerning minorities’ right to effective participation in public life. International human rights law provides clear rules of equal enjoyment of rights and non-discrimination in that enjoyment.

Vietnam has constitutional provisions and legal norms directed to achieve equality between all ethnic groups in the Vietnamese society. While the Viet civilisation is undoubtedly the cultural core of the Vietnamese State, politically, minorities are considered full citizens of the Vietnamese State with equal right to participate in public life. The Vietnamese Government is actively putting efforts into including ethnic minorities in political structures, at national level and at local level. There appears to be awareness from the leadership in Vietnam that any strategy for ethnic minority development needs to link the needs, aspirations and participation of different ethnic groups, while taking traditional structures and customary law into account.

The current composition of the highest State organ, the legislative National Assembly, includes over 17% from ethnic minority groups. This representation of ethnic minority deputies is higher than their proportion of the population, following a pattern throughout all legislatures, which should be commended. Although it appears that ethnic minority deputies in the National Assembly generally have a weaker voice and lower capacity than other deputies, they play an important role in providing the ethnic minorities with influence at the central level, which is further strengthened by the functioning of the Ethnic Council of the National Assembly. It should also be mentioned that the current Secretary of the Communist Party in Vietnam is from the Tay minority group, holding allegedly the most powerful political position in Vietnam. In terms of numbers, ethnic minorities are also well represented in structures such as People’s Councils at local levels, but despite positive efforts of the Government, it appears as if relatively few are personnel of People’s Committees. Further, participation does not always mirror the ethnic composition of a locality. Minority groups with higher literacy levels such as the

³³⁶ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 4.

Tay and Nung, are generally well-represented in local authorities relative to their share in the population, while minority groups such as Hmong tend to be under-represented in the local administration.³³⁷

Decentralisation and a genuine application of the principle of subsidiarity facilitate the solution of minority concerns.³³⁸ Vietnam is putting ambitious effort into promoting popular participation at the local level, which benefits the local population of all ethnicities. The far-reaching provisions of Decrees 29 (1998) invites comparison with the theories of direct and participatory democracy. Mass local participation can be understood as an important realisation of the ethnic minorities' right to effectively participate in decisions at local level, in line with Article 2(3) of the UN Minority Declaration. The decentralisation process in Vietnam and its changes have also promoted greater local transparency and accountability,³³⁹ vital ingredients in the concept of good governance. Active participation of citizens in formulating goals and strategies moves the affected institutions in the direction of self-governance and heightens the incentive and skills of citizens for engagement in political processes intended to influence government.³⁴⁰

A growing body of local evidence shows that ethnic minorities in Vietnam want to have a greater voice in public affairs, and want to have training in project management to effectively assume more responsibility for development activities if given the opportunity and skill development.³⁴¹ Thus, as in all States, Vietnam is facing challenges in furthering the participation of its minorities. As one national academic expressed, the problem is not the state law and policies regarding ethnic minorities, but the implementation and enforcement, implying discrepancies between what is written in paper and the reality. Importantly, Vietnam appears to have the political will to address these issues, as stated in Vietnam's 2001 State report under the ICCPR:

“Vietnam has only achieved initial results in the implementation of the rights of ethnic minorities living in the country. So it has to make greater efforts in the years to come and in the distant future as well.”³⁴²

As an example of a shortcoming - although the mechanisms of decentralisation of government facilitating broad-based participation of ethnic minorities in decision-making are in place, these mechanisms are not fully developed and yet utilised in practice. There is a number of underlying reasons why the ethnic minorities may, for example, not be able to benefit fully in taking part in the enhanced forms of grassroots democracy, which also have bearing at the participation at the national level. These hindering obstacles will briefly be elaborated upon below.

Overview of obstacles of further participation of ethnic minorities

Vietnam has invested considerable resources in the provision of social services in remote, mountainous areas where most of the ethnic minority population and most

³³⁷ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, Hanoi, June 2002, p 31.

³³⁸ Peter Leuprecht, *Minority Rights Revisited: New Glimpses of an Old Issue in Peoples' Rights* by Philip Alston, Oxford, 2001, p 125.

³³⁹ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 32.

³⁴⁰ Henry Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook, Vol. 1, 1988, p 104.

