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THE DRAFT LAW ON THE STATUS OF NATIONAL MINORITIES VERSUS THE REAL CHALLENGES OF THE SYSTEM FOR THE PROTECTION OF MINORITIES

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ABSTRACT

The study proposes an in-depth discussion of the provisions of the Draft Status of National Minorities: the definition of national minorities, the cultural autonomy system, the monopoly of political and cultural rights, and lack of transparency in the resources usage, the statements of individuals concerning their affiliation to a national community, the provisions dealing with religions “specific” to minorities, and the status of national minorities as constitutive factors of the Romanian state. The intention to reform the system for the protection of national minorities by adding cultural autonomy to other provisions is a positive one. However, the solutions put forward are dissatisfying. The Draft Status destroys democracy within the minority communities; reinforces the status quo where it should be questioned; extends the monopoly of political groups regarding decision-making in the cultural and educational areas; creates the conditions for increased ethnic business and leads to unreasonably higher costs of the national minority protection system compared to the benefits. Particularly important is the fact that the Draft Status does not tackle the specificity of the two big “nationalizing minorities”, Hungarians and Roma population. Hungarians are experiencing a continuous population decrease and are concerned about the decline of the old Hungarian civilization in Transylvania. The Roma population is facing severe issues regarding social status and poverty and need to be provided with an environment in which this fragmented community may mobilize. They need creative solutions for institutionalization.

KEYWORDS

- *Draft Status of National Minorities*
- *ethnic business*
- *political and cultural rights*
- *liberalism*
- *National Councils of Cultural Autonomy*

1. Recent Parliamentary History of the Draft Law on the Status of National Minorities

The end of the 2008-2012 political terms could prove critical to the Romanian system for the protection of national minorities. Three years ago, the draft law on the Status of National Minorities (hereafter “Draft Status”) was suspended and, in June 2011, was reintroduced for parliamentary debate.¹ And this fact was due to successful pressure by Democratic Union of Hungarians in Romania (UDMR) which used its leverage as key player in saving the government of Prime Minister Boc from a seemingly imminent fall. But this call for mobilization by UDMR was not reflecting so much their concern for the Minority Status but rather for the effects of the Romanian President’s intervention in favor of a new regionalization project which does not take into account the will of the Hungarian community to have a region “of their own.” Supporting a regionalization process that would draw the frontiers of a territory inhabited by a Hungarian majority is a compromise both for UDMR and other Hungarian organizations.² This means giving up the special status of the Székely Land. Faced with a law that would have disappointed its community, UDMR preferred and managed to impose postponing the decision on the future map of Romanian regions emphasizing once more how hot this topic is.³ The highest stake for Romanian Hungarians remains their goal to bring all Hungarians together in one historical region where they would form the majority and decide on their destiny. This goal was reflected both in the work of experts and political statements.⁴ UDMR is in a position to put pressure on its political partners, the Democratic Liberal Party, since the latter would lose its governmental status if the UDMR withdraws its support. Moreover, the Hungarians demands are backed by the legal arguments according to which the new administrative reorganization should avoid the loss of rights already won by the minorities⁵.

Therefore, the renewed discussions on the Minority Status within the Committee on human rights, religions and national minority issues were more or less circumstantial. The hottest topics for debate were the restrictions on the changing of administrative frontiers when they mark the boundaries of a minority

¹ “Statutul minorităților naționale reîntră în discuție”, *ziare.com*, 21 June 2011. Available at: <<http://www.ziare.com/politica/parlament/statutul-minoritatilor-naționale-reintra-in-discutie-1102652>>.

² M Bakk, ‘Comunitate politică, comunitate națională, comunități teritoriale’, [Political community, national community, territorial community], in G Andreescu, M Bakk, L Bojin & V Constantin, *Comentarii la Constituția României* [Remarks on Romania’s Constitution], Polirom, Iași, 2010

³ A Giurgea, ‘Avertisment pentru PD-L din partea lui Hunor Kelemen’, *România Liberă*, 27 iunie 2011. Available at: <<http://www.romanialibera.ro/actualitate/transilvania/avertisment-pentru-pd-l-din-partea-lui-hunor-kelemen-229458.html>>.

⁴ L Salat, “Forme de autonomie și condițiile de realizabilitate a lor” [Forms of autonomy and conditions for their fulfillment], *Altera*, Year XII, no. 29, 2006

⁵ I.e., the Art. 16 of the Framework Convention for the Protection of National Minorities: „The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.”

community.⁶ The related provision in the Minority Status is directly relevant for the future regionalization or the possibility to create a special status region. There are reasons to believe that the Draft Status is not only of secondary importance in relation to the issue of a Hungarian region⁷, but even problematic when it comes to standards of fairness and adequacy imposed by an update of the Romanian system for the protection of minorities.