³⁴¹ World Bank, *Voices of the Poor*, Hanoi, 1999, p 33.

³⁴² Second Periodic Report of Vietnam to the Human Rights Committee, 14 May 2001, UN Doc. CCPR/C/VNM/2001/2, para 129.

of the country's poverty is concentrated.³⁴³ UNDP Vietnam reports that any low rates of participation of ethnic minority people in public life can be explained by their low education levels, lack of fluency in Vietnamese language, lack of accessible public information in local languages, as well as the failure to consult with groups on the part of local authorities.³⁴⁴

Education

Minority participation can only be effective if the minorities are fully aware of their rights, obligations and opportunities.³⁴⁵ Practically, illiteracy stunts development by preventing the dissemination of printed information on issues such as government policies to ethnic minority groups.³⁴⁶

In line with the Articles 35 and 36 of the 1992 Constitution, the state invests heavily in education and supports various preferential programs for ethnic minorities, such as ethnic minority boarding schools, lower entry requirements and quota for minorities.³⁴⁷ One obstacle is that newly graduated teachers from ethnic minority groups, having received education in the urban areas, tend to resist returning to their local communities. However, the expansion of the education system to mountainous areas and projected increase in lower secondary attainment should substantially improve the resource pool of skilled minority peoples.³⁴⁸ The Government's sustained efforts in this area should be commended.

Language

Even though education in the mother tongue is enshrined in article 5 of the Constitution, primary education for ethnic minorities is offered almost exclusively in the Vietnamese language. It is a challenge to combine the need of ethnic minorities to be trained in the official Vietnamese language, while being able to learn and maintain their own local language. Encouraging Kinh teachers to take on teaching positions in the mountainous areas is difficult and even more difficult encouraging them to learn the local language. Positive measures include the broadcasting of a TV channel in minority languages and planned activities, in cooperation with UNDP Vietnam, to encourage the usage of minority languages in the dissemination of information related to public plans, budgets and laws in the minorities' respective localities.³⁴⁹ It may be a challenge in itself to ensure that laws, decrees and decisions are quickly published in an official and widely circulated text in remote areas, let alone making it available in minority languages.

Prejudice

The failure to consult with groups on the part of local authorities may in some areas relate to prejudice towards ethnic minorities. A report state that district and commune levels sometimes view that ethnic minorities lack the capacity to make "good" decisions.³⁵⁰ A national official stated that discrimination of local

³⁴³ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, Hanoi, June 2002, p 12.

³⁴⁴ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, June 2002, p 31.

³⁴⁵ European Centre for Minority Issues, *Proposals of the ECMI Seminar "Towards Effective Participation of Minorities"*, 1999, UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.4, para 29.

³⁴⁶ UNDP Vietnam, *Fact Sheet on Ethnic Minorities Groups*, Hanoi, December 2000, p 3.

³⁴⁷ UNDP Vietnam and National Centre for Social Sciences and Humanities, *National Human Development Report 2001*, Hanoi: National Political Publishing House, 2001, p 38f. While children belonging to ethnic minority households have been catching up in terms of enrolment rates, ethnic inequalities in education remain significant. A complication is that it is difficult to find (lowlander) teachers who are willing to work in difficult conditions in remote areas where they do not speak the local language.

³⁴⁸ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, Hanoi, June 2002, p 32.

³⁴⁹ UNDP Vietnam, *Promoting Ethnic Minority Development in Vietnam*, Hanoi, June 2002, p 18.

³⁵⁰ Ministry of Agriculture and Rural Development Vietnam and Sweden Mountain Development Programme, *An Uphill Voyage The Village Development Budget and Decentralisation in Phu Tho Province, Northern Vietnam*, Göteborg, 2001, p 28.

authorities towards ethnic minorities happens in some areas and that there is a need to strengthen the capacity of key people in minority areas to address this problem.³⁵¹

In a concluding observation, there appears to be a widespread perception in Vietnam that the implementation of civil and political rights is conditioned on the initial fulfilment of economic, social and cultural rights. A study expressed the common notion that a full exploitation of democratic rights requires a “certain standard of people’s livelihood and intellect”.³⁵² Drawing on the interrelation between economic and political rights, the effective participation of the ethnic minorities in Vietnam in all domains of public affairs facilitate a narrowing of the income gap. There is a correlation between participation and socio-economic development, and they mutually re-enforce each other. Political participation empowers people to claim their economic and social rights, while education increases their ability to demand economic and social policies according to their priorities.