2. Background of the Draft Status. Preparing and putting forward the latest draft

The current system for the protection of national minorities is based on constitutional norms, sectorial laws (Art. 6), and institutions meant to monitor and support special minority rights. The first draft for a comprehensive protection law meant as a synthesis and extension of current rights was submitted to the Parliament by UDMR in 1993 but never made it on the parliamentary agenda for debate.⁸ The Council of National Minorities, which was under governmental control and included representatives of all national minorities, - its purpose being to develop policies supporting minorities - submitted a counter-draft. Later on APADOR-CH, the most prestigious human rights organization in Romania at the time, prepared a third theoretical model of such a law.⁹ Under the CDR-PD-UDMR government, the protection of national minority rights took the form of institutional changes and amendments to sectorial legislation (the Education Law, the Local Administration Law). In 2003, the Constitution itself was amended again in favor of national minorities.

The debate on the need (or lack thereof) to pass a comprehensive law on national minorities was reopened in 2002. There were several causes leading to mobilization around this theme by human rights organizations and minority theoreticians. One reason was the accession to the Parliament of representatives of “new minorities”, the Ruthenians and the Macedonians, phenomenon perceived by researchers as an expression of the ethnic business, i.e., the exploitation of the legislation aimed at protecting national minorities for the benefit of private interests.¹⁰ The significant

⁶ E Avram, “Dezbaterea pe Statutul Minorităților, amânată la cererea” UDMR [Debate on the Status of National Minorities draft law, postponed at the request of the UDMR], *Romania liberă*, 17 iunie 2011.

⁷ G Andreescu, “Cultural and Territorial Autonomy and the Issue of Hungarian Identity”, *Hungarian Studies*, vol. 21, no. 1-2, 2007, pp. 61-85.

⁸ See G Andreescu, V Stan & R Weber, *Study on the Conception of Democratic Alliance of Hungarians in Romania on the Rights of National Minorities*, The Center for Human Rights, Bucharest, 1994.

⁹ G Andreescu, V Stan & R Weber, “Un proiect de lege privind minoritățile naționale elaborat de Centrul pentru drepturile omului” (A Law on National Minorities Elaborated under the aegis of the Centre for Human Rights) in L Mihai, P van Dijk (eds.), *Legislația în tranziție*, Center for Human, Rights, Bucharest, 1995, pp. 102-112.

¹⁰ In Romanian, the mass media systematically names this phenomenon “business ethnic” (literally, “ethnic business”). In Sociology, the term “ethnic business” refers to “a business whose proprietor has a distinctive group attachement in virtue of self-definition or ascription of others”, a different meaning than that above (See Howard E. Aldrich, Roger Waldinger, “Ethnicity and Entrepreneurship”, *Annual Review of Sociology*, Vol. 16, 1990, pp. 114. And also S Lahiri, P Raimondos-Møller, “Lobbying by Ethnic Groups and Aid Allocation” *The Economic Journal*, Vol. 110, No. 462, Conference Papers. March 2000, pp. C62-C79. However, other authors

increase in the number of resident refugees and immigrants also raised the issue of the need to extend the minority protection system to include these minorities as well. About the same time, more traditional ethnic groups living on Romanian territory, such as the Csangos and the Aromanians, became more vocal in demanding recognition as national minorities.¹¹

As part of the research conducted under the aegis of the Legal Resources Center in 2002, with the participation of several human rights organizations, the framework for a national minority law was defined including principles such as: integration of all relevant international provisions; adopting a definition for “national minority”; making the legal distinction between national minorities and ethnic groups; simplifying the current institutional framework for minority protection by implementing a two-level system where executive decisions can be challenged before independent control institutions.¹²

In 2004, the system for the protection of national minorities became once more a hot topic for public debate as a new election law was passed. The last provisions of the law spelled a clear advantage for cultural unions which were part of the National Council of National Minorities (see section 3 for details). Important actors in promoting minority rights and theoreticians qualified this law as discriminating and potentially destructive for the internal democracy of minorities, and their criticisms would later be presented in the European Parliament.¹³ The opinions the civil society voiced in 2002 and 2004 were not to be found in the text prepared by the initiators of the Draft Status. The cultural unions, which had taken over representation of national minorities and, consequently, control of the communities they were supposed to represent, were too busy taking advantage of such a favorable law.

also use the term ethnic business as meaning the exploitation of the legislation aimed at protecting national minorities for the benefit of private interests (among them Nóra Teller: “Local Self-Government and the Ethnic Minorities in Hungary”, *National Minorities in South-East Europe, Legal and Social Status at Local Level*, Friedrich Ebert Stiftung, 2002, p. 82).

¹¹ In his Opinion adopted on 6 April 2000, the Advisory Committee phrased: „Furthermore, the Committee of Ministers *concludes* that, given the historic presence of Csangos in Romania and the specific elements of their identity, persons belonging to this community cannot be *a priori* excluded from the personal scope of application of the Framework Convention” (see Gabriel Andreescu, “Avizul privind România al Comitetului consultativ al Convenției-cadru pentru protecția minorităților naționale” [The Framework Convention for the Protection of National Minorities: the Advisory Committee’s Concluding Remarks on Romania], *Revista Română de Drepturile Omului*, no. 24, 2003, pp. 41-52).

¹² G Andreescu, LC Popescu, R Prună, & S Tănăsescu, *Studiu preliminar privind necesitatea existenței unui proiect de lege privind minoritățile naționale din România* [Preliminary study on the need to engage in the drafting of a law on national minorities], Working-Paper, Centrul de Resurse Juridice, 2002.

¹³ See the written question by Kinga Gál (PPE-DE) and József Szájer (PPE-DE) to the Commission: „By applying the current Law on Local Elections (No 67/2004), the Romanian authorities are excluding several organisations representing national minorities from running for local and general elections. Preventing organisations representing the Hungarian Civic Alliance and the Roma community and some other minority organisations from participating in the electoral race violates basic values of democracy, and represents clear discrimination between these organisations and those already represented in the Romanian Parliament, which do not have to fulfil these requirements ...” - 19 March 2007, at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2007-1411+0+DOC+XML+V0//EN>>.

In autumn 2004, UDMR offered its support to the D.A. Alliance, the political group which later on formed the government, in exchange for passing a national minority law. In spring 2005, UDMR and the Parliamentary group of the national minorities, which claimed ownership of the Draft Status, presented this draft in meetings with experts, representatives of civic organizations and politicians. Later, on May 19, 2005, the Government submitted the Draft Status to the Parliament under urgency proceedings.¹⁴ The Draft Status was rejected in the Senate in October 2005 on the account of its introducing the right to cultural autonomy, i.e., organizing minorities in clusters of associated persons and so recognizing for them collective rights. The issue became international in 2005 with the publication of the Opinion of the European Commission for Democracy through Law (hereafter “Venice Commission”) which led to a well- or ill-intentioned debate on this “Constitution of the minorities.”¹⁵

The arguments offered by Romanian officials in denying the collective rights for minorities became during decades stereotypes of the Romanian nationalism: that collective rights are substantively vague and procedurally impracticable; that their end is to ensure a legal status for minorities both nationally and internationally; that the concept aims to ensure the self-determination of minorities. Romania has constantly claimed that rejecting collective rights for minorities is a position confirmed and supported by the EU’s fundamental documents.¹⁶ Paradoxically, the Romanian state contradicts itself because it grants collective rights, like the right of the organizations of citizens belonging to national minorities to one Deputy Seat each¹⁷, or the right of groups to not be subject to discrimination.¹⁸

Under pressure from UDMR, the Government announced once more that it supported the Draft Status in August 2008 but nothing actually happened that year. The 2009 Governmental crisis blocked the debate on this law for a further two years. However, there were issued several messages contrary to the UDMR demands. In the debate on the independence of Kosovo, President Traian Basescu reopened the campaign against collective rights, with the support of all Romanian parties – cultural autonomy, as well as the creation of the Székely Land means recognizing such rights.¹⁹

¹⁴ See details in D Opreșcu, “Odiseea” unui proiect de lege: Statutul minorităților naționale din România (varianta UDMR din 2005)” [“The Odyssey” of a draftlaw: the Status of National Minorities in Romania (the UDMR version of 2005)], *cotidianul.ro*, 30 August 2011 – Available at: <<http://www.cotidianul.ro/odiseea-unui-proiect-de-lege-statutul-minoritatilor-nationale-din-romania-varianta-udmr-din-2005-155704/>>.

¹⁵ European Commission for Democracy through Law, Opinion no. 345/2005, CDL-AD 2005 059 – 2.

¹⁶ B Aurescu, “Drepturi individuale vs. drepturi colective. Drepturi exercitate individual și drepturi exercitate împreună cu alții”, *Observator cultural*, no. 439, 04 September 2008.

¹⁷ In conformity to the Article 62 (2) of the Romanian Constitution.

¹⁸ In conformity to the Article 2 (2) of the Ordinance no. 137/2000 on the prevention and punishment of all forms of discrimination.

¹⁹ See G Andreescu, Argumentele noii ofensive oficiale împotriva drepturilor colective [An assessment of the arguments for the new official offensive against collective rights], *Noua Revistă de Drepturile Omului* no. 3, 2008, pp. 24-41.

3. In-depth Discussion of the Draft Status

I will now provide an in-depth analysis of the Draft Status of National Minorities, separating the essential aspects of the law, which express the philosophy behind the draft law, from the purely technical aspects that could be improved easily through amendments. The first big question before the draft law authors was whether they are preparing a legal instrument devised for the whole of minorities in Romania, as they are viewed by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁰; or one devised to address the concerns of only the main national minorities, that are granted special rights under the Romanian Constitution.

Definition of National Minorities

The Draft Status concerns Romanian national minorities (art.1), understood as historical minorities made up of Romanian citizens who are free to express their belonging to the national community in question (art. 4). National minorities are listed on a closed list.²¹

One question arises – also raised by the Venice Commission – is this limitation to historical communities appropriate in a law that claims to be a constitution for national minorities be them national-historical, ethnic, linguistic, etc.?

Venice Commission firmly criticized the Draft Status for avoiding the broader definition above²² as it deemed it inappropriate to grant protection only to citizen minority members.²³ On this issue, the reputed commission seems to have strayed from the focus. Indeed, the Romanian system of rights granted to national-historical minorities, just like the Hungarian one or those of other countries in the region, is radically more generous than any system granting rights to minorities arising from migration. These are not simply political rights, which depend on the citizen/non-citizen distinction as acknowledged by the Venice Commission, but also far-reaching educational, cultural and linguistic rights. It is nothing unusual for the Romanian state to have a law dedicated to the complex network of measures in favor of historical minorities the more so as the law would codify new rights such as cultural autonomy. In addition, there are Western European countries which passed laws specifically for historical minorities as reflected in the declarations and reservations on adopting the Framework Convention for the Protection of National

²⁰ Adopted by General Assembly resolution 47/135 of 18 December 1992.