Recommendations to the Vietnamese Government:

- Conclude the draft Law on Minorities, reflecting international standards of minority rights as enshrined, *inter alia*, in the UN 1992 Minority Declaration and the international treaties that Vietnam has adhered to, including the right to effective participation in public life.
- Following the current research phase, draft a Referendum Law, with provisions enabling people to request a referendum under some provisions.
- Amend Article 10 of the Law on Election of Deputies to the National Assembly, strengthening the wording of electing an “*appropriate number*” of ethnic minority deputies to a phrasing in line with “*number at least equal to the proportion of their population share*”. Also consider entrenching, or establishing by customary practice, that each officially recognised ethnic minority group is guaranteed one deputy in the National Assembly.
- Continue to encourage ethnic minority representation in all State organs, but also in Party cells and in key position of the State administration. Increase the representation of ethnic minorities in the Steering Committees implementing Decree 29.
- Support the idea of Politburo member Truong Quang Duoc on strengthening the regulations on democratic rights at the grassroots level (Decree 29), by drafting a law or other normative legal document, with the purpose of clarifying, or establishing guidelines specifying how to involve people to participate, how information should be provided, where decisions should be taken, and to what extent local persons should be consulted in which questions.
- Continue facilitating the village elections, enabling local people to elect the *traditional elder* as formal *head of village*. Promote and approve the ethnic minorities’ incorporation of their traditional customary law in the form of village conventions.

³⁵¹ Comment by a national official, 2002-08-02.

³⁵² SIDA and Vietnam’s Ministry of Internal Affairs, *A Study on the Implementation of Grass-root Democracy*, Hanoi, June-July 1999, p 20.

- Provide voting information in minority languages for elections at all levels in ethnic minority areas and ensure the right to secrecy of voting.
- Amend the Law on Legal Documents, providing all members of the public the opportunity to comment on proposed regulations significantly affecting them, during for example a 90-day period in writing and by means of at least one hearing. This could strengthen, *inter alia*, the ethnic minorities' possibility to directly participate and formulate any major legal normative document that affects them, for example in the drafting of the Law on Minorities.
- Although the province level was not discussed in this paper, an idea forwarded by UNDP Vietnam should be supported, suggesting consideration of setting up local independent councils on provincial level of minority persons who advise authorities on social economic developments and social service provision. The councils should reflect the diversity and numbers of the ethnic minority in that province, be provided appropriate funding to carry out their work, and potentially relate to the Ethnic Council of the National Assembly.
- Conclude the draft Law on Associations, reflecting international standards on the freedom of association as enshrined in, *inter alia*, Article 22 of the ICCPR and Article 2(4) of the UN Minority Declaration, in order to provide a supportive legal environment for any groups to set up and operate domestic NGOs. Encourage minority community-based local NGOs to develop.
- Establish a mechanism to involve minority-established domestic NGOs in policy formulation concerning ethnic minorities and mountainous areas.
- Encourage domestic NGOs to participate in the preparatory work of submitting Vietnam's State Reports to the UN treaty monitoring bodies, accompanied with enabling domestic NGOs to submit independent shadow reports.
- Consider acceding to Optional Protocols of the CEDAW, CERD and ICCPR, enabling individual petition at the treaty-monitoring bodies of, *inter alia*, the right to take part in the conduct of public affairs.