²¹ Albanese, Armenian, Bulgarian, Czech, Croat, Greek, Jewish, German, Italian, Macedonian, Hungarian, Polish, Russian-Lippovan, Roma, Ruthenian, Serbian, Slovak, Tartar, Turkish, Ukrainian (art.74).

²² “This provision should be deleted; the interpretation and application of the general definition of Article 3, paragraph 1 of the draft law should be left to the competent authorities and, ultimately, to the competent courts. Should such a list be retained, it should be explicitly construed as non-exhaustive or indicative, not least of all because over time other communities may meet the elements of the definition” (Art. 21)

²³ “Removing the citizenship requirement from the definition would also eliminate certain apparent contradictions with other provisions of the draft. (Art. 28)”

Minorities (FCPNM)²⁴, so the Venice Commission's insisting on the "historicity" of minorities seems indeed odd.²⁵

Moreover, Romania and Hungary can bring as argument in support of their focus on historical national minorities their Treaty on Understanding, Cooperation and Good Neighbourhood²⁶ in which they pledge to construe the concept of national minorities as referring „to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

The definition above is the concept of historical minorities. Minorities produced by immigration are protected by the Ordinance no. 137/2000 on the prevention and punishment of all forms of discrimination. There is no pressure on their part to be granted special rights. The real issue is that the Draft Status aims at creating status quo. There are many objections to the current list of national minorities. There are 4 minorities with less than 5,000 members and 8 with less than 10,000 (the least numerous, the Armenians, count today a mere 1,870 members). How is their right to an automatic mandate in the Chamber of Deputies legitimate? Deputies representing citizen organizations belonging to national minorities form the Parliamentary Group of national minorities. Given the small percentage that separates the Parliament majority from the Opposition, starting with 1996, this Group (16 members currently) played an active role on the political scene. However, according to the spirit of the Constitution, their role is

²⁴ Denmark: the German minority in South Jutland of the Kingdom of Denmark; Germany: the Danes of German citizenship and the members of the Sorbian people with German citizenship; Slovenia: autochthonous Italian and Hungarian National Minorities; Sweden: Sami, Swedish Finns, Tornedalers, Roma and Jews; Republic of Macedonia: Albanian people, Turkish people, Vlach people, Serbian people, Roma people and Bosniac people etc. (see Gabriel Andreescu, *Națiuni și minorități* [Nations and minorities] Iași, Polirom, 2004).

²⁵ In 1993, the Venice Commission criticized the Hungarian Bill on the Rights of National and Ethnic Minorities for applying national minorities provisions only to those ethnic groups who lived the last 100 years within the Hungarian state: “In addition to the technical problems of calculations, the Commission expresses doubt on this criterium. The Commission recalls that the definition of minorities in its proposal for a Convention does not contain such a criterium of time.” (‘Opinion on the Hungarian Bill No. 5190 on the Rights of National and Ethnic Minorities’, Venice, 5-6 February 1993. Available at: <<http://www.venice.coe.int/docs/1993/CDL-MIN%281993%29004rev-e.pdf>>).

²⁶ Done at Timisoara, 16th of September, 1996.

not to settle political matches but to represent the voice of the minorities. Minority deputies are neither in the legislative Chamber because they have a right to be there nor to tip the balance in favor of the political right or left. Instead, they are there to ensure that the majority makes informed decisions on minority-related issues. The current situation raises issues concerning the nature of representation in a constitutional democracy.²⁷ The problem is the more acute as there are 19 ethnic and cultural groups enjoying national-historical minority status and waiting to be represented as compared to one in Denmark, two in Germany, 5 in Sweden or 6 in the Republic of Macedonia.²⁸

Another issue is the existence of other historical minorities that were not recognized a national minority status such as the Csangos and the Aromanians. In terms of numbers, historical presence and community solidarity, these two “perform” better than other minorities. In order to avoid identity injustice, the Draft Status should have set out a reasonable procedure for the recognition of national minority status.

There is also the issue of the emergence of Ruthenians and Macedonians as national minorities whose promotion and mobilization during elections was documented to be a political affair.²⁹ The Draft Status could have been an opportunity to set these issues straight. But the draft was thought to ossify the power positions of organizations and leaders gained in the name of ethnic communities. The representatives of cultural unions within the Council of National Minorities acted as a wall during the drafting of the Status opposing any amendments that would have diminished their privileges.

Cultural Autonomy – a System

The main opposition to the Draft Status within the majority coalition of spring 2005 was determined by suspicions regarding cultural autonomy, the great innovation in the draft. Cultural autonomy *per se* does not raise any constitutional or practical issues.³⁰ It proved a positive practice in the countries that implemented it:

²⁷ RD Popescu, “Distorsiuni în exercitarea dreptului de vot și în alegerea reprezentanților de către corpul electoral” [Distortions Regarding the Exercise of the Right to Vote and the Election of the Representatives by the Electoral Body], *Noua Revistă de Drepturile Omului* no. 1, 2011, pp. 33-41.

²⁸ PS. Caps, ‘Les minorités et la notion de représentation’, *Les Cahiers du Conseil Constitutionnel*, no. 23, 2007, p. 86-90.

²⁹ B Duca, *Minoritățile sunt o excelentă zestre electorală* [Minorities are a wonderful electoral asset], *Adevarul.ro*, 14 October 2011, at <http://www.adevarul.ro/actualitate/Minoritatile_nationale_sunt_o_excelenta_zestre_electorală_Pentru_fiecare_minoritate_se_poate_gasi_un_loc_in_Parlament_-_Cine_vrea_sa_se_declare_gepid_0_572342930.html>.

³⁰ There are many contrary statements deploring the anti-constitutional nature of cultural autonomy provisions (see the opinion of the “Centrul European de Studii în Probleme Etnice” [European Center for Ethnic Studies] belonging to the Romanian Academy <<http://www.condeulardelean.ro/articol/centrul-european-de-studii-probleme-etnice-al-academiei-romane-centrul-european-de-studii-co>>). The analysis proves that they have no theoretical legitimacy, but anti-Hungarian prejudices.

the Baltics, Hungary, etc.³¹ Criticisms of cultural autonomy are motivated especially by the poor management of institutions of the autonomy, and not its value as an instrument.³² The Venice Commission expressed its appreciation for the potential will of the Romanian state to introduce, in support of minorities, the system of cultural autonomy and stated it on several occasions.³³

To the purpose of creating such competences, the National Councils of Cultural Autonomy are created as administrative autonomous legal entities, with their members elected internally. Depending on the size of the population granted cultural autonomy, the members of the Councils range from 7 (for below 5,000 community members) up to 91 (more than 1 million members).

Nothing exceptional about these provisions compared to other examples of cultural autonomy. The only objections the Venice Commission raised to the draft system were technical in nature, except for the issue of the breach of individual rights by the exercise of cultural autonomy. The relation between collective and individual rights can sometimes become fraught with tension. I will illustrate this with one example.³⁴ The elections for a body with competences specific to the National Council must ensure access to any professional in the cultural and educational areas. The candidates could be at most required to prove the support of a certain number of minority members, but imposing political affiliation (as stipulated in the cultural autonomy provisions) is against the minority's internal democratic principles. Changing this detail in the current version of the Draft Status is impossible as it would entail changing the entire spirit of the said document. And this is precisely the issue we will deal with next.

*Monopoly of Political and Cultural Rights through Organizations
of Citizens Belonging to National Minorities*

Article 62 (2) of the Romanian Constitution sets out that citizen organizations belonging to national minorities that do not gather the necessary number of votes to be represented in the Parliament will be allotted a deputy mandate under the

³¹ See D J Smith, *Cultural Autonomy in Contemporary Europe*, Routledge, United Kindom, 2008.

³² See Nóra Teller's comment: "As a conclusion, it must be added that the legal status of the minorities as collectives are considered to be ambiguous in the sense that declaring the belonging to a minority can sometimes result in a kind of ethno-business and the lack of financial resources often make the minorities self-governments an apparent self-governing instance with no means and no real minority representation." (Nóra Teller: "Local Self-Government and the Ethnic Minorities in Hungary", *National Minorities in South-East Europe, Legal and Social Status at Local Level*, Friedrich Ebert Stiftung, 2002, p. 82).

³³ It notices that "cultural autonomies have been recognised, despite frequent shortcomings, as potentially instrumental for the implementation of Article 15 of the Framework Convention¹⁸ and the OSCE Lund recommendations consider non-territorial forms of self-governance, including cultural autonomy, useful for the maintenance and development of the identity" (G. d. 58). His conclusion: "the introduction of a model of cultural autonomy for national minorities may thus be considered a positive and useful step to reinforce their participation in public affairs [...] (G. d. 59).

³⁴ In conformity with Art. 62 (5): "At the internal elections [for the National Councils of Cultural Autonomy] may run the members of the organizations of citizens belonging to national minorities [...]"

election law.³⁵ This article has been the main pillar of the Romanian system for the protection of minorities for the past 20 years and it is indeed a very powerful instance of affirmative action. It is relevant that it does not appear in any other national laws on minority protection.

Automatic representation in the Parliament, a collective right *par excellence*³⁶, is the basis for an institutional network with an active and effective role in promoting the interests of national minorities. And yet the Parliamentary group of national minorities has been trying since 2004 to distort the constitutional provisions on persons belonging to minorities in order to create a political monopoly on minority communities. This was done by creating a distinct legal subject called an “organization of citizens belonging to a national minority” equipped with political rights, under Art. 62 (2) of the Romanian Constitution. The phrasing “organization of citizens” was and still is interpreted as “foundation” or “association” so that the above-mentioned constitutional provisions can apply. The 2004 Election Law as well as the Draft Status make use of the word of the Constitution to make sure that political rights are recognized only to organizations defined by prohibitive requirements: (2) The number of members of an organization of citizens belonging to a national minority cannot be smaller than 10% of the total number of the citizens that declared their affiliation to the respective minority at the last census. (3) In case 10% from the total number of citizens registered as belonging to a minority in the last census is equal or surpasses 25.000 persons, the list of founding members must contain at least 25.000 persons, domiciled in at least 15 counties from Romania, but no less than 300 persons for each of these counties (Art. 40 (2)).