Supplement A – Ethnic groups in Vietnam

Official name	Language group	Language family	Approximate population size(1999)
1. Kinh (Việt)	Việt-Miền	Austro-Asiatic	65,795,718
2. Tày	Tày-Thái	Austro-Asiatic	1,477,514
3. Thái	Tày-Thái	Austro-Asiatic	1,328,725
4. Miền	Việt-Miền	Austro-Asiatic	1,137,515
5. Khmer	Mek-Khmer	Austro-Asiatic	1,055,174
6. Hoa	Sinitic/Han	Sino-Tibetan	862,371
7. Nùng	Tày-Thái	Austro-Asiatic	856,412
8. Hmông	Hmông-Đào	Austro-Asiatic	787,604
9. Dao	Hmông-Đào	Austro-Asiatic	620,538
10. Giã-rai	Malayo-Polynesian	Austronesian	317,557
11. Ê-đê	Malayo-Polynesian	Austronesian	270,348
12. Ba-na	Mek-Khmer	Austro-Asiatic	174,456
13. S'ng Chay	Tày-Thái	Austronesian	147,315
14. Chăm	Malayo-Polynesian	Austronesian	132,873
15. Chăm	Mek-Khmer	Austro-Asiatic	128,723
16. Xơ-đ	Mek-Khmer	Austro-Asiatic	127,148
17. S'ng D'x	Sinitic/Han	Sino-Tibetan	126,237
18. H'á	Mek-Khmer	Austro-Asiatic	113,111
19. Ra-glai	Malayo-Polynesian	Austronesian	96,931
20. M'ng	Mek-Khmer	Austro-Asiatic	92,451
21. Thái	Việt-Miền	Austro-Asiatic	68,394
22. Xti'ng	Mek-Khmer	Austro-Asiatic	66,788
23. Kh'm	Mek-Khmer	Austro-Asiatic	56,542
24. Bru-V'ng K'ou	Mek-Khmer	Austro-Asiatic	55,559
25. Chăm	Mek-Khmer	Austro-Asiatic	50,458
26. Gi'ng	Tày-Thái	Austro-Asiatic	49,098
27. T'ng	Mek-Khmer	Austro-Asiatic	34,960
28. M'	Mek-Khmer	Austro-Asiatic	33,338
29. Gi'ng-tri'ng	Mek-Khmer	Austro-Asiatic	30,243
30. Chăm	Mek-Khmer	Austro-Asiatic	27,766
31. Chăm	Mek-Khmer	Austro-Asiatic	22,567
32. Xi'ng-mun	Mek-Khmer	Austro-Asiatic	18,018
33. H'ng N'ng	Tibeto-Burman	Sino-Tibetan	17,535
34. Chăm	Malayo-Polynesian	Austronesian	14,978
35. L'ng	Tày-Thái	Austro-Asiatic	11,611
36. Chăm	Ka'ai (C'ng Lao)	Austro-Asiatic	10,765
37. Chăm	Mek-Khmer	Austro-Asiatic	10,272
38. Ph'ng L'	Tibeto-Burman	Sino-Tibetan	9,046
39. Chăm	Tibeto-Burman	Sino-Tibetan	6,874
40. Chăm	Ka'ai (C'ng Lao)	Austro-Asiatic	5,686
41. Ph'ng Th'ng	Hmông-Đào	Austro-Asiatic	5,569
42. Chăm	Tày-Thái	Austro-Asiatic	4,964
43. Chăm	Sinitic/Han	Sino-Tibetan	4,841
44. Chăm	Việt-Miền	Austro-Asiatic	3,829
45. Chăm	Tibeto-Burman	Sino-Tibetan	3,307
46. Chăm	Mek-Khmer	Austro-Asiatic	2,663
47. Chăm	Ka'ai (C'ng Lao)	Austro-Asiatic	1,865
48. Chăm	Tày-Thái	Austro-Asiatic	1,864
49. Chăm	Tibeto-Burman	Sino-Tibetan	1,676
50. Chăm	Tibeto-Burman	Sino-Tibetan	840
51. Chăm	Ka'ai (C'ng Lao)	Austro-Asiatic	705
52. Chăm	Mek-Khmer	Austro-Asiatic	352
53. Chăm	Mek-Khmer	Austro-Asiatic	313
54. Chăm	Mek-Khmer	Austro-Asiatic	301
55. Overseas origin			39,532
56. Unidentified			1,333
Total			76,323,173

sources: Dang Nghiem Van *et al.* (2000); GSO, census 1/4/1999

(as referred to in UNDP Vietnam, Promoting Ethnic Minority Development in Vietnam, June 2002, p 33.)

Supplement B – Overview of State structure

“The administrative units of the Socialist Republic of Vietnam are distributed as follows:

The country is divided into provinces and cities under direct central rule;

The province is divided into districts, provincial cities, and towns; the city under direct central rule is divided into urban districts, rural districts, and towns;

The district is divided into communes and townlets; the provincial city and the town are divided into wards and communes; the urban district is divided into wards.