The only associations meeting the requirements of Art. 40 at the time the draft was launched were the cultural unions’ members of the Parliamentary Group of national minorities. Their advantage compared to other associations and foundations is the result of their access to decision-making, material and symbolical goods provided by the Romanian state to the Parliamentary Group of national minorities, the Council of National Minorities, the Authority of Inter-ethnic Relations, the National Agency for the Roma population, etc.

In 2004, when this prohibitive system was adopted under the Election Law, the main Romanian human rights and minority organizations protested against the discriminating provisions. Venice Commission itself gave its negative opinion on the election law. The critiques were proven right: after the 2004 elections, the number of votes won by the Social Democrat Roma Party (PRSD) decreased sharply. This was expected as the Roma population lives dispersed and they have different local loyalties. Given that the organizations representing the various Roma

³⁵ See an extensive study: MR Prisacariu, “Condițiile și procedura recunoașterii ca minoritate națională a unui grup etnic” [Terms and procedures for the recognition of an ethnic group as a national minority], *Noua Revistă de Drepturile Omului* no. 4, 2010.

³⁶ G Andreescu, „Argumentele noii ofensive oficiale împotriva drepturilor colective” [An assessment of the arguments for the new official offensive against collective rights], *Noua Revistă de Drepturile Omului*, no. 3, 2008, pp. 24-41.

communities could not participate in the elections, the number of Roma votes decreased. The number of members of local councils was smaller and they were all PRSD members. Nonetheless, the Draft Status undertook to impose this monopoly system once and for all.

The monopoly thus created is further reinforced by the provisions on cultural autonomy.³⁷ The National Councils and the state share decision-making powers in areas such as minority education³⁸, culture³⁹, mass media⁴⁰, etc. To conclude, the representative organization proposes candidates to the National Council of Cultural Autonomy elections, organizes the elections and, as a result, gains control over the Councils. Having secured political monopoly over the minority community it is supposed to represent, the representative organization gains educational and cultural monopoly as well.

However, identity issues are the expression of specific competences which have nothing to do with political loyalty. As a result, the elections to the National Councils should be open to candidates based on professional abilities or to apolitical cultural entrepreneurs. Contrary to this principle, the Draft Status imposes an essentially political criterion for that. We already know from past behavior that a National Council for Roma Cultural Autonomy led by the Roma Party will never accept a PR manager coming from, for example, the Alliance for the Unity of the Roma population. As long as the National Council of Hungarian Cultural Autonomy is controlled by UDMR, it seems unlikely that however competent a teacher is, if he/she is a supporter of László Tórkés he/she does not stand a chance to be appointed headmaster.⁴¹

The Draft Status and the mechanism described above lead to the destruction of democracy within the minority communities. This mechanism is essentially discriminating in terms of political rights and pushes discrimination to the area of cultural and educational rights. The collective rights that the allotment of a

³⁷ „In the spirit of the present law, cultural autonomy means the right of a national community to have decisional powers in matters regarding its cultural, linguistic and religious identity, through councils appointed by its members (Art. 57.(1)).

³⁸ „...organization, administration and control of the education in the mother tongue, or participation in partnership with public competent authorities in carrying on these duties in the case of institutions from the public system education” (Art. 58, b).

³⁹ „...organization, administration and control, in the conditions of the law, of the cultural private educational institutions or research and development of culture institutions in the mother tongue, or, in case, the participation in partnership with public competent authorities in carrying on these duties, in the case of public cultural institutions” (Art. 58, c).

⁴⁰ „...establishment and administration of their own mass-media organs, or participation in partnership with public competent authorities at the organization of stations, sections, editorial boards or shows within the public radio and TV stations (Art. 58, d).”

⁴¹ László Tórkés is the founding member and president of the Hungarian National Council of Transylvania.

Parliament mandate and cultural autonomy embody, go against individual rights.⁴² Venice Commission showed the same concern [C, 33].⁴³

4. Ethnic Business. The Problem of Resources Available to Minorities, Inappropriateness and Lack of Transparency in Their Usage

The increasingly higher benefits the national minorities enjoyed after 1990 were translated into Parliamentary representation and its wide-ranging institutional effects. At the same time, over the past 20 year, the minorities' right to representation in the Parliament was abused.

The system of mandate allocations was introduced and used by the National Salvation Front starting with February 1990 to gain control of the Provisional National Unity Council. After the elections of May 20, 1990, the so-called "group of national minorities other than the Hungarian minority" was constantly used against UDMR. On April 6, 1993 the National Council on National Minorities was created as a consultative body for the Government under the authority of the Government's general secretariat. Almost any UDMR complaint was met by opposition in the National Council on National Minorities where UDMR, otherwise stronger in number than all the other cultural organizations, had only one vote. Finally, UDMR announced its suspension from the Council in order to no longer lend legitimacy to an institutional construct which, at the time, seemed to be used against Hungarians.⁴⁴ After 1997, the relations between UDMR and the other cultural unions got warmer until they turned into consistent cooperation as mutual support was beneficial to all parties when it came to putting to good use the system for the protection of minorities.

The possibility to send a representative to the Parliament and get substantial budget funding by the organizations of citizens belonging to national minorities generated interest for abusing these opportunities. In the 2000 elections, Vasile Savu, trade union leader of Jiu Valley, was a candidate on the lists of the "new" Macedonian minority. According to the 2002 census, there were 695 declared Macedonians but this innovative organization managed to receive 25,689 votes and, consequently, get Vasile Savu elected to the Chamber of Deputies. One possible explanation for their "success" put forward by some was that this was a reward to Savu for having betrayed Miron Cozma during the 1999 miners' rally.

⁴² Particularly, with regard to Art. 40 (4): "Persons that do not belong to a national minority may be members of an organization of citizens belonging to a national minority, but their number cannot surpass 25% from the total number of the members of the organization at local, as well as at national level" and Art 40 (5): "A person cannot be member of two organizations belonging to the same minority, registered according to the provisions of this law" see the Venice Commission comment: „Both provisions amount to a strong interference with the freedom of association as guaranteed in Article 11 of the European Convention on Human rights, and their justification is not obvious" (G, 55).

⁴³ Opinion on the draftlaw of the statute of national minorities living in Romania, Venice, 22-23 October 2005: F. 39, available at: <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=225717&Site=COE>>

⁴⁴ G Andreescu, *Pages from the Romanian-Hungarian Reconciliation: 1989-1999. The Role of Civic Organizations*, Institute of International Education, Washington, 2001.

According to the 2002 census, there were 257 Ruthenians. Gheorghe Firczak, of Hungarian origin, who ran for Parliament on the lists of the Free Democrat Hungarian Party in the 1996 and 2000 elections, created a Ruthenians organization and managed to gather 2,871 votes becoming the representative of the Ruthenians Cultural Union. These are typical instances of ethnic business.

Another face of ethnic entrepreneurship is the use of public funding for national minorities. According to the Constitution (Art. 6), the state is funding the conservation and development of community identity. The representative organizations must spend this money on educational and cultural projects. Out of the 24 billion old lei that PRSD received in 2003, they used 84.49% of the amount for organization and equipment. 6.57% of the budget was used for events in support of PRSD such as the 10-year anniversary of the Campia Turzii office. Not one penny was spent on book publishing, the history of the Roma population in Romania, or educational projects. PRSD spent almost all the money meant for the Roma community for its own benefit.⁴⁵ The Romanian tax payers spent about one million euro in 2004 to make sure that a PRSD representative gets a mandate to the Parliament and that this organization could have its own men on the list of members of local councils and public institutions.

The Draft Status was supposed to cater for the need to oppose ethnic business whose forms were ripe for assessment after 15 years of experience. However, the Draft Status created instead the conditions for multiplying abuses, reinforcing the monopoly of the political and extending it to the cultural and educational fields. The extended protection system requires new institutions: the Authority of Inter-ethnic Relations, The Council of National Minorities, the National Councils of Cultural Autonomy, the Permanent Secretariats and a process of electoral competition. There is no evaluation of the ratio between the benefits of the new system and the increase in costs. There are no provisions ensuring more transparency of funding and the expenditure of funds.

5. Low-profile Aspects of the Draft

The Draft Status raises the foreground issues dealt with above. However, there are some details in the provisions whose implications seem not to have been properly assessed. We will only discuss what we consider to be the most relevant details.

Art. 4 (2) demands the public authorities to observe the obligation to accept the statements of non-minor individuals concerning their affiliation to a national community without exception. However, in the case of affirmative action which is not meant for individuals but for strengthening the communities, the declared identity needs to be confirmed. Should this provision be adopted, any young person could sign up on the Roma student list provided by a university without nobody stopping him/her although he/she does not belong to this community.

⁴⁵ In 2003, PRSD owned 10 offices and leased 106 offices while dozens of Roma organizations were fighting to find the space necessary for their activities.

Art. 11. is excessive when it imposes that in all matters regarding the rights of persons belonging to a national minority the competent authorities are compelled to take into account the will of the representatives of the respective national minority. “To compel” is too strong and it should be replaced, e.g. “consult together with” the minority representatives. Otherwise, how could the Romanian State fulfill its duty to protect children if one day the Roma Party demanded that girls should be subject to a distinct compulsory school age limit compared to other children? The European Court of Human Rights ruled against the Czech Republic for having sent Roma children to school institutions based on their parents’ consent. The examples can go on.⁴⁶

There is another issue related to the provisions dealing with religions “specific” to minorities.⁴⁷ Do such statements find their place in a law on national minorities? The freedom of religion and the general status of religions cover specific rights and no distinction arises from the fact that one faith is more popular within a minority community.

One last observation refers to provision [a] of Art. 2 which declares national minorities as “constitutive factors of the state.” The statement met with a lot of criticism. Indeed, the provision constitutes a big topic for constitutional debate. According to Art. 4, the State is not founded on identity communities but “the unity of the Romanian people and the solidarity of its citizens” (4 (1)) while Romania “is the shared and indivisible homeland of all its citizens.” It is our observation that, if national minorities are perceived as constitutive factors of the Romanian state, there is correlation between this perception and the constitutional right of minorities to be granted automatic mandates to the supreme national forum, i.e. the Parliament.