The establishment of People’s Councils and People’s Committees in administrative units is determined by law.”

Article 118 of the 1992 Constitution

“The People’s Councils at all levels are local organs of State power; they represent the will, aspirations, and the right to mastery of the people; they are elected by the local people and are accountable to them and to the superior State organs.”

Article 119 of the 1992 Constitution

“The People’s Committee elected by the People’s Council is the latter’s executive organ, the organ local State administration. It is its responsibility to implement the Constitution, the law, the formal written orders of superior State organs and the resolutions of the People’s Council.”

Article 123 of the 1992 Constitution

People’s Councils and People’s Committees exist at all administrative levels. The People’s Committees, the executive organ at local levels, is more powerful than the equivalent to the legislative chambers on local level, the People’s Councils. The two institutions’ relation was described in one interview as “the relationship between a father and son – and where the son has become more powerful”.³⁵³ However, the People’s Councils may rescind regulations enacted by People’s Committees at the same or lower levels.³⁵⁴ Enactments may only be rescinded if they are considered “improper”, i.e. do not confirm with superior legislation or when the enacting agency has transgressed its competency.³⁵⁵ In general, there has been an unclear division of function, authority, and duty between People Council and People Committee.³⁵⁶ Despite efforts to strengthen the role of the People’s Councils, in fact, the People’s Committees are holding the power.

³⁵³ Comment by a national observer, 2002-07-16.

³⁵⁴ Per Bergling et al, *An Introduction to the Vietnamese Legal System*, Umeå, 1998, p 37.

³⁵⁵ 1992 Constitution, Art. 124.

³⁵⁶ Dr. Nguyen Van Sau et al, *Vietnam Village-Commune Community Today*, National Political Publishing House, Hanoi, 2001, p 39.

Supplement C – Overview of normative legal documents

The concept of **normative legal documents** is defined by Article 1 of the 1996 Law on Promulgation of Legal Documents to include the *laws* and *ordinances* of the National Assembly and its Standing Committee, as well as *orders*, *decisions*, *directives*, and *circulars*, that is, regulations and instructions to implement laws and ordinances, issued by ministers and agency heads and by the State President, the Prime Minister, and the Government. Thus, "normative legal documents" include any rule or set of rules having the force of law whether promulgated by a legislative body such as the National Assembly or its Standing Committee in the form of a law or ordinance or by an authorised State agency in the form of a decree, circular, decision, directive, etc.

Sub-law documents are normative legal documents passed by lower-level state agencies than the National Assembly and its Standing Committee. The right to issue sub-law documents enables regulations in line with superior legal documents such as law-documents and the Constitution.

Standing Committee

- *Resolutions* are issued by the Standing Committee in order to interpret or supervise the observance of the Constitution, laws and ordinances

Government

- *Decrees* are issued by the Government and contain provision on the implementation of laws, resolutions and ordinances by the National Assembly and the Standing Committee
- *Resolutions* issued by the Government to decide the policies concerning the administrative apparatus, to guide and supervise the implementation of state policies and legal documents

Prime Minister and ministers

- *Decisions* can be issued by Prime Minister, ministers, used to define the organisation and to direct the operation of the administration.
- *Directives* can be issued by the Prime Minister to direct and co-ordinate the activities of the Government and supervise the activities of the ministries.

Ministries

- *Circulars* issued by the ministries provide guidelines on the implementation of higher-level documents. Although Head of Government's organs have no competence to promulgate legal documents, however remaining in charge of directly steering the study and drafting of normative legal documents relating to state management on their fields and branches.

President

- *Orders* and *decisions* are issued by the President to promulgate the Constitution and laws, to command the armed forces, propose the election or removal of the Prime Minister to the National Assembly, to appoint or dismiss members of the Government on basis of resolutions

Within the Comprehensive Legal Needs Assessment an amendment to the Law on Promulgation of Legal Documents is being considered, allegedly, *inter alia*, to redefine the term “normative legal documents”.

(Source: John Bentley, *Completion of Vietnam’s Legal Framework for Economic Development*, UNDP Discussion Paper 2, UNDP Vietnam, Hanoi, 1999.)

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