Conclusions

The intention to reform the system for the protection of national minorities by adding such substantial instruments as cultural autonomy was, in principle, a positive one. However, on closer scrutiny, the solution put forward proves deeply dissatisfying. The main issues for concern are the fact that it destroys democracy within the minority communities; reinforces status quo where it should be questioned; extends the political monopoly of some groups to decision-making in the cultural and educational areas; creates the conditions for increased ethnic business; leads to unreasonably higher costs of the protection system compared to the benefits.

An additional source of dissatisfaction is the inappropriateness of the draft to current realities. 15 even 20 years after the fall of communism, this draft was a good

⁴⁶ G Dezideriu, ‘Delimitările conceptuale ale discriminării directe în legislația Uniunii Europene și probleme de transpunere în legislația din România: excepții permise sau derogări interzise?’ [Conceptual delimitations of the standard of direct discrimination in EU law and subsequent issues of transposition into Romanian law: permitted exceptions or prohibited derogations?], *Noua Revistă de Drepturile Omului* no. 4, 2010.

⁴⁷ As, “The [denominations] may establish associations and foundations, respectively cultural-educational and social-charitable units, activities supported by the state in the conditions of the law.” (Art. 30.) The official translation sent to the Venice Commission makes an error, using the word “cults” for denominations.

opportunity to rethink and adapt the system for the protection of national minorities based on the practical and theoretical experience gained. The current system and its uniform provisions for all 19 national minorities does not take into account the radically different nature of Hungarian and Roma issues compared to the small minorities. The two big identity communities, which fit Zoltán Kántor's category of "nationalizing minority"⁴⁸, need urgently conditions for institutionalization, the progress of which will benefit the entire society.

All organizations representing Hungarians have included as an aim in their political programs the achievement of cultural and territorial autonomy. The fundamental desire is to stop the decline of the old Hungarian civilization in Transylvania, heralded by the demographic decline. Starting with 1977, the time of the last census of the communist period, Hungarians have experienced a steady decline in numbers. In 2002 only 1,435,000 (6.6% of the population) remained, and their emigration continues.⁴⁹ The Roma minority, which undergoes a rapid expansion, in both absolute numbers and as a percentage of the total population⁵⁰, is facing severe issues regarding social status and poverty, but enjoys today an elite capable of mobilizing it. The situation demands, on one hand, the provision of conditions for organizing this territorially dispersed and internally fragmented community, while on the other hand demanding an implementation of radical public policies, the only ones capable of answering long term needs.

The social and political atmosphere of Romania is not auspicious for answering the needs of the important Hungarian and Roma minorities. Even to this day, the Romanian state is infused with nationalism which sabotages the rationality of

⁴⁸ "In line with Brubaker's conceptual transformation of the *nation state* into *nationalising state*, I propose the concept of *nationalising minority* instead of *national minority*. This concept captures the internal dynamics of the national minority and permits the analysis of long-term processes. These processes are slightly different from those of the nationalizing state, but the mechanisms are similar. National minorities engaged in a nation building process are *nationalising minorities*. Nationalising national minorities are distinguishable from the non-nationalising ones. Empirically, one can present the following distinctive features: (1) A nationalising minority is sufficiently numerous to have a real possibility of achieving a number of its goals; (2) nationalising minorities express political goals, not only cultural goals. Their goal is not only the preservation of national/cultural identity, but also its promotion and institutionalisation. The creation of institutions that resemble those of a state is essential, as is the establishment of a minority 'life-world'; and (3) nationalising minorities attempt to transform the political structure of the state and struggle for political representation at the state level." (Zoltán Kántor, "The Status Law Syndrome and Regional/National Identity: Hungary, Hungarians in Romania, and Romania", p. 82, Available at: <http://src-h.slav.hokudai.ac.jp/coe21/publish/no10_ses/06_kantor.pdf>

⁴⁹ G Andreescu, *Schimbări în harta etnică a României*, CDRE, Cluj, 2005, p.43.

⁵⁰ The census of 2002 found 535,000 Roma, but accurate population estimations are difficult because of the Roma's reluctance to register as "Roma" in censuses. A Finnish study in 2005 found 1,800,000 Roma (Arno Tanner, "The Roma of Eastern Europe: Still Searching for Inclusion", Finnish Directorate of Immigration, May 2005 – at <<http://www.migrationinformation.org/feature/display.cfm?ID=308>>. More accurate data is available on natality: 2,5 higher than that of the majority population (Georgiana Antofie. "Natalitatea la romi, de 2,5 ori mai mare decât la români" [Roma natality, 2,5 times that of Romanians], *Capital*, 3 February 2010).

a series of national and international policies.⁵¹ In such a context, a system for the protection of minorities build upon an unbiased view of the issues related to identity groups could be a great step forward.

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⁵¹ See for the first category the issue of regionalization, for the second – the attitude of the Romanian state regarding the independence of Kosovo.

